The promotion and protection of foreign investment law bill: denunciation of BITs, and the de-internationalisation of investor-state arbitration in South Africa

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Abstract

The protection of foreign investment is a sensitive issue, and so are the different legal methods employed in protecting and regulating investment which diverge considerably according to different jurisdictions. The failure of world government to establish an international investment agreement has been deal with through bilateral investment treaties (BITs). On 4 November 2013 South Africa published for public comment the Promotion and Protection of Investment Bill. In a move that can simply be described as bold South Africa signalled the intention to follow in part the precedents set of countries like Australia that jettisoned the approach of the foreign protection and remedies through BITs. A few of South Africa's trading partners who have been affected by the termination of BITs are unhappy with the advent of the new investment regime effectively labelling it a step backwards and a disincentive for investment. This paper discusses the ramifications of the new investment regulatory regime in South Africa, in particular the legislative prohibition of international investor-State arbitration, and what this move means for foreign direct investment (FDI) in the country.

1 Introduction

> [BITs have] proved an open invitation to unhappy investors, tempted to complain that a financial and business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government and delighted by the opportunity to threaten the national government with a tedious, expensive arbitration. (Vandevelde, 2000)

During the dawn on democracy period, the period which began with the release of the first democratic president of the Republic of South Africa (hereinafter "South Africa"), and the end of the global political and economic isolation South Africa went into a state of euphoria. The euphoric moment included the country being party to many bilateral investment treaties (BITs) to attract foreign direct investment (FDI). These treaties were mostly with European countries, followed by the American and Asian countries. The first of these important BITs was *An Agreement for the Promotion and Protection of Investment* was signed with the United Kingdom on September 20, 1994 (Petersen, 2006). This was succeeded in subsequent years by treaties with Belgium-Luxembourg, Canada, Cuba, Italy, France, Germany, Korea, the Netherlands and Switzerland. According to the database of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) South Africa is one of those countries with a rising number of BITs concluded. This has been confirmed by a study that reported that "(i)n less than a decade, South Africa has become one of the top 10 investors in, and trading partner of, many African countries, displacing those companies from Europe (particularly in countries that are former colonial powers) and America, which have traditionally retained their economic links in Africa" (Games, 2004 p.1-2). BITs have been so widely used in investment that they became an international phenomenon due to the rate they are being negotiated, which was one per day in the mid-1990s, according to Vandevelde (2000).

In hindsight the Government of South Africa became increasingly apprehensive of the impact of BITs on domestic policy sovereignty and space; and the general issues of public interests which are incidental to BITs. Thus, the Government of South Africa under the leadership of the Department of Trade and Industries (DTI) began the process of reviewing the country's investment regime between 2008 – 2010. . In his speech as part of the launch of UNCTAD's Investment Policy Framework for Sustainable Development in Geneva in September 2012 Minister of Trade and Industry Dr Rob Davies stated:

> *The recommendations emanating from the Review were largely endorsed by the South African Cabinet in April 2010. Cabinet understood that the relationship between BITs and FDI was ambiguous at best, and that BITs pose risks and limitations on the ability of the Government to pursue its Constitutional-based transformation agenda. Cabinet concluded that South Africa should refrain from entering into BITs in future, except in cases of compelling economic and political circumstances. It instructed that all "first generation" BITs which South Africa signed shortly after the democratic transition in 1994, many of which have now reached their termination date, should be reviewed with a view to termination, and possible renegotiation on the basis of a new Model BIT to be developed.*

The Minister made it clear the South African Government's intention to refrain from BIT-based investment promotion and protection regime, "except in cases of compelling economic and political circumstances." Consequently, on 4 November 2013 South Africa published for public comment the Promotion and Protection of Investment Bill (Bill). Part of the process for a legislative approach towards FDI protection is the termination of BITs, and the restriction, implied though, on the availability of international arbitration of state-investor disputes. The Bill stood in draft form and was open to public comment until 1 February 2014. This may be seen as the country's denunciation of the ICSID Convention, an event which represents a major policy direction change by a developing country, though not entirely new such development. With the introduction of the Bill South Africa signalled her intention to follow in part the precedents set by other countries like Australia, Bolivia, and Ecuador that jettisoned the approach of the foreign protection and remedies through BITs for a legislative approach. Other countries like the US and Canada have in the past revised their BITs to introduce more protections and reclaim their policy space.

