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Clash of Laws? Testing the Effectiveness of the National Treatment Principle against Black Economic Empowerment Laws in South Africa

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Abstract

In 2013, the South African government introduced the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) with the purpose of correcting the injustices of the past. In 2015, the government introduced the Protection of Investment Act 22 of 2015 with the purpose of regulating investment including, foreign direct investment in South Africa. On one hand, the B-BBEE Act and the Protection of Investment Act justify discrimination to correct the injustices of the past. On the other hand, the international economic law principle of national treatment requires that foreign investors who are in similar economic situations be treated equally to domestic investors. The B-BBEE Act and the Protection of Investment Act are important pieces of legislation aimed at shaping the economy of South Africa. However, they are to a certain extent inconsistent with the international economic law principle of national treatment. In light of the above, the question that begs for an answer is: Is it possible for South Africa to fully implement the national treatment principle taking into account the imperative B-BBEE measures and the obligation in terms of the Protection of Investment Act? This article seeks to test the effectiveness of national treatment's "in like circumstances" requirement as contained in the Protection of Investment Act against South Africa's black economic empowerment policies.

Keywords: South Africa; national treatment; equality; democracy; foreign investor; domestic investor; public interest; Broad-Based Black Economic Empowerment

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1 INTRODUCTION

South Africa's history is characterised by apartheid which economically excluded most black South Africans from actively participating in, *inter alia* the economic affairs of the country.[1] Since the dawn of democracy in 1994, South Africa has been actively involved in shaping the economic environment for all South Africans through, *inter alia*, putting in place legislative measures at the domestic and international levels. The Protection of Investment Act[2] and the Broad-Based Black Economic Empowerment Act[3] (B-BBEE Act) are some of the pieces of legislation that have been put in place to achieve economic liberation for South Africans. Needless to say, this has not been an easy task for the South African government, given the diversity of the country.

This article seeks to interrogate the interplay between certain provisions of the Protection of Investment Act and the B-BBEE Act particularly on discrimination with the national treatment principle. This principle requires that foreign investors who are "in like circumstances" with domestic investors be treated equally in the host State. The article thus tests the practicality of the application of the national treatment principle in a country like South Africa, which is in the process of correcting the injustices of the apartheid era.

2 OVERVIEW OF THE NATIONAL TREATMENT PRINCIPLE IN TERMS OF INTERNATIONAL INVESTMENT LAW

The national treatment principle is one of the most important, and also one of the most controversial principles of international economic law. The main issue with this principle is the responsibility of a host State to treat foreign and domestic investors equally.[4] It generally prohibits discrimination based on the nationality of a foreign investor. The national treatment principle defines the required treatment by reference to the treatment accorded to other investments in similar circumstances.[5] It underscores the principles of non-discrimination and equality which are applied between contracting parties of a particular international investment agreement (IIA). It can be found in many IIAs dating back centuries.[6] The national treatment principle brings about an obligation on the host State not to discriminate against foreign investors.[7]

The WTO recognises the national treatment as one of its core principles in Article 3 of the General Agreement on Tariffs and Trade of 1947 (GATT).[8] The majority of the jurisprudence surrounding the national treatment principle emanates from the GATT. In terms of the GATT, the "likeness" refers to the determination of the nature and extent to which a competitive relationship exists between the imported and domestic products.[9] In determining whether the host State has breached the national treatment principle, it is not necessary to separately demonstrate the likeness of services and service suppliers, but rather that both should be considered holistically on a case by case basis.[10]

1 The Preamble of the Constitution, the Broad-Based Black Economic Empowerment Act 46 of 2013 and the Broad-Based Black Economic Empowerment Defence Sector Charter of 2019.
2 22 of 2015.
3 53 of 2003.
4 Sornarajah *The International Law on Foreign Investment* (2004) 233.
5 Lawal "Variability of Fair and Equitable Treatment Standard According to the Level of Development, Governance Capacity and Resources of Host Countries" 2014 *Journal of International Commercial Law and Technology* 229.
6 However, the first modern BIT was between Germany and Pakistan in 1959; see UNCTAD "Bilateral Investment Treaties 1959-1999" https://unctad.org/system/files/official-document/poiteiiad2.en.pdf (accessed 15-06-2021).
7 Sornarajah *International Law on Foreign Investment* 233.
8 Article 3 of GATT prohibits Member States from discriminating between imports and "like" domestic products.
9 WTO Appellate Body Report "European Communities–Measures Affecting Asbestos-Containing Products" 2000-2011 WT/DS135/AB/R 99.
10 King "National Treatment in International Economic Law: The Case for Consistent Interpretation in New Generation EU Free Trade Agreements" 2018 *Georgetown Journal of International Law* 94-944.

