RETHINKING THE PROMOTION AND PROTECTION OF FOREIGN INVESTMENTS: THE 2015 SOUTH AFRICA'S PROTECTION INVESTMENT ACT

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ABSTRACT

The disaffection of States towards investment treaties has grown considerably in the last few years and triggered the upgrading of BITs (i.e. BIT between Morocco and Nigeria), the revision of treaty models (i.e. India and Indonesia) or the conclusion of much less ambitious facilitation agreements (i.e. Brazil-Mozambique). South Africa has opted instead for the termination of several investment treaties and adoption of a piece of domestic legislation. The South African Protection of Investment Act (2015) is largely pegged to the Constitution and based on the extension to foreign investors of the protection granted to nationals, including the provisions on expropriation and regulatory powers. This chapter attempts to discuss and compare the protection foreign investors may expect to enjoy under the Act. It argues that from both substantive and procedural standpoints, the Act offers a level of protection definitely lower of that normally provided by international investment treaties. It remains to be seen whether such rather drastic departure from treaty standards is appropriate and what the consequences of the replacement of investment treaties with the Act may be on the flow of foreign investment to South Africa.

I. INTRODUCTION

After many years of popularity, investment treaties have recently caused increasing concern amongst States, most prominently for the unbalance of their content, the often inadequate safeguard to the regulatory powers of the host State and the shortcomings of international investment arbitration. Some States have upgraded their investment treaties, other revised their investment treaty model, and other opted for facilitation agreements. South Africa has taken a different route: it has terminated several investment treaties and adopted a piece of domestic legislation specifically on the protection of investment. The South African Protection of Investment Act (2015),[1] is largely pegged to the Constitution and based on the extension to foreign investors of the protection granted to nationals, including the provisions on expropriation and regulatory powers. This chapter attempts to discuss and compare the protection foreign investors may expect to enjoy under the Act. It argues that the Act offers a level of protection definitely lower of that normally provided by international investment treaties from both substantive and procedural standpoints. It remains to be seen whether such rather drastic departure from treaty standards was appropriate and, keeping in mind the still unproved causal relationship between investment treaties and the flow of foreign investment, what the consequences of the replacement of investment treaties with the Act will have.

[1] The Act is available at https://www.thedti.gov.za/gazzettes/39514.pdf. All websites visited last time on 31 March 2017.

II. GROWING UNPOPULARITY OF BILATERAL INVESTMENT TREATIES

Investment treaties, and especially bilateral investment treaties (BITs), were popular in the 1990s and 2000s. At the end of March 2017, according to UNCTAD, 857 BITs have been concluded amongst African States or between them and third States.[2] Only 506 of them (or 59,04 %), however, are currently into force. Yet, the bilateral network remains underdeveloped as these treaties correspond roughly to 5,66 % of the treaty network necessary to cover all bilateral relationships amongst African States and between them and the rest of the world.[3] Furthermore, the number of BITs concluded by African countries varies remarkably. Suffice it to mention that the aggregate number of BITs applicable to Algeria, Egypt, Libya, Morocco and Tunisia amount to 202 (out of 301 signed), or the equivalent of 39,92 % of the BITs in force in the entire continent.

While regionalism is clearly on the rise in the continent[4] and several African sub-regional organizations have concluded important and often innovative investment agreements,[5] BITs have been increasingly perceived as inconvenient for the host State for several reasons,[6] including their unbalanced content, the unduly restrictions on the regulatory powers of the host State, the lack of transparency and public scrutiny, and the exposure to arbitral claims which may trigger large compensation.[7] Moreover, there is no clear evidence yet that investment treaties are necessary to

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[2] UNCTAD Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA.

[3] To cover the totality of bilateral relationships between the 54 African States it is necessary to conclude a number of bilateral treaties equivalent to: 54 (54 - 1) / 2 or 1,431 BITs. See Emile Giraud, 'Modification et terminaison des traités collectifs' (1961) 49 *Annuaire Institut de droit international* 1, 16 ff. To cover the bilateral relationships between the 54 African States and the remaining States – using the 193 current UN membership as benchmark - it is necessary to conclude 54 x (193-54) = 7,506 BITs. The grand total is 8,937 BITs.

[4] UNCTAD, 'The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?', IIA Issues Note, N. 3, June 2013, at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=532.

[5] See Tarcisio Gazzini, Erik Denters, 'Role of Sub-Regional Organizations in the Promotion and Protection of Foreign Investment in Africa', 18 *JWI&T* (2017) ... On regionalism in general, see Leon Trakman, Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford: OUP, 2013); Wolfgang Alschner, 'Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?', 17 *Journal of International Economic Law* (2014) 271.

[6] For a balanced assessment of these treaties, see Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion', 2 *Trade Law & Development* (2010) 1. For a critical look at the BIT between China and African States, see Uche Ewelukwa Ofodile, 'Africa-China Bilateral Investment Treaties: A Critique', 35 *Michigan Journal of International Law* (2013) 131.