The denunciation is seen as the unchaining from the shared sovereignty which is often seen in BITs (Tienhaara 2011). A few of South Africa's trading partners who have been affected by the termination of BITs, particularly the European countries who since 1977 had concluded many BITs with several number of developing countries (Salacuse, 1990), are unhappy with the advent of the new investment regime effectively labelling it a step backwards and a disincentive for investment due a threat of possible nationalisation and expropriation measures. Some commentators have disparaged the Bill as the Government's departure from a tried and tested regime on the promotion and protection of FDIs in BITs. The protection of and international settlement of investor-state disputes has been a hallmark of BITs over decades. Until recently there has been a surge and interest on BITs as appropriate framework for the governance of FDIs. Since the first BIT was signed between Germany and Pakistan in 1959 and came into force in 1962, BITs became one of the increasingly "popular form of international alternative to domestic institutional protection" (Ginsburg 2005, p.107). Up to 1999, another 1856 BITs have been signed and further BITs are expected in the future (United Nations, 2000).

Why then a sudden change in the vehicle for the promotion and protection of investment in South Africa? This paper appraises the intended regime under the Bill. In particular it looks at the merits and de-merits of the Bill, and the reasons that led to this investment promotion policy change.

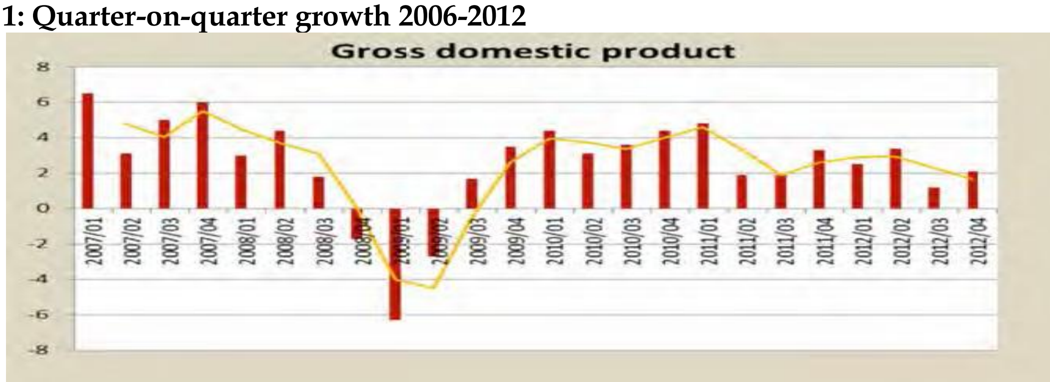
Methodological and Information Sources Notes

This study uses a qualitative research approach, this involves building a complex, holistic picture and reporting on detail views of informants as contained in different sources. These sources include but not limited to various international legislations, judicial decisions, journals, papers, information from the internet and other necessary reading materials. The qualitative approach chosen as relevant and most appropriate for the topic under investigation because it is interpretivist and constructionist. It allowed the thorough interrogation of issues and the exploration. Most importantly the approach chosen allowed the researcher to employ analytical, critical and the comparative approach in addressing the issues in question. Use was made of the literary library sources in particular; the primary sources that were examined include Bill and the Constitution. Secondary sources in the form of academic writings such as books and journals were also consulted. Abstracts from the subject specific journals such as there were critically appraised and the full article sought and read if the abstract was considered robust and relevant.

The Investment Climate, and Economic Growth in South Africa

The transition from a protectionist economic climate under the Apartheid South Africa to a more open and FDI directed liberal economy ushered in some significant changes in the South African investment climate; and policies. It is reported that since the dawn of democracy South Africa has experience a steady but consistent flow of FDI, mostly because of its attractive non-discriminatory investment environment (National Treasury, 2011:1 -2. See also Rusike 2008). This is a marked outlook compared to the period before 1993 when South Africa attracted little foreign direct FDI because of the political and socio-economic environment under the Apartheid regime which was characterised by trade and economic sanctions; inward growth strategies; capital controls and a moratorium placed on payments to external creditors. There are also reports of growth contributed by different sectors at an annualised rate of 2,1% in the fourth quarter of 2012, for example, which was projected at 2.7% in 2013 (DTI, 2013).