Article 2(2)(c) of the Charter of Economic Rights and Duties of States[11] provides for the national treatment standard. However, the capital-exporting States argue that foreign investors should be treated in accordance with the international minimum standard only, rather than affording them national treatment.[12] The national treatment standard provides protection of foreign investment at the pre-entry and post-entry stages. At the pre-entry stage, it creates a right of entry into the host State and a right of establishment of business.[13]

The scope of the obligation may vary from treaty to treaty, and may apply to various activities of the host State. It is not clear if the national treatment principle forms part of customary international law, however, it has been widely embraced in many IIAs.[14] The main purpose of the national treatment principle is to grant foreign investors treatment that is similar to that accorded domestic investors in the host State.[15] For example, if State A and B have an IIA in place, and State A accords its domestic investors a tax rate of fourteen per cent, foreign investors of State B who have an agreement with State A, are also entitled to the same tax rate.

Generally, the host State has no inherent responsibility to afford foreign investors protection that is equivalent to the one it accords its own domestic investors.[16] This responsibility only comes into operation if the contracting states have entered a bilateral investment treaty (BIT) or IIA and inserted the national treatment clause. This provision prohibits the contracting States to the agreement from discriminating against foreign investors or each other.[17] This means that foreign investors should be treated in the same way as domestic investors. This principle further places an obligation on the State to be mindful of the foreign investor's rights and interests.[18] Therefore, a foreign investor's rights can only be limited if such limitation is in the best interest of the host state.

The Southern African Development Community (SADC) Model BIT[19] recommends the inclusion of a provision ensuring that each contracting state "accords foreign investors and their investments a treatment no less favourable than the treatment it accords, 'in like circumstances', to its own investors and their investments with respect to the management, operation and disposition of investments in its territory."[20] The SADC Model BIT makes an exception to this requirement by providing a list of present and future non-conforming measures, sectors and activities, which are permanently excluded from the scope of the national treatment provision.[21] The SADC Protocol on Finance and Investment[22] also makes an exception to the national treatment. It provides that all SADC (SADC FIP) Member States must establish conditions favouring the participation of least-developed countries of the SADC in the economic integration process, based on the standards of non-reciprocity and mutual benefit.[23]

The national treatment principle is a relative standard in that the violation of the foreign investor's rights is determined by how the host State treats its domestic investors "in like circumstances".[24] The "in like circumstances" component requires a determination of the similarities of circumstances of foreign and domestic investors.[25] The criteria used to determine the "in like circumstances" is subjective, and it is generally limited to commercial considerations in various economic sectors.[26] When determining whether the foreign investor has been subjected to less favourable treatment by the host state, arbitration tribunals tend to focus on the effect of the measure on the foreign investor, rather than on the purpose or

11 The Charter of Economic Rights and Duties of States, General Assembly Resolution 3281.
12 Sornarajah *International Law* 233.
13 UNCTAD *National Treatment* 4.
14 *Ibid.*
15 Subedi *International Investment Law: Reconciling Policy and Standard* (2012) 57.
16 Salacuse *The Law of Investment Treaties* (2010) 47.
17 Reinisch *Standards of Investment Protection* (2008) 32.
18 Sornarajah *International Law* 320.
19 *Ibid.*
20 Woolfrey "The SADC Model Bilateral Investment Treaty Template: Towards a New Standard of Investor Protection in Southern Africa" 2014 *Trade Law Centre* 5.
21 *Ibid.*
22 Southern African Development Community Protocol on Finance and Investment, 2016.
23 Article 20(1) of the SADC Protocol on Finance and Investment.
24 Segger *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 268.
25 UNCTAD "National Treatment" UNCTAD Series /ITE/IIT/11, Vol IV (UNCTAD Series: National Treatment) 5.
26 *Ibid.*

motive behind the measure taken.[27]