[7] According to Xavier Carim, 'Lessons from South Africa's BITs review', VALE Columbia FDI Perspectives, No. 109, 25 November 2013, at http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf, "the current system [had] open[ed] the door 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". See also R. Davies, Minister of Trade and Industry, 2007 UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) in Geneva, at http://www.dti.gov.za/delegationspeechdetail.jsp?id=2506.

attract foreign investments and stimulate economic growth.[8] With regard to Africa, it has been observed that "[t]he impact of bilateral investment treaties on economic and social development in Africa remains debatable. There is no conclusive evidence regarding the effect of these treaties on foreign investment".[9]

Dissatisfaction with traditional BITs has generated four main types of reactions. The first reaction is rather generalised and relates to the deceleration which has recently characterised the entry into force of BITs. In Africa, in particular, only 17 BITs – including 3 between African countries – have entered into force since January 2012. The second reaction is less evident and regards the attempts to upgrade these treaties, strike a better balance between the private and public interests at stake, and ultimately bring them in line with the evolution of international law. In this regard, the BITs concluded – but not entered into force yet – between Morocco and Nigeria is remarkably innovative. While granting foreign investors an adequate substantive and procedural protection, the treaty introduced several obligations upon the foreign investors (including the obligation to carry out environmental and social impact assessment, to apply the precautionary principle, to ensure an appropriate protection of labour and human rights, and to comply with international accepted standards of corporate governance and corporate social responsibility).[10] Pursuing similar objectives, other States have substantially amended their model for BITs.[11] The third reaction has led to the conclusion of so-called facilitation agreements, which radically downgrade the substantive protection of foreign investment and do not provide for judicial or arbitral proceedings against the Host State.[12] The fourth reaction, of which

[8] UNCTAD, 'The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014', *Issues Note, Working Draft*, September 2014, available at http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf.

[9] UN Economic Commission for Africa, Committee on Regional Cooperation and Integration, *Investment Agreements Landscape in Africa*, 7–9 December 2015, at http://www.uneca.org/sites/default/files/uploaded-documents/RITD/2015/CRCI-Oct2015/report-on-investment-agreements.pdf, p. 1.

[10] Signed on 3 December 2016. See also BIT between Japan and Mozambique (2013); the BITs by Canada with Benin (2013), Cote d'Ivoire (2014), Mali (2014), Senegal (2014) and Tanzania (2013); the BIT between the United States and Rwanda BIT (2008). See also the SADC Model Bilateral Investment Treaty Template with Commentary, at http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

[11] See, most notably, the new Indian BIT Model, at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[12] See, i.e. the Cooperation and Investment Facilitation Treaty (CFIT) recently concluded by Brazil with Mozambique, at www.itamaraty.gov.br/index.%20php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR.

South Africa is the protagonist, is the termination of BITs and the adoption of a piece of domestic legislation on the protection of investment.[13]

III. ADOPTION AND CONTENT OF THE ACT

In 2007, South Africa undertook a thorough review of its BITs with a view of assessing their impact on both the economic growth of the country and its regulatory powers.[14] The results of the review were published in 2009[15] and revealed that "the current system [had] open[ed] the door 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".[16] On the basis of the findings of the review, the government of South Africa decided to terminated 9 BITs with European countries (Austria, Belgium-and Luxembourg Economic Union, Denmark, France, Germany, the Netherlands, Spain, Switzerland, the United Kingdom), thus reducing the number of BITs in force to 14, according to UNCTAD database.[17]

At the domestic level, the government prepared draft legislation on the protection of investment. Published in October 2013, the draft was open to public comment and it triggered the reaction of several stakeholders.[18] The bill was then formally introduced in the National Assembly on 22 July

[13] On South African investment treaty practice and policy, see Engela C. Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy', 31 *ICSID Review* (2016) 167.

[14] As pointed out by the UN Economic Commission for Africa, Committee on Regional Cooperation and Integration, Investment agreements landscape in Africa, 7–9 December 2015, at http://www.uneca.org/sites/default/files/uploaded-documents/RITD/2015/CRCI-Oct2015/report-on-investment-agreements.pdf, p. 1, "[t]he impact of bilateral investment treaties on economic and social development in Africa remains debatable. There is no conclusive evidence regarding the effect of these treaties on foreign investment". Several authors, including Lorenzo Cotula, Xiaoxue Weng, Qianru Ma and Peng Ren, *China-Africa Investment Treaties: Do they Work?*, (London: International Institute for Environment and Development, 2016), 51, at http://pubs.iied.org/pdfs/17588IIED.pdf, have argued that "There is a strong case for African governments to conduct rigorous reviews of the performance of their investment treaties, including both costs and benefits".

[15] South Africa Department of Trade and Industry, *Bilateral Investment Policy Framework Review*, General Notice 961, Government Gazette 32386 (7 July 2009).

[16] Xavier Carim, 'Lessons from South Africa's BITs review', VALE Columbia FDI Perspectives, No. 109, 25 November 2013, at http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf. See also R. Davies, Minister of Trade and Industry, 2007 UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) in Geneva, at http://www.dti.gov.za/delegationspeechdetail.jsp?id=2506

[17] BITs with Russian Federation, Nigeria, South Korea, Cuba, China, Mauritius, Argentina, Iran, Greece, Sweden, Senegal, Finland, Zimbabwe and Italy, at http://investmentpolicyhub.unctad.org. An unofficial list provided by the South Africa's Department of International Relations and Cooperation is composed of 13 BITs (on file with author). Compared to UNCTAD database, it does not contain Iran.

[18] Amongst the numerous reactions, see European Union Chamber of Commerce and Industry in Southern Africa, 'The Promotion and Protection of Investment Bill 2013', August 2015, at

2015 under the title "Promotion and Protection of Investment Bill" and eventually promulgated in the final form on 15 December under the new title, which dropped the reference to "promotion". The Protection of Investment Act, 2015 (hereinafter the "Act") was eventually promulgated in January 2016.