Figure 1: Quarter-on-quarter growth 2006-2012



Source: South Africa Reserve Bank

There is no conclusive empirical and substantive evidence on the value of BITs to the broader investment environment of LDCs. There are those who hold a view that BITs have opened up foreign investment in many countries due to the heightened confidence and security of investment they provide. Though a subject of another study, a study sanctioned by the World Bank found out that BITs have stimulated little FDI (Hallward-Driemeier, 2003. See also Vandevelde, 2000; Stiglitz, 2005 p.150; Sornarajah, 2004 p.57). And, in fact, BITs are inherently problematic for LDCS (Weston, 1981 p.461). However, what is clear is that the presence of foreign investors in a country inevitably creates opportunities for economic growth beyond that facilitated by domestic industries. In particular because BITs provide international standards for the protection of foreign investment. (Bubb and Rose-Ackerman 2007). Countries gain benefits from FDI subject to the existence of a healthy engagement with investors; under conditions that are mutually beneficial. During the apartheid era FDI was insignificant, at least to the black communities of the country; and was curtailed by the long period of isolation from international relations. Immediately after the dawn of democracy in 1994.

Promotion and Protection of Investment Bill

General : Précis of Key Provisions

The Bill provides foreign investors with a number of guarantees, including the obligation on the relevant host state not to expropriate or nationalise property without due process of the law and without compensation (Section 8); to accord national treatment to investors at all times, (Section 6); possible repatriation of investment (Section 10); full protection and security obligation (Section 7); and the resolution of investment dispute (Section 11).

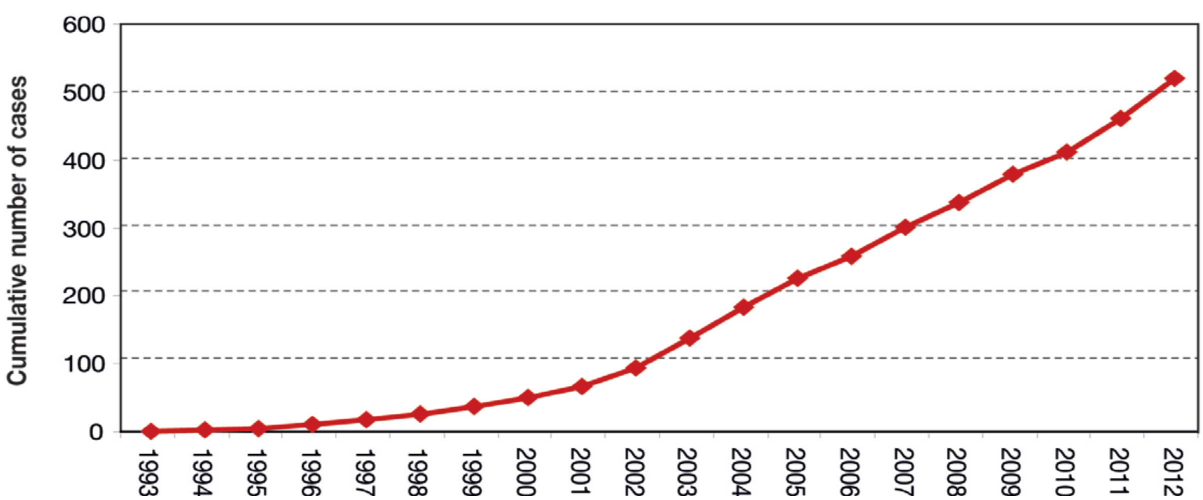
In the light of expropriation being one of the key reasons for the objections against the Bill, it is apposite to note that section 8 of the Bill, headed *"Principles relating to expropriation of investments"* provides that "An investment shall not be expropriated except in accordance with the Constitution and in terms of other laws of general application, for public purposes or in the public interest." Section 8 is an embodiment of section 25 of the Constitution. Section 25 of the Constitution states that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property" and that "property may be expropriated only in terms of law of general application…for a public purpose or in the public interest." Section 10 of the Bill provides that: "*a foreign investor may, in respect of any investment, transfer funds, subject to taxation and other applicable legislation*." Although not expressly referring to repatriation of investment, it can be read-in that purposive interpretation of section 10 may permit such repatriation. Equally important is section 7 which provides that the state must provide foreign investors with an *"equal level of security as may be provided to other investors and subject to available resources and capacity"*. And further that these investors must investors , both foreign and domestic, shall be treated equally in terms of compensation or restitution for loss or damage arising from insurrection, revolt, war, etc.