For this reason, foreign investors receive more protection, to the detriment of the host State. This is because the evolvement of international investment dispute-resolution mechanisms has been geared towards protecting the rights of foreign investors, sometimes to the detriment of host States.[28] Many foreign investors have taken advantage of this regime and utilised international investment dispute-settlement mechanisms.[29] Coupled with the fact that many African states are reviewing some of their national laws, terminating or altering their existing IIAs with a purpose of advancing sustainable economic development in their territories, international investment disputes are on the rise.[30] African states have started to balk at IIAs as their policy sovereignty are encroached on and challenged.[31] This makes it difficult to implement legal reforms without the threat of dispute.[32]

These radical developments and reformation processes have affected many foreign investors, and as such the number of ICSID cases has increased. Many African states have found themselves in international investment disputes where foreign investors are challenging them, and arguing that their rights have been infringed or treated unfairly by the host States.[33]

For example, in the case of *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger*,[34] the claimants in their capacity as foreign investors challenged the two government orders made by the Republic of Niger. These orders reduced the BIT's duration between Niger and the claimants from ten to five years, repealed earlier provisions, and modified the structure of the ground-handling operations.[35] In the case of *CMC Africa v Republic of Mozambique*,[36] the claimants alleged that Mozambique as a host State acted in bad faith, frustrated the claimants' legitimate expectation and was not transparent.[37] The tribunals rejected these claims in both cases.[38] Even though these cases have been dismissed, they expose the gaps in the current IIAs framework. This underscores that many States committed themselves to the most financially risk-laden international obligations in the world today without a credible empirical basis for the claim that these would achieve their stated purpose.[39] South Africa has realised this error and has set up laws and policies aimed at closing this gap.

3 THE APPLICATION OF THE RIGHT TO EQUALITY IN FOREIGN INVESTMENT IN TERMS OF THE CONSTITUTION

There are two types of equality, namely, the formal equality and substantive equality.[40] Formal equality refers to the sameness of the treatment afforded by the law to individuals who are in similar situations "in like circumstances".[41] This type of equality can be limited by extending the same rights to everyone in accordance with the same neutral standard of treatment.[42] It does not take into account the social and economic disparities between individuals or groups.[43]

27 Segger *Global Trade* 265.
28 Welsh and Kupfer "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration" 2013 *Harvard Negotiation Law Review* 74.
29 *Ibid.*
30 Schill "International Investment Law and Rule of Law" 2017-18 *Amsterdam Law School Legal Studies Research Paper No.* 1–2. See OECD "Key Issues on International Investment Agreements" 2017 1. See further *Azurix Corporation v the Argentine Republic* ICSID Case No. ARB/01/12 2006; *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v Argentina* ICSID Case No. ARB/03/17 and *AWG Group Ltd v the Argentine Republic* UNCITRAL 2017.
31 Polity "Africa and Bilateral Investment Treaties: To 'BIT' or not?" https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23 (accessed 03-06-2021).
32 *Ibid.*
33 Argentina is highest recipient of international investment claims with 62 cases brought against it. Investment Policy Hub "Investment Dispute Settlement Navigator" https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2 (accessed 03-06-2021).
34 *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger,* ICSID Case No ARB/11/11 (English Summary version).
35 *Ibid* 2.
36 *CMC Africa v Republic of Mozambique* ICSID Case No ARB/17/23 para 400–411.
37 *Ibid* paras 410–411.
38 *Ibid* paras 465. See *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger*. See also *Oded Besserglik v Republic of Mozambique* ICSID Case No ARB(AF)/14/2.
39 Gus "Five Justifications for Investment Treaties: A Critical Discussion" 2010 2 *Trade Law and Development* 11.
40 Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 213.
41 *Ibid.*
42 *Ibid.*
43 Wesson "Equality and Social Rights: An Exploration in Light of the South African Constitution" 2013 *Public Law*

The formal equality denotes that if there is consistency in its application, there can be no discrimination.[44] It thus only requires equal application of the law without further examination of the particular circumstances or context of the individual or group. It therefore examines the content and the potential discriminatory impact of the law and/or policy under review.[45]

The term substantive equality refers to the sameness of the outcome. It requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's[46] commitments and obligations are being upheld.[47] The term substantive equality is a social and economic idea that people who are in similar circumstances should be treated the same.[48] This then begs the question: What constitutes similar treatment of persons in a similar situation? Is it wrong for the South African government to provide more favourable investment conditions to historical disadvantaged persons[49] (HDPs) as compared to foreign investors?