The Act consists of 16 articles (including the last three on practical matters and transitional arrangements). Its structure is broadly modelled after traditional BITs, although it presents macroscopic differences, both substantially and procedurally. Similarly to traditional BITs, the Act contains a rather sophisticated definition of investment composed of three categories. Under Section 2.1, an investment is

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

Category (a) is reminiscent of the so-called *Salini* test, based on three elements of the notion of investment, namely "contributions, certain duration of performance of the contract and a participation in the risks of the transaction".[19] Interestingly, no mention is made to the contribution to the economic development of the host State, which has been referred to in the preamble of the Act and that some

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http://static1.squarespace.com/static/55f93ec2e4b0d99faf1aef57/t/56091fcce4b08574a5b910be/1443438540876/EU+Chamber+of+Commerce_Parliamentary+Submission_Investment+Bill_Shorter_....pdf .

[19] *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Morocco*, ICSID ARB/00/4, Jurisdiction, 31 July 2001, para 52 *in fine*. On the definition of investment, see in particular: Noah Rubins, 'The Notion of "Investment" in International Investment Arbitration', in Norbert Horn *et al.* (eds.), *Arbitrating Foreign Investment Disputes* (The Hague: Kluwer, 2004) 283; Sebastian Manciaux, 'The Notion of Investment: New Controversies', 9 *JWI&T* (2008) 443; Paolo Vargiu, 'Beyond Hallmarks and Formal Requirements: a "Jurisprudence Constante" on the Notion of Investment in the ICSID Convention', 10 *JWI&T* (2009) 754; Emmanuel Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds.), *International Investment Law for the 21th Century. Essays in Honour of C. Schreuer* (Oxford: OUP, 2009), p. 403; Katia Yannaca-Small, 'Definition of "Investment": An Open-ended Search for a Balanced Approach', in Katia Yannaca-Small, *Arbitration under International Investment Agreements. A Guide to the Key Issues* (Oxford: OUP, 2010) p. 243; Celine Lévesque, '*Abaclat and Others* v *Argentine Republic*: The Definition of Investment', 27 *ICSID Review* (2012).

arbitral tribunals have considered as an additional requirement for the purpose of the definition of investment.[20]

Section 2.2 further provides a comprehensive but non exhaustive list of assets. The term "assets", which is presumably used here as synonymous of "resources" under Section 2.1, includes (a) shares, stocks, debentures, securities, or other equity instruments of the enterprise or another enterprise; (b) a debt security of another enterprise; (c) loans to an enterprise; (d) movable or immovable property or other property rights such as mortgages, liens or pledges; (e) claims to money or to any performance under contract having a financial value; (f) copyrights, know how, goodwill, or intellectual property rights such as patents, trademarks, industrial designs and trade names; (g) returns such as profits, dividends, royalties or income yielded by an investment; or (h) rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.

The Act does not contain any detailed definition of investor. Instead, Section 1 laconically defines in a rather circular manner "investor" as an enterprise making an investment. The definition of investor is completed by that of "enterprise", which clarifies that the Act protects both natural and legal persons, regardless to their incorporation in South Africa. Since nationality is irrelevant for the purpose of the substantive protection granted under the Act, there seems to be no need for a definition of investor similar to those that can be found in investment treaties. Nonetheless, the nationality of foreign investors is relevant for the purpose of international arbitration between South Africa and the home State, even if such mechanism – whose recourse has been rather exceptional in State practice – is not mandatory under Section 13 (5) of the Act.

The Act aims are threefold as enunciated in Section 4. First, it purports to protect investment in accordance with and subject to the Constitution, with a view of striking a balance between the public interest and the rights and interests of investors. Second, it affirms and safeguards the sovereign rights of South Africa to regulate investments in the public interest. Third, it confirms the application to all investments made in South Africa of the Bill of Rights in the Constitution as well as of all relevant laws.

Section 3 of the Act, which is entirely consecrated to interpretation, is an intriguing provision. It provides that the Act must be interpreted and applied in accordance with its purposes, the Constitution – including the *interpretation* of the Bill of Rights, customary international law and international law, disciplined respectively in Sections 39, 232 and 233 of the Constitution – as well as relevant international treaties to which South Africa is or becomes a party.

[20] See, for instance, *Helnan International Hotels A/S* v *Egypt*, ICSID ARB/05/19, Jurisdiction, 17 October 2006, para 77. *Contra*, see *Pey Casado and President Allende Foundation v. Chile*, ICSID ARB/98/2, Award, 8 May 2008, para 232.

Section 39 (Interpretation of Bill of Rights) reads:

1. When interpreting the Bill of Rights, a court, tribunal or forum (a) *must* promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider international law; and (c) *may* consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".[21]

Section 232 deals with the legal status of customary international law in the South African legal system and establishes that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Interestingly, Section 3 of the Act does not contain any reference to Section 231.4 of the Constitution, the equivalent for international treaties of Section 232. Section 231.4 states that international treaties become law in the Republic when enacted into law by national legislation, whereas self-executing provisions contained in international treaties approved by the Parliament is law of the Republic, provided they are not inconsistent with the Constitution or an Act of the Parliament.

According to Section 233, finally, when interpreting any legislation, South African courts must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The Act applies to all investments falling within the definition of Section 2, or, using the terminology of Section 5 of the Act, "to all investments made in accordance with the requirements set out in Section 2". It also provides that all investments must be established in accordance with domestic law (Section 7.1) and clearly excludes any pre-establishment rights (section 7.2).