Relevant to the crux of this study, section 11 of the Bill provides for an initial process of mediation of investment dispute, at the election of the foreign investor and recourse for relieve from national courts. Section 11(5) of the Bill provides that an investor may refer a dispute to arbitration under the Arbitration Act of 1965. Should the parties to a dispute fail to agree on the arbitrator to be appointed, the Bill allows either of the Parties may seek the intervention of the domestic court. Notable for its absence in section 11 is reference to international arbitration, the fact of concern for foreign investors.

Domestic versus International Investor-State Arbitration of Investments in South Africa

It is instructive to note the UNCTAD report which reveals that in 2012 the number of new known treaty-based investor-State dispute settlement cases filed under international investment agreements grew by at least 58. And that of the 58 new disputes 39 were filed with the ICSID, seven under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and another five under the Stockholm Chamber of Commerce (See UNCTAD, 2013). Furthermore that the International Chamber of Commerce (ICC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) received one new case each. According to the report this constitutes the highest number of known treaty-based disputes ever filed in one year (UNCTAD, 2013). The total of treaty-based arbitration in 2012 rose to 514, as demonstrate in the graph below.

Figure 1. Known investor-State treaty based dispute settlement case:



Source: UNCTAD

To some this information is testimony to the importance of internationalised investor-State resolution. Equally this may only be a continuation of arrangements that were locked-in during the negotiations of many BITs and which cannot be dispensed with even with the termination of such BITs.

The Bill, particularly the move toward the localisation of state-investor arbitration, was particularly influenced by the events in the 2007 dispute that involved an Italian mining companies that invested in South Africa, *Foresti v. South Africa*, that went before ICSID and was later amicably resolved. At stake in casu was the sovereignty of the Government of South Africa on issues of socio-economic adjustment; and its policy formulation authority and mandate. In *Foresti v. South Africa*, a group of Italian citizens that had invested in the South African quarrying sector claimed that legislation enacted in 2004 to increase the participation of historically disadvantaged South Africans in the minerals sector effectively 'extinguished' their mineral rights without providing adequate compensation, and that this was contrary to South Africa's obligations under the Italy-South Africa BIT. The investors in essence argued that South Africa must govern its investment environment purely to the advantages of foreign investors; and abandon its constitutionally enshrined responsibility to address some of the important interests including, but not limited to, addressing the economic imbalances created over a period of more than 100 years by the Apartheid government through the Black Economic Empowerment policies. They detested the mandate of the country as a sovereign state to advance the interest of all its citizens even if it means through investment related measured. In my view, they argued for South Africa to ensure that economic benefits of its now open investment climate accrue to foreign investors at all costs.

What the opponents of the investment regulation have been best at doing is to pay willful blindness to the countries national interests; and ignore how these interests influence the national economic policy within the global context. The country's BEE policies as it relates to FDI should be construed as reconciling its national interests to those in its bilateral and multilateral engagements. Thus, ensuring that equilibrium is reached between interests and various dimensions of its FDI. BEE legislation and policies are part of the broader policy interventions for economic transformation in South Africa (Klaaren and Schneiderman, 2010). Admittedly, the much celebrated political and socio-economic transformation in South Africa under the African National Congress-led government came with its responsibilities towards international actors. But, in my view, this responsibility cannot be seen to minimize the relevance of the country's reversal of economic inequities and imbalances through investment instruments. It is apposite re-iterate the following observation by O'Regan (2012):

> South Africa is one of the most unequal societies in the world with a gini co-efficient considerably above 0.6 (on a scale where 0 is equal, and 1 is unequal), estimated by the Presidency at 0.66 for 2008. The Presidency estimates (using 2008 constant figures) that monthly income for the poorest 10 per cent grew from R783 to R1041 per capita between 1994 and 2009, while for the richest 10 per cent it grew from R71 055 to R97 899.The richest 10 per cent therefore earn monthly 100 times the amount earned by the poorest 10 per cent. ...The pattern of inequality is also deeply racial, as is illustrated by the fact that the mean monthly per capita income for Africans is R775.46 while for whites it is R7 645.48. The simple sad fact is that nearly twenty years into the new democratic order, poor black South Africans still fare miserably when it comes to the necessities of life: housing, education, health care and job opportunities.