The court in the *Hugo*[50] case held that to determine whether the impact of discrimination was unfair, "it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."[51]

In the case of *Feldman v Mexico*,[52] the Tribunal recognised the power of host States to frequently change their laws and regulations as necessary under economic and social conditions. In this regard, it held that "[t]hose changes may well make certain activities less profitable or even uneconomic to continue."[53] The court in the *Harksen* case[54] held that discrimination in the context of South Africa should be understood in the context of its history.[55] This is in line with the view taken by the court in the *Prinsloo v Van der Linde* case[56] where the court held that:

> Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.[57]

Since the attainment of freedom in 1994, the South African government has changed the legal landscape with the adoption of the Constitution, and through adopting progressive laws in different fields. Like most constitutions, the South African Constitution asserts its own supremacy, and any act or conduct that is inconsistent with it is invalid.[58] With the new Constitution came the recognition of fundamental rights which were not previously recognised under the apartheid regime. The right to equality contained in section 9 of the Constitution forms the cornerstone of South Africa as a democratic country. The court in the *Brink v Kitshoff* [59] case recognised South Africa's history as an important part of the content of equality.[60]

For this reason, the South African government prefers the substantive equality over the formal equality.[61] In this regard, the Constitution does not treat everyone as if they were in the

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44 Smith "Equality Constitutional Adjudication in South Africa" 2014 *African Human Rights Law Journal* 612.
45 *Ibid.*
46 Section 9 of the Constitution of South Africa, 1996 (the Constitution).
47 *Ibid.*
48 Currie and De Waal *Bill of Rights* 210.
49 In the South African context, historically disadvantaged persons is a generic term, which refers to indigenous Africans, Coloureds and Indians.
50 *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997].
51 *Hugo* case para 43.
52 *Feldman v Mexico* ICSID Case No ARB(AF)/99/1 (2002).
53 *Ibid* para 112.
54 *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.
55 *Harksen* para 91.
56 *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC).
57 *Prinsloo* para 31.
58 Section 2 of the Constitution. In terms of s 1 of the Constitution, the supremacy of the Constitution is also a value upon which the entire constitutional framework is based.
59 *Brink v Kitshoff* NO 1996 (4) SA 197 (CC).
60 *Ibid* para 40.
61 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 61; Albertyn

same position in society and merely outlaw all race or sex-based differentiation;[62] nor does it merely convert existing interests into rights, thus risking the entrenchment of an unequal status quo.[63] On the contrary, it expressly aims to address and overcome the structural, social and economic, public and private inequalities of race, gender and so on, inherited from our past.[64]

Apart from recognising equality as a right,[65] the Constitution also recognises equality as a value.[66] It provides that South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Section 9(1) of the Constitution states that everyone is equal before the law, and has a right to enjoy full and equal protection of the law. The meaning of "everyone" is deduced on an *ad hoc* basis, taking into account individual circumstances.[67] Therefore, the extent of the application of this clause in affirmative action is an exercise that is carried on a case-by-case basis.[68] Furthermore, this equality clause attempts to undo the social structure that oppressed HDPs during the apartheid era.[69] It does this by making an exception to section 9(1) of the Constitution. Section (9)(2) of the Constitution allows discrimination in order to promote the achievement of equality through legislative and other measures designed to protect or advance persons, or categories of persons.

The term non-discrimination is equally expressed in the negative and only signifies an absence of discrimination.[70] In the foreign economic-law context, the principle of equality is the same as the national treatment principle,[71] since they both encompass similar elements of non-discrimination.[72] From the South African context, equality practically means promoting effective participation of HDPs in the economy and the running of the government.[73] This will in turn promote South Africa's economic prosperity, protect the common market, and promote equal opportunity and equal access to government services.[74] Equality is thus a catalyst of transformation, and this will be evident from the discussion of the B-BBEE measures below.[75]

4 THE SOUTH AFRICAN BROAD-BASED BLACK ECONOMIC EMPOWERMENT MEASURES

The need for B-BBEE measures is alluded to in the South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment (B-BBEE Transformation Strategy).[76] The South African government took a broad-based strategy, as the name of the legislation suggests, because it aims to situate BEE within the context of a broader national empowerment strategy which focuses on HDPs.[77] The then Department of Trade and Industry (DTI) – now the Department on Trade, Industry and Competition (DTIC) indicated that South Africa requires an economy that can meet the needs of its economic citizens, and their enterprises in a sustainable

"Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice" 2018 *South African Journal on Human Rights* 442.