The catalogue of provisions on investment protection of the Act is limited to 5 provisions. Under Section 6, the Government must ensure that "administrative, legislative and judicial processes" do not operate in a manner that is arbitrary or that denies administrative and procedural justice" to investors in accordance with the Constitution and relevant legislation. In spite of the absence of any reference to fairness apart from fair public hearing before a court, the section is titled "Fair administrative treatment" (without any mention to administrative and judicial treatment).

The standard embodied in Section 6, which did not appear in the draft submitted in July, is essentially national and based on the prohibition of arbitrary treatment and on denial of administrative and procedural justice as provided in domestic legislation. It is then further substantiated by three *renvois*

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[21] Emphasis added.

to Articles 32 to 34 of the Constitution, concerning, respectively the right to be given written reasons and administrative review, access to government-held information, and right to a fair public hearing before a court or another independent and partial tribunal or forum.[22]

Reminiscent of the so-called Calvo doctrine[23], Section 8.1 (National treatment) provides that foreign investors cannot be treated less favourably than domestic investors in like circumstances. Section 8.2 offers a non-exhaustive list of elements that have to be taken into account in order to establish the existence of "like circumstances", such as (a) effect of the foreign investment on the Republic, and the cumulative effects of all investments; (b) sector that the foreign investments are in; (c) aim of any measure relating to foreign investments; (d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned; (e) effect on third persons and the local community; (f) effect on employment; and (g) direct and indirect effect on the environment.

Yet, the scope of application of the national treatment is significantly reduced by the express exclusion of the extension to foreign investors of preferences or privileges resulting *inter alia* from (a) government procurement processes, (b) public subsidies and grants, (c) promotion of equality or protection historically disadvantaged persons, promotion of cultural heritage, indigenous knowledge and related biological resources, or national heritage; and (d) assistance or development of small and medium businesses or new industries (Section 8.4).

Under Section 9 South Africa must ensure the physical security of foreign investors "as may be generally provided to domestic investors in accordance with minimum standard of treatment of customary international law (MSCIL) and subject to available resources and capacity".

[22] Section 32 (Access to information) reads: "Everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state. Section 33 (Just administrative action) reads: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration. Section 34 (Access to courts) reads: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

[23] On the clause, see, in particular, Amos S. Hershey, 'The Calvo and Drago Doctrine', 1 *Amer. Jour. Intl Law* (1907) 26; K. Lipstein, 'The Place of the Calvo Clause in International Law', 22 *Brit. Yearbook Intl Law* (1945) 130; and, more recently, Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', 4 *Law and Practice Intl Court s and Tribunals* (2005) 1.

The Act contains a Section reminiscent of, yet significantly different from the other key provision normally found in investment treaties, namely on expropriation. Section 10 of the Act confines itself to extend to foreign investors the right to property protected under Section 25 of the Constitution, a rather complex provision of more than 350 words.[24] Section 25 indicates *inter alia* the requirements that are to be satisfied in case of expropriation. First, no one may be deprived of property except in terms of law of general application. Second, no law may permit arbitrary deprivation of property. Third, property may be expropriated only for a public purpose or in the public interest, which includes land reform and equitable access to all South Africa's natural resources. Forth, expropriation entails the obligation to pay just and equitable compensation fixed, in case of disagreement, by a domestic court and reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

Section 25 of the Constitution further clarifies, *inter alia*, that 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; and that nothing in Section 9 prevents 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.

The final substantive provision relates to the right of foreign investors to repatriate funds, subject to taxation and other applicable legislation (Section 11).

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[24] Section 25 (Property) reads: "1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. 2. 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 interests 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. 4. For the purposes of this section (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land. 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. 6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. 7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. 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). 9. Parliament must enact the legislation referred to in subsection (6)".

A key provision of the Act is Section 12 (Right to regulate) providing in paragraph 1 that nothing in the Act precludes the adoption by the government, in accordance with the Constitution and applicable legislation, of measures concerning *inter alia*: (a) redressing historical, social and economic inequalities and injustices; (b) upholding the basic values and principles governing the public administration; (c) upholding the rights guaranteed in the Constitution; (d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; (e) fostering economic development, industrialisation and beneficiation; (f) achieving the progressive realisation of socio-economic rights; or (g) protecting the environment and the conservation and sustainable use of natural resources.

Furthermore, under paragraph 2 of Section 12, the government or any organ of state may take measures that are necessary to comply with international obligations related to international peace and security, or the protection of the security interests, including the financial stability of the Republic.

With regard to the settlement of disputes between the investor and the government, the Act makes available to the former two types of domestic remedies. Within six months of "becoming aware of the dispute", the investor may request the Department of Trade and Industry (TDI) "to facilitate the resolution of such dispute by appointing a mediator" (Section 13.1). Under Section 13.2, the mediator is appointed by the government and the investor from a list maintained by the DTI or in the absence of such list from individual proposed by either party. If the DTI is party to the dispute, the parties *may* jointly request the Judge President of one of the divisions of the High Court to appoint a mediator.

Alternatively, under Section 13.4 and subject to applicable legislation, an investor, upon becoming aware of a dispute, "is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment".

The Act also foresees the possibility of arbitration between South Africa and the national State of the investor in respect of investments covered by this Act. In this case, the government *may* consent to international arbitration, subject to the exhaustion of domestic remedies. In considering such request, the government must respect the administrative processes set out in Section 6 of the Act (Fair and administrative treatment).