Furthermore, the Bill left the door ajar for international arbitration, and thus there may be a possibility of the investor-State dispute ending up at an international *fora* like ICSID or ICC arbitration. But, for that to happen the Bill prioritises dispute resolution with the host country's national framework whereby disputants must refer their disputes to available arbitration/conciliation/mediation mechanisms, and national courts provided under the substantive and procedural law of South Africa. What we have seen previously is the BIT being used as an excuse to shun adjudication before domestic courts (Ginsberg, 2004).

Legal Restrictions and Investor Protections

Entering into BITs is perceived as the legal circumvention of host-country's legal restrictions; and the securing of appropriate protection that may not be offered by the local law (Wallace. & David Bailey, 1998). Existing body of knowledge points to little evidence indicating that host country regulating FDI as South Africa intends to do is a disincentive to investment, and amounts to denial of protection of investors (Blackwood and Macbride …). Be that as it may, the following reality must be appreciated before arguing a carte blanche case for national treatment obligation violation: First, non-discrimination is a nebulous concept (see Horn & Mavroidis, 2004); Second; national treatment is "relatively new" in the field of investment (DiMascio and Pauwelyn, 2008:49 & 59). DiMascio and Pauwelyn (2008:49) points, and correctly so, a dispute in 2007 that involved an Italian mining companies that invested in South Africa, *Foresti v. South Africa*, ICSID Case No. ARB(AF)/07/l (registered Jan. 8, 2007), that argued amongst others, that the country's BEE policy and the regulatory regime under the Black Empowerment Act as espoused in the Minerals and Petroleum Resources Development Act (MPRDA) was discriminatory. And that their investments in the South African mining sector have been impaired contrary to the terms of South African investment protection treaties with Italy and Belgium and Luxembourg.

Interestingly, the South African mining sector is a critical contributor to the country's GDP, and in addition to its important role as contributors of foreign earning the mining sector provides employment to many people from the previously disadvantaged group. In 2009, for example, the Chamber of Mines of South Africa estimated that the mining industry contributed about 8.8% directly, and another 10% indirectly, to the country's GDP; about 1 million jobs (500 000 directly) created; and about 18% of gross investment (10% directly) created (DTI, 2013). Thus it is a priority sector even with the FDI context.

Third, the problem with the proponents of national treatment obligation in investment context seems, in my view, to stem from the fact that they tend to treat the obligation as a "discipline to facilitate competition and to protect foreigners against government abuse" (see DiMascio and Pauwelyn, 2008:49). Fourth, GATS articles XVI and XVII require countries only to provide market access and national treatment in service sectors that they have specifically listed in the schedules annexed to the Agreement, with the permissibility of allowing specific exceptions for FDI in these sectors (see But, 1997).

In the future if the national treatment argument is raised against the Bill the question to be asked is: Does the national treatment claim relate to the harm to specific investments, and not just abstract competitive opportunities. (DiMascio and Pauwelyn 2008, p.70). If the answer is in the negative such claim will be without merit. What needs to be highlighted is that South Africa has received some positive reviews. In 2011 the World Bank report, *Doing Business Report*, ranked South Africa at 10th position out of 183 countries for good practice in protecting investors in business (DTI, 2014).

Expropriation is also one of the expressed concerns about the proposed legislation. It should be noted that the Constitution of the Republic of South Africa of 1996 is the supreme law of the land. Any law or legislation contrary to its provisions may be rendered invalid and unconstitutional. Section 25 of the Constitution permits the expropriation under strict conditions, which investors are free to invoke to promote and protect their investment. These conditions, as already indicated above, include the requirement that (1) property can be expropriated only in terms of law of general application, for a public purpose or in the public interest and 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; and that (2) such compensation and 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. Despite the difference in formulations and the flexibility that can be read into section 25 of the Constitution (Essenberg, 1993), the Constitutional property protection in South Africa is functionally comparable to that of other countries such as Germany (Klein, 1996). And, I must emphasise, the revisions of the Bill covers the protection of investors from unlawful expropriation and nationalistion.