62 *National Coalition for Gay and Lesbian Equality v Minister of Justice* para 61.

63 Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice" 2018 *South African Journal on Human Rights* 442.

64 *Ibid.*

65 Section 9 of the Constitution.

66 *Ibid* 1.

67 Mathekga "The Formulation of Equality Clause in the South African Constitution: a Juristic Question, or a Political Point of Departure" http://www.clearcontent.co.za/storage/files/prev_Formulation_of_equality_clause.pdf (accessed 10-06-2021).

68 *Ibid.*

69 Chow "Discriminatory Equality v non-discriminatory Inequality: The Legitimacy of South Africa's Affirmative Action Policies under International Law" 2008-2009 *The Connecticut Journal of International Law* 306.

70 *Ibid.*

71 This is discussed in ss 2 and 3 above.

72 Sornarajah *The International Law on Foreign Investment* (2004) 233.

73 This is discussed under heading 2.

74 The Preamble of the BBEE Act.

75 Currie and De Waal *Bill of Rights* 214.

76 The B-BBEE Transformation Strategy can be accessed at https://www.gov.za/documents/south-africas-economic-transformation-strategy-broad-based-black-economic-empowerment (accessed 16-06-2021). The B-BBEE Transformation Strategy commensurate with the totality of government's programme of reconstruction and development which aims to correct the historical injustices caused by apartheid.

77 The B-BBEE Transformation Strategy can be accessed at http://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/b-bbee-codes-b-bbee-acts-strategies-policies/ (accessed 19-05-2021). The B-BBEE Transformation Strategy commensurate with the totality of government's programme of reconstruction and development which aims to correct the historical injustices caused by apartheid.

manner.[78] The Preamble of the B-BBEE Act[79] states that South Africa needs to increase the effective participation of the majority of South Africans in the economy. It further provides that failure to take these steps, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, regardless of race.[80]

The B-BBEE Act is endorsed by section 9(2) of the Constitution which requires government to put in place legislative measures aimed at correcting the historical imbalance caused by the apartheid government. It is a legislative framework aimed at promoting black economic empowerment in South Africa. The Preamble of the B-BBEE Act acknowledges the injustices of the apartheid government, and it attempts to correct these injustices. As a result of these injustices, the majority of South Africans are still excluded from ownership of productive assets and the possession of advanced skills.[81]

The purpose of B-BBEE policies in South Africa is to achieve equality and to rectify the inequalities and injustices created by the apartheid government.[82] On the one hand, the South African government generally has an obligation to advance the interests of its nationals, while promoting foreign investment in order to fulfil constitutional obligations for securing sustainable economic development.[83] On the other, foreign investors have a right to have their investment protected by the host State, and this right cannot be overlooked.[84] Therefore, the question is how can South Africa strike a balance between the national interests of the country and those of foreign investors? For example, there are laws and policies in South Africa that cannot be ignored, such as the B-BBEE Act, whose aim is to protect the interests of HDPs in South Africa.

In this regard, the B-BBEE Act aims to, among other things: (i) Facilitate broad-based black economic empowerment by promoting economic transformation in order to enable meaningful participation of black people in the economy;[85] (ii) achieve a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;[86] (iii) increase the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increase their access to economic activities, infrastructure and skills training;[87] and promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity.[88]

The BEE programme is an integrated and coherent socioeconomic process that directly contributes to the economic transformation of South Africa. It brings about significant increase in the numbers of HDPs that participate in the country's economy as well as significant decreases in income inequalities.[89] The BEE programme is therefore not only a moral imperative to redress the injustices of apartheid; it is a pragmatic growth strategy to realise the country's full potential by including the black majority in the economic mainstream.[90] It should be pointed out that the aim of the B-BBEE Act is not to take wealth from one group and give it to another.[91] It is essentially a growth strategy, targeting the South African economy's weakest point which is inequality.[92]