IV. PRELIMINARY ASSESSMENT OF THE ACT

The Act is a strong response to the perceived inadequacy of investment treaties, which are facing growing criticism for three main reasons. First and in spite of some recent interesting developments

and with significant exceptions,[25] these treaties remain manifestly unbalanced in favour to the investor, to the point that in *Spyridon* v. *Romania*, the Tribunal candidly admitted that the BIT between Greece and Romania "imposes no obligation on investors, only on contracting States".[26] Second, investment treaties are often perceived by the host State as unduly restricting its regulatory powers and its capacity to protect collective interests and pursue its social and economic policies.[27] Third, investment arbitration is not considered as offering adequate guarantees in terms of legitimacy, transparency and coherence.[28]

The disaffection for investment treaties, combined with the lack of clear evidence that investment treaties are necessary to attract foreign investments and stimulate economic growth,[29] has pushed several States to reconsider their approach to the legal protection of such investments. In recent years, States have demonstrated a good deal of reluctance to ratify BITs, upgraded their BITs, revised their BIT models, or opted for much less facilitation treaties.[30] The South African government has opted for a different route based on the assumption that domestic legislation is more appropriate than international legal instruments to regulate foreign investment.

The Act is firmly anchored to the Constitution, as it is evident first in Sections 3 and 4. The first section indicates that it must be interpreted *inter alia* in accordance with the Constitution. The second one enunciates its objectives and subsection (a) eloquently provides that foreign investments are to be protected "in accordance with and subject to the Constitution". The Act also contains several references and *renvois* to the Constitution, most prominently with regard to Section 6 (Fair administrative treatment), Section 9 (Legal protection of investment) and Section 12 (Right to regulate).

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[25] For two examples of quite innovative investment treaties, see the BIT between Morocco and Nigeria (not in force yet), above note 10, see Supplementary Act Adopting Community Rules on Investment and the Modalities for its Implementation within ECOWAS, 19 December 2008, at http://www.privatesector.ecowas.int/en/III/Supplementary_Act_Investment.pdf.

[26] *Spyridon* v. *Romania*, ICSID ARB/06/1, Award, 7 December 2011, para 871.

[27] It has been recently declared that "[o]ne common issue is the need to clarify the interaction between international investment instruments and domestic investment policy as well as policy in other areas – for e.g., sustainable development and environmental regulation. Governments must always be concerned about ensuring that there is sufficient policy space for them to engage in reconciling competing interests", Commonwealth Investment Experts Group Meeting for the African Region, Kampala, Uganda, October 20-21, 2011, on file with author.

[28] See, in particular, Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, Claire Balchin (eds.), *The Backlash against Investment Arbitration* (The Hague: Kluwer, 2010); Jean E. Kalicki, Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* (Leiden: Brill-Nijhoff, 2015).

[29] UNCTAD, 'The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014', *Issues Note, Working Draft*, September 2014, available at http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf.

[30] See, above section II.

The choice to move away from international treaties in favour to a domestic piece of legislation solidly pegged to the Constitution is an interesting compromise. Domestic legislation unavoidably exposes foreign investors to greater risks and instability as the legislator may at any time amend the legal rules whereas modifying a treaty requires the agreement of all parties. Pegging the Act to the Constitution, however, significantly mitigates such exposure due to the rigidity of the Constitution, which can be modified only in accordance with a more complex procedure.[31] Yet, the Acts and the Constitution itself make several references to other pieces of domestic legislation, thus paving the way to the "ordinary" legislative intervention to complete and elaborate on the rules contained in the Act and the Constitution. Here the risks foreign investors are exposed to become more important.

With regard to the substantive provisions, the Act does not impose any new obligations upon the investor. The only obligation expressly mentioned in the Act is the obligation to comply with domestic law, which needless to say exists regardless to any express provision.[32] From this perspective the legislator has preferred to include in the Act several references to domestic legislation rather than to insert in the Act any of obligations for the investors like those that have slowly found their way into investment treaties, such as obligations on transparency, access to documents, consultation, corporate social responsibility, corruption, or social and environmental impact assessment.[33]

Moving to the catalogue of provisions on the protection of investments contained in the Act, the key provision on fair administrative treatment (Section 6) is completely different from the fair and equitable treatment (FET) normally found in investment treaties.[34] FET is a rather vague international standard that investment tribunals have progressively shaped through a largely consistent body of decisions.[35] As pointed out by a tribunal, the standard "encompasses *inter alia* the following concrete

[31] See Section 74 (Bills Amending the Constitution).

[32] In *Parkerings-Compagniet AS v Lithuania* , ICSID ARB/05/8 , Award , 11 September 2007 , para 332, for instance, the Tribunal pointed out that "[i]t is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion".

[33] See, for instance, Chapter III of ECOWAS Supplementary Act on Foreign Investment, which contains a comprehensive catalogue of foreign investors' obligations and duties. Amongst them, Article 12 imposes upon foreign investors the obligation to conduct an environmental and social impact assessment of the potential investment, to duly apply the precautionary principle, and to make the documents related to the investment available to the local community.

[34] See, for instance, Article 3.1 of the BIT between South Africa and China, according to which, "Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party".

[35] As pointed out in *Total S.A.* v. *Argentina*, ICSID ARB/04/01), Liability, 27 December 2010, para 109, "tribunals have endeavoured to pinpoint some typical obligations that may be included in the standard, as well as types of conduct that would breach the standard, in order to be guided in their analysis of the issue before them."

principles: the State must act in a transparent manner; the State is obliged to act in good faith; the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations."[36] Such concrete principles are regularly recognized and applied by the generality of States within their respective jurisdictions as well as by international arbitral tribunals.