Conclusion

It would seem that the once increasing popularity of BITs and their decades' contribution on the law of FDI is slowing down. The much revered depoliticised investor-State dispute resolution under ICSID (Shihata, 1986) is no longer working in its greatest favour. It is noted that several reasons are given for this seemingly fall of favour for BIT particularly from LDCs ranging from important decisions by ICSID favouring investors and to the BIT arrangements encroaching on the sovereignty of Government to determine their policy space. BITs have been used by investors, particularly those in LDCs to force policy change in their favour or respond negatively to host country's policy changes through the threat of arbitration (Vandevelde, 2000). The case in point involving South Africa is *Foresti v. South Africa*. Other cases of note include the three oil arbitration cases in the 1970s involving Libya that were decide by the "white man" (Sornarajah, 1991 p.442) and with outcomes favourable to investors which trampled the interest of the host country namely: the BP *Libyan American Oil Co. v. Libyan Arab Republic* of 1977; *Exploration Co. v. Libyan Arab Republic* of 1974; and *Texas Overseas Petroleum Co. v. Libyan Arab Republic* of 1977. There is also the problem of foreign investors attempting to negotiate high-end benefits while the "quid pro quo that the host state receives is tenuous and uncertain (Sornarajah 2000, p.268) despite the fact that the relationship was supposed to be bilateral (Asante, 1988 p.607) and reciprocal in terms of interests receiving (Schreuer, 2001 par.305).

While discussions in this paper focused on the de-internationalisation of investor-State arbitration, the success of the entire South Africa's Bill will lie in the maintenance of conducive investment environment in general that balances national interests and investment concerns. The current and proposed investment regime offers immense opportunities and advantages. South Africa through its now discarded BITs approach has built a much credible environment for the promotion and protection of FDI, rooted on procedural and constitutional rights which to some extent may not be found anywhere in the world. Similarly, there are important national interests that may not be overlooked purely for the sake of appeasing investors. Even with its propulsion to an investment hub of the continent South Africa still remains obligated to address the inequalities of the past which are entrenched in the Constitution of 1996.

There is nothing wrong in the country exercising its policy formulation sovereignty to address some of the economic disparities through the closer regulation of investment environment. This is the socio-economic and political space claimed expressly or impliedly by investors and the countries South Africa cannot yield to. Contrary to the position that that "many states are now more receptive to the concept of surrendering economic sovereignty in order to achieve economic growth and to establish an investor friendly market" (Geist, 1995 p.678), such a surrender abrogation of the policy making space is constitutionally not an option in South Africa (See Klaaren and David Schneiderman, 2010). The country has more to lose than to gain in surrendering its economic sovereignty. Speaking of sovereignty, relevant to this paper is the United Nations General assembly resolutions 625(VII) of 21 December 1952; 1803(XVII) of December 1962; 2158(XXI) od 25 December 1966 and resolution 3201 (SVI) of 1 May 1974 give due recognition to the principle of "permanent sovereignty over natural resources" by States in order, to amongst others, to exploit them to realise their plans of economic development concomitant with their national interest. In relation to this study, this was of significant importance and implication in the *Foresti v. South Africa* case, and unfortunately it was given little regard by investors when the challenged the MPRDA. As stated by Schrijver (1998) the principle in question involves amongst others States' regulation of admission of foreign capital and exercising authority over activities of foreign investors. (p.90).

By introducing the Bill the South African Government reclaimed its policy space, including affirming its discharging of the obligations some of which are mandated by the Constitution of 1996. Succumbing to the unfounded fears of investors would render the country foul of disregarding protections in violation of its national sovereignty jurisdiction. The case in point, for example, is Constitutional Court of Ecudor which on 17 December 2010, when it held that the 1997 BIT between the USA and Ecuador was unconstitutional because its dispute resolution provisions amounted to a "waiver of sovereign jurisdiction" in violation of the principle of supremacy of the Ecuadorian constitution. Compared to Ecuador the proposed South Africa is nowhere near extreme. Article 422 of the 2008 of the Constitution of Ecuador forbidding Ecuador from concluding treaties containing de-localising arbitration clauses similar to those in BITs. Moreover, the Bill does not advocate the *Calvo* Clause-like investment regime. The *Calvo Clause* required, amongst others, international investment agreements submission to local legal jurisdiction and application of local law; and waiver of diplomatic protection in the investor's home state (Shea, 1955; Manning-Cabrol, 1995). There are no unassailable limitations to recourse for investors. What the Bill proposes is the exhaustion of local remedies, and asserting the adjudicatory credibility of the domestic system which is often undermined by BITs (Salacuse, 1990). The insistence on investor-state arbitration in domestic courts in no way devalues the importance of arbitration in investment disputes as observed by Shalakany (2000) who posit that investor-state arbitration is critical to attraction of DI. In fact the contrary is not true.