78 South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment of 2003 4.
79 The B-BBEE Act is a llegislative framework for the promotion of black economic empowerment in South Africa.
80 South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment of 2003 4.
81 The Preamble of the B-BBEE Act.
82 Article 1 of the B-BBEE Act.
83 Section 4(a)-(b) of the Protection of Investment Act; Section 25(2)*(a)* and 4 of the Constitution.
84 Section 10 of the Protection of Investment Act and section 25 of the Constitution.
85 Section 2(a) of the B-BBEE Act.
86 Section 2(b) of the B-BBEE Act.
87 Section 2(c) of the B-BBEE Act.
88 Section 2(e) of the B-BBEE Act.
89 The South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment available at http://www.thedtic.gov.za/wp-content/uploads/bee-strategy.pdf (accessed 19-05- 2021).
90 Brand South Africa "Black Economic Empowerment" https://www.brandsouthafrica.com/investments-immigration/business/trends/empowerment/black-economic-empowerment (accessed 02-11-2020).
91 *Ibid*.
92 *Ibid*.

5 THE *PIERO FORESTI* CASE: CHALLENGING THE BROAD-BASED ECONOMIC EMPOWERMENT MEASURES

5 1 Background of the Case

The issue of balancing the rights of foreign investors with those of HDPs came before the South African courts in the case of *Piero Foresti, Laura De Carli v Republic of South Africa*.[93] The court in this case dealt with the mining interests owned by a group of European investors namely, Piero Foresti, and Laura de Carli (claimants) who had investments in South Africa. The South African government was the respondent in this arbitration. The proceedings were initiated by the claimants under Article 8 of the Italy-South Africa BIT[94] and Article 10 of the Luxembourg-South Africa BIT, respectively.[95]

The Tribunal had to decide whether the coming into operation of the Mineral and Petroleum Resources Development Act[96] (MPRDA) resulted in a direct and/or indirect expropriation of the claimants' assets. The claimants alleged that the South African government was in breach of Articles 5 of both BITs.[97] First, they alleged that the coming into effect of the MPRDA

93 *Piero Foresti, Laura De Carli v Republic of South Africa* ICSID case No ARB (AF) /07/1.

94 Italy–South Africa Bilateral Investment Treaty, 1999 http://investmentpolicyhub.unctad.org/Download/TreatyFile/3216 (accessed 18-10 2019).

95 Luxembourg–South Africa BIT, 1998 https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/537/bleu-belgium-luxembourg-economic-union---south-africa-bit-1998- (accessed 19-05-2021). Since the claimants held some of their assets indirectly through a Luxembourg incorporated company, they lodged parallel claims under the Luxembourg-South Africa BIT. This was because the provisions of the Luxembourg-South Africa BIT are identical in substance to those of the Italy–South Africa BIT. As a result, it was convenient for the matters to be heard concurrently.

96 28 of 2002.

97 Article 10 of the Luxembourg–South Africa BIT states that "investments by investors of a Contracting Party will not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Party contracting, except for reasons of public utility related to the internal needs of that Party, according to legal proceedings, on a non-discriminatory basis and with prompt compensation, adequate and effective. Such compensation will correspond to the actual value of the investment expropriated on the date immediately preceding the expropriation or on the date which the expropriation was made public, regardless of the earlier of these two dates, it will include interest at the normal commercial rate until the date of payment, will be made without delay, will be effectively realizable and freely transferable at the market price applicable on the date of transfer in accordance with the foreign exchange regulations in force. The investors concerned will have the right, within the framework of the legislation of the Party contracting party carrying out the expropriation, to obtain a rapid review by a judicial authority or another independent authority of that Contracting Party, their case and the assessment of their investments in accordance with the principles presented in this paragraph. (2) When a Contracting Party expropriates the assets of a company which is incorporated or constituted under the legislation in force in each part of its own territory, and in which investors from the other Contracting Party have actions, it will ensure, if necessary and within the framework of its laws, that the compensation provided for in paragraph (1) of this article is accessible to these investors."
The Italy–South Africa BITs states that: (1) "the investments to which this Agreement relates shall not be subject to any measure which might limit the right of ownership, possession, control or enjoyment of the investments, permanently or temporarily, save where specifically provided by current national or local legislation or regulations and orders handed down by Courts or Tribunals having jurisdiction. Investments of investors of a Contracting Party shall not be de jure or de facto, directly or indirectly, nationalized, expropriated, requisitioned or subjected to any measures having an equivalent effect in the territory of the other Contracting Party, except for public purposes or in national interest and in exchange for immediate, full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal Provisions and procedures. The just compensation shall be established in the national currency on the basis of the real international market values immediately prior to the moment on which the decision to nationalize or to expropriate is announced or made public. The exchange rate applicable to any such compensation shall be that prevailing on the date immediately prior to the moment in which the nationalization or expropriation has been announced or made public. without restricting the scope of the above paragraph, in case that the object of nationalization, expropriation, or similar action by a Contracting Party, is a company with mixed capital, the evaluation of the share of the investor of the other Contracting Party will be in the currency of the investment, not lower than the starting value of the investment increased by capital increases and revaluation of capital, undistributed profits and reserve funds and diminished by the value of capital reductions and losses. Compensation will be considered as actual if it has been paid in the same currency in which the investment has been made by the investor, in as much as such currency is - or remains - convertible, or, otherwise, in any other currency accepted by the investor. Compensation will be considered as timely if it takes place without undue delay and, in any case, within one month from the date of the establishment of the value thereof. Compensation shall include interest calculated on a six months LIBOR basis from the date of nationalization or expropriation to the date of payment.
A national or company of either Contracting Party that asserts that all or part of its investment has been