The standard contained in Section 6 of the Act, on the contrary, does not go much further than confirming the protection granted to investment in the Constitution. Significantly, it does not make any express reference to non-discriminatory measures lest of restricting the regulatory powers of South Africa, especially with regard to the implementation of policies aimed at correcting past discriminatory measures.[37]

The distinction between arbitrary measures (or "arbitrary deprivation of property" using the wording of Article 25 of the Constitution) and discriminatory measures has emerged sufficiently clearly in international law and in foreign investment law in particular.[38] The former category possesses a manifestly negative connotation since arbitrary measures inflict damage on the foreign investor without serving a legitimate purpose,[39] or bear "no rational relationship […] between a measure adopted by the government and the alleged purpose or goal of that measure".[40] Relying on both ICJ jurisprudence[41] and dictionaries, several investment tribunals have described arbitrary measures or means as "derived from mere opinion", "capricious", "unrestrained", "despotic", "fixed or done

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[36] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S.* v. *Kazakhstan*, ICSID ARB/05/16, Award, 29 July 2008, para 609.

[37] It is worth noting that BITs concluded by South Africa normally prohibit unreasonable or discriminatory measures, see, for instance, Article 41.1 of the BIT with China, Article 4.1 of the BIT with Nigeria and Article 3.1 of the BIT with Argentina.

[38] Christoph Schreuer, 'Protection against Arbitrary or Discriminatory Measures', in Roger P. Alford and Catherine A. Rogers (eds.), *The Future of Investment Arbitration* (Oxford: OUP, 2009) 183, with reference to some arbitral decisions in footnote 60.

[39] *Idem*, especially p. 198.

[40] Patrick Dumberry, 'The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105', 15 ***JWI&T*** (2014) 117, p. 122-123. According to UNCTAD, *Fair and Equitable Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012) p. 78, arbitrary measures are "derived from mere opinion", "capricious", "unrestrained", "despotic" or "founded on prejudice or preference rather than on reason or fact".

[41] In *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989,* p. 15, at p. 76, the Court described an arbitrary conduct as "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety". In *Colombian-Peruvian Asylum Case,* Judgment, *I.C.J. Reports 1950*, p. 266, at p. 284, it held that "[a]rbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims".

capriciously or at pleasure", "without adequate determining principle", "depending on the will alone", "without cause based upon the law".[42] In a similar vein, the South Africa Constitutional Court has held that a conduct is arbitrary when "capricious or proceeding merely from the will and not based on reason or principle".[43]

The choice made in Section 6 not to expressly refer to discriminatory conduct is of great importance from the standpoint of the exercise of regulatory powers by South Africa. South African authorities may adopt measures having – probably *de facto* – discriminatory nature, but not amounting to arbitrariness, in pursuing their public policies, including those intended to redress the consequences of past discriminatory measures, to promote the wellbeing of historically disadvantaged categories, or to implement land reform. From this perspective, Section 6 must be read together not only with the relevant parts of the Constitution it refers to, but also with Section 9 of the Constitution and Section 12 of the Act on the power to regulate.

It is true that Section 6 requires South Africa to ensure administrative and procedural justice. Such a requirement, however, relates to access to the competent tribunals or other bodies and well as property of the administration of justice. It is argued that such requirement does not undermine measures adopted by public authorities to pursue public policies, even if they may be discriminatory against foreign investors, provided that the later have access to justice and justice is properly administered.

The national treatment standard contained in Section 8 is in principle comparable with that guaranteed by investment treaties, if not for its source.[44] The innovative element is the detailed yet non-exhaustive list of elements to be taken into account to determine the existence of "like circumstances", which appears to be well articulated and may be expected not only to facilitate the application of the Act, but also to enhance the predictability and consistency of the related judicial and arbitral decisions.

The specifications in Section 8.4, however, water the standard down rather drastically by carving out important and broadly worded exceptions to the extension to foreign investors of the treatment

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[42] See, for instance, *Siemens A.G. v. Argentina*, ICSID ARB/02/8, Award, 17 January 2007, para 318. In *Methanex* v. *United States*, Award, 3 August 2005, Part IV, Chapter B, para 1, the Tribunal referred to "malign intent". On the application of the notion of arbitrariness, see, in particular, Vaijo Heiskanen, 'Arbitrary and Unreasonable Measures', in August Reinisch (ed.), *Standards of Investment Protection* (Oxford: OUP, 2008) 87; Jacob Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard and the International Law of Investment', 25 *Leiden Jour. Int'l Law* (2012) 77.

[43] *Beckingham* v *Boksburg Liquor Licencing Board* 1931 TPD 280 at 282 and *Johannesburg Liquor Licencing Board* v *Kuhn* 1963 (4) SA 666 (A) at 671C.

[44] Article 10 (1) of the BIT with China, for instance, provides that "[i]f the treatment to be accorded by one Contracting Party in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other Contracting Party is more favourable than the treatment provided for in this Agreement, the more favourable treatment shall be applicable".

reserved to domestic investors. In spite of the apparent close character of the list of exceptions, Section 8.4 leaves the government great room for manoeuvre, especially when it comes to promoting the achievement of equality, cultural heritage and practices or developing small, medium or new industries.

The policy space of the government is further safeguarded by Section 12 on the right to regulate, this time with a non-comprehensive list of categories of measures. It must be noted that these measures do not need to be *necessary* to protect certain social interests – such as the environment or public health. They allow a proactive role of South Africa and their general nature makes it hardly feasible any administrative or judicial control beyond compliance with the procedural guarantees contained in Section 6 of the Act as well as the principles of good faith, proportionality and reasonableness.