At the heart of the Bill is not divestment policy nor is it a threat to investment stability and insidious approaches to nationalisation or expropriation. In fact, the proposed South African law contains provisions intended to guarantee certain minimum protective standards to investors, including most-favoured nation and non-discrimination clauses, references to private property rights and the promise of fair compensation in case of expropriation. The Bill, together with the constitutional protection of property and freedom of trade and economic activities, can be said to adequately espouse the *Hull* Rule. The Hull Rule, named after Secretary of State Cordell Hull who in 1938 put to the Mexican authorities Mexican revolutionary period expropriation to observe customary international law requiring prompt, adequate and effective compensation to the expropriated foreign investor (Dolzer, 1981) unfortunately ceased be a rule of customary law in the 1970s. The Bill should be viewed from its broader objective of attracting FDI through a proper regulatory framework.

It is interesting to note that a number of LDCs already have foreign investment legislation some of which limits international arbitration through a number of approaches including the cooling off period (e.g., Kyrgyz Republic, the Law of the Kyrgyz Republic on Investment in the Kyrgyz Republic of 2003); allowing international arbitration only after conciliation failed (e.g., Nigeria and Ghana, the Nigerian Investment Promotion Commission Decree of 1995 and the Ghana Investment Promotion Centre Act of 1994 respectively. Other legislation, such as the 1970 investment legislation of Botswana for instance, contains liberal investment resolution clauses which involve the possibility of sending the dispute to ICSID upon consent in writing by the host country (Azousu, 2001 p.336). And others like the Namibian Foreign Investment Promotion Act of 1990 for instance leave the choice of where to send the dispute for international resolution under UNCITRAL Rules to the election of the investors. There are those laws which specifically restrict investor-State dispute resolution to national courts, such as that of Armenia. The Armenian law clearly state that "[a]ny disputes on foreign investments, which may arise between the foreign investor and the State *shall be considered by the courts of the Republic of Armenia based on the legislation of the Republic of Armenia*" (See Article 24 of the Law of the Republic of Armenia On Foreign Investments of 1994). For those dispute which Armenia is not involved as a party Armenian courts still have jurisdiction, unless if this was expressly excluded by the agreement of the parties.

The South African Bill will usher in a comprehensive, clearly pronounced and uniform legal framework for investment regulatory regime. BITs are limited instrument constituting only a trifling fragment of the country's investment framework and which are targeted at specified arrangement – and thus they can only be considered on a case by case basis. In fact, if anything, the Bill should be seen as a positive evolution of national foreign investment law, and its positive contribution to finding a proper framework for the most efficient regulation of FDI (Klaaren and Schneiderman, 2010), where nationality of the investor is irrelevant as has been the case with BITs. An imminent economist who has more insight on and information about South Africa an investment destination, Joseph Stiglitz, has in defence of South Africa commended the Bill as a step in the positive direction which should not be frowned upon merely on the unfounded fears of investors. What the Government of South Africa needs to do is to avoid legislation that is abstruse and expressed in uncertain terms. Otherwise the legislative regime will find itself, to use the words of Paulsson (1995), exposed to the exploitation of foreign investors who keenly awaited the opportunity "seize on any ambiguity that might arguably defeat [local] jurisdiction" (p.255). The lack of international arbitration legislation in South Africa may be a cause for concern, and provide such an opportunity to foreign investors. The Arbitration Act of 1965, largely influenced by the English Arbitration Act of 1889 and the English Arbitration Act of 1950, explicitly governs national arbitration, together with the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977. The latter was enacted to give effect to the New York Convention. However, even the South African Law Commission in its 1998 Report entitled, "Arbitration: an international arbitration for South Africa" Project 94, conceded that the Arbitration Act is by international standards 'defective', 'outdated' and 'inadequate', to deal with arbitration having international elements. The Arbitration Act is largely influenced by the English Arbitration Act of 1889, the English Arbitration Act of 1950.

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