While it is certainly legitimate to ensure that the host State is able to exercise its rights and fulfil its duties,[45] the combination of Section 8.4 and Section 12 substantially weakens the protection of foreign investments. One may wonder whether a more balanced approach could be inspired by provisions contained in existing BITs, such as Article 3 (3) (c) BIT between South Africa and the Czech Republic, which excludes foreign investors from the enjoyment of any treatment preference or privilege which may be granted by the host State in relation to "any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination".[46]

Section 9 on the legal protection of property is not particularly well drafted as MSCIL by definition applies only to foreign investors while the use of the modal "may" with reference to the protection accorded to domestic investors seems rather ambiguous. More importantly, it limits the protection to physical security and introduces a limitation to the related obligation to the available resources. Both treaty practice and arbitral awards vary significantly with regard to whether the obligation to ensure

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[45] As pointed out with regard to investment treaties by the Commonwealth Investment Experts Group Meeting for the African Region, "Summary Record", Kampala, October 20-21, 2011, "[o]ne common issue is the need to clarify the interaction between international investment instruments and domestic investment policy as well as policy in other areas – for e.g., sustainable development and environmental regulation. Governments must always be concerned about ensuring that there is sufficient policy space for them to engage in reconciling competing interests", at http://secretariat.thecommonwealth.org/files/243514/FileName/FINALIEGOutcomesSummary%282%29.pdf.

[46] Article 4 bis of the Protocol to the BIT with Iran, likewise, exclude the extension to investors of the benefit of any treatment, preference or privilege resulting *inter alia* from "any law or other measure taken, pursuant to Article (9) of the Constitution of the Republic of South Africa, 1996 (Act 108, 1996) the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination".

full protection goes beyond physical security.[47] The standard protected under Section 9 therefore cannot be considered as a departure from current practice, but rather a confirmation of a tendency to reduce it to physical security.[48]

Section 10 of the Act (Protection of property) – which is essentially a renvoi to Section 25 of the Constitution – does not reassure foreign investors in the event of expropriation. First of all, it deals only with direct expropriation, i.e. transfer of the title to property – and not also to indirect expropriation, which today is by far the most frequent form of deprivation of property.[49] Second, it expressly imposes only three of the four requirements imposed by international law to lawfully expropriate foreign investment, namely public interest, respect of procedural rules and compensation. In line with the approach taken with regard to NT standard and right to regulate, mention is made to arbitrary measures, but not to discriminatory measures. Quite the contrary, foreign investors may suffer the consequence of measures aimed at redressing past racial discrimination, realizing land reform, and promoting equitable access to all South Africa's natural resources.

These measures can be described as "positive discrimination" and are certainly legitimate from a social and political standpoint. From a strictly legal perspective, however, Section 10 hardly reassures foreign investors due to the vagueness and subjectivity of the just and equitable level of compensation, which reflects an equitable balance between the public interest and the interests of those affected. This is definitely much less satisfactory, for the foreign investor's standpoint, than the "prompt, full and adequate" formula that can be found, in different variants, in the overwhelming majority of investment treaties.[50]

If the substantive provisions of the Act can scarcely meet the level of protection normally offered by investment treaties, the settlement of dispute mechanism appears to be hardly satisfactory. Mediation is certainly to be encouraged for several reasons, including the higher probability to continue – if not to strengthen – the underlying business partnership as well as the flexibility it offers – especially with regard to expropriation by allowing the parties to avoid the gamble of either full compensation or no compensation at all.[51] By definition, however, its effectiveness depends on the concerned parties

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[47] See, in particular, George K. Foster, 'Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance', 45 *Vand. J. Transnat'l L.* (2012) 1095.

[48] See, for instance, Article 3.2 Indian Model BIT, above note 11, according to which "full protection and security" only refers to a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever".

[49] See, for instance, Article 4.1 of the BIT between South Africa and China.

[50] See, for example, Article 6.1 of the BIT between South Africa and Argentina.

[51] See the symposium on 'Alternative Dispute Resolution in Investment Disputes', 29 *ICSID Review* (2014) 1. See also Noah Rubins, J. Day, 'The Use of Mediation for Investment Disputes', 1 *Transnational Dispute Settlement* (2004), 1; J.J.

commitment and willingness to settle the dispute friendly. The exercise may be frustrated by financial implications, political considerations or public pressure, especially when the dispute relates to investments in sensitive sectors.

Leaving aside diplomatic protection, in the absence of an applicable treaty providing for international arbitration, foreign investors in South Africa may only have recourse domestic adjudicatory bodies, which are not necessarily courts. The settlement of the dispute before domestic court, tribunals or statutory bodies provided for Section 13.4 calls for several comments. To start with, the remedy in Section 13.4 is independent from any attempt to settle the dispute through mediation. Besides, the verb "to approach" used to describe the initiation of the proceeding under Section 13.4 is not particularly felicitous. Perhaps more importantly, Section 13.4 must be read in conjunction with Section 6.4 (*a fortiori* considering that under Section 6.4 the latter is "subject to the former). However, it remains unclear what are the effects of the renvoi operated by Section 6.4 to Article 34 of the Constitution, according to which the dispute could be settled by a court or, where appropriate, another independent and impartial tribunal or forum.

The reference in Section 6.4 to dispute "that can be resolved by the application of law", moreover, remains rather cryptic and apparently assumes the existence of disputes that *cannot* be resolved by the application of law. This begs the question on what are the criteria to establish whether a dispute is susceptible to be settled by the application of law, who will make the related determination, and what happens to disputes that cannot be settled by the application of the law.

Furthermore, the abandonment of investment-State arbitration is a rather drastic measure. Investment arbitration has been celebrated by numerous tribunals and in literature as a remarkable development bringing the dispute outside the reach of politics with a view of ensuring the equalities of the parties in efficient proceedings conducted by independent tribunals.[52] While there is no doubt that investment

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Coe, 'Toward a Complementary Use of Conciliation in Investor-State Disputes. A Preliminary Sketch', 12 *U.C. Davis J. Int'l Law & Policy* (2005-6) 7; Thomas .W. Wälde, 'Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation', 22 *Arbitration International* (2006) 205; Stephen M. Schwebel, 'Is Mediation of Foreign Investment Dispute Plausible?', 22 *ICSID Review - FILJ* (2007) 237; Tarcisio Gazzini, 'Mediation in the Settlement of Disputes between Foreign Investors and States', in Bernardo Cortese (ed.), *Liber Amicorum M.L. Picchio Forlati*, Padova: Cedam (2014) 395.

[52] As pointed out in *Gas Natural SDG* v *Argentina*, ICSID ARB/03/10, Jurisdiction, 17 June 2005, paras 29 ff (notes omitted), "[t]he creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts. Correspondingly, the prospect of international arbitration was designed to offer to host states freedom from political pressures by governments of the state of which the investor is a national. The vast majority of bilateral investment treaties, and nearly all the recent ones, provide for independent international arbitration of investor-state disputes, whether pursuant to the ICSID Convention, the ICSID Additional Facility, the UNCITRAL

arbitration presents several problems, it remains to be seen whether the bald move backward made by the Act was indispensable or whether South Africa could have better calibrated the exposure of the host State (for instance by restricting or conditioning access to arbitration, or by expressly introducing counter-claims), enhance transparency, participation and public scrutiny.

The settlement of disputes through State-State arbitration, which completes Section 13, can hardly expected to improve much the procedural protection of foreign investors, not only due to its entirely voluntary character, but also because States are traditionally rather reluctant to resort to this kind of arbitration.[53] Equally important, even assuming arbitration under Section 13 is possible, the entire proceedings and all decisions related to the dispute (including a possible friendly settlement or an agreement on compensation) will be firmly in the hands of the home State, with all associated shortcomings and implications. With regard to the proceedings, furthermore, the silence of the Act on the determination of the nationality of foreign investors unavoidably adds further uncertainty on the entire procedure.

In conclusion, one may even wonder what is the added value of the procedural rules of the Act given that that they hardly offer foreign investors anything more that the remedies already available under the Constitution and confine international arbitration to State-State voluntary arbitration.

V. CONCLUSIONS

The 2015 Protection Investment Act has resolutely rebalanced the private and public rights related to foreign investment in South Africa in favour of the State. While it is undisputed that States can and should review their investment treaty policy and if appropriate switch from international treaties to domestic legislation, the drastic reduction of the protection of foreign investors, both in terms of substantive and procedural provisions, is not entirely convincing. It is argued that a better equilibrium could have been achieved by adjusting the existing level of legal protection for foreign investors, either through the renegotiation of existing investment treaties or the adoption of domestic legislation striking an even-handed balance between the need to reassure foreign investors and that of preserving the capacity of South Africa to fully exercise its sovereign prerogatives and meet its responsibilities.

The host State could have reconsidered and possibly limited the rights of foreign investors as well as introduced obligations upon them, including social and environmental impact assessment, corporate

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Arbitration Rules, or comparable arrangements, and such provisions are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment".

[53] See Michele Potestà, 'State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is there Potential?', in Nerina Boschiero *et al.* (eds.), *International Courts and the Development of International Law. Essays in Honour of T. Treves* (Vienna: Springer, 2013) 753.

social responsibility, consultation, transparency, fight against corruption, access to information and documents and so on. In this regard, the SADC model BIT[54] and the recent Indian model BIT[55] as well as some modern investment treaties, such as the 2016 BIT between Morocco and Nigeria[56] or ECOWAS Supplementary Act,[57] could have been useful sources of inspiration.

Furthermore, the right to regulate certainly deserves to be adequately safeguarded, with carefully drafted specific or general exceptions, possibly modelled after WTO Article XX, rather than vague and politically charged provisions as those appearing in the Act. Besides, provisions especially designed to allow the adoption by South Africa of the measures necessary to redress past discrimination and injustices, such as Article 3 (3) (c) of the current BIT with the Czech Republic,[58] could have been further developed.

Finally, wiping out investor-State arbitration may prove unnecessary if not counterproductive. A variety of options are available between keeping the existing – admittedly unsatisfactory – regime and its flat rejection. The current concerns on the legal protection of foreign investment could indeed be addressed by introducing appropriate provisions on the exhaustion of domestic remedies, fork in the roads clauses, provisions on counterclaims – if not even claims – put forward by the State and so on.

It remains now to be seen what impact the Act will have upon the flow of foreign investment to South Africa. Such assessment is particularly arduous due to several reasons, including the difficulties to establish a link between the Act and the evolution of the flow of foreign investment and to discharge alterations of such flow to other endogenous and exogenous causes.

[54] See above note 10.

[55] See above note 11.

[56] See above note 10.

[57] See above note 25.

[58] Se above note 46.