extinguished their old-order mining rights.[98] They argued that the MPRDA brought an end to the old-order mineral law by repealing the common law because they both encompass different principles.[99]

Second, that the coming into effect of the MPRDA, when combined with the Mining Charter of 2004 (Mining Charter), the South African Chamber of Mines, the National Union of Mineworkers, and the South African Mineral Development Association was an attempt to encourage greater ownership of mining industry assets by HDPs.[100] In this regard they challenged the international legality of the MPRDA.

Last, they alleged that the old-order mining rights associated with fifty properties affecting twenty-five quarries have been directly expropriated against a measure of compensation that is still pending. Even if the amount of compensation had been determined, it would still not satisfy the standards for compensation required under both the Italy-SA BIT and the Luxembourg-SA BIT.[101]

With regard to these allegations, the claimants argued that the MPRDA and the Mining Charter breached the respondent's fair and equitable treatment (FET)[102] and national treatment obligations under the Italy-SA and Luxembourg-SA BITs respectively.[103] The claimants further argued that their rights had been expropriated in the following two ways. First, that the old-order mining rights associated with 44 properties affecting 21 quarries had been effectively, definitively and directly or indirectly expropriated because, at the end of the conversion process, no new order right was granted and therefore, no compensation was granted.[104] Second, that the old-order mining rights associated with five properties affecting four quarries had been directly expropriated against a measure of compensation that fails to satisfy the standards for compensation required under both BITs.[105]

They further argued that if these cases did not amount to direct expropriations, then they were indirect and/or partial expropriations and/or inequivalent measures taken against inadequate compensation.[106] With regard to the claimants' allegations, the respondent argued that assuming, for argument's sake that the claimants had a valid claim for expropriation of the old order mineral rights, the expropriation was lawful under both BITs and therefore, the respondent did not breach the BITs as alleged by the claimants.[107]

They gave the following reason for this argument: That the two BITs permit the South African government to expropriate investments provided that the expropriation meets the requirements for expropriation contained in both BITs.[108] They further argued that the alleged expropriation of old-order mineral rights were undertaken for multiple and important public purposes, and that the claimants had conceded as much in their memorial.[109]

The respondent pointed out that the MRPDA and the Mining Charter were promulgated for the purpose of:

(i) simplifying and modernising an overly complex legal system;
(ii) ameliorating the disenfranchisement of historically disadvantaged South Africans;
(iii) reducing the economically harmful concentration of mineral rights and promoting the

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expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Contracting Party to determine whether any such expropriation conforms to national law principles and international law. The provisions of paragraph (2) of this Article shall also apply to profits accruing to an investment and, in the event of winding-up, the proceeds of liquidation. If, after the dispossession, the good concerned has not been utilized, wholly or partially, for that purpose, the owner or his assignees are entitled to the repurchasing of the good at the market price."

98 The old-order mining rights refers to any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed that were in force before the MPRDA came into force. See Schedule II of the MPRDA.

99 Choudhury "Democratic Implications Arising from the Inters of Investment Arbitration and Human Rights" 2009 *The Alberta Law Review* 656.

100 The *Piero Foresti* case para 54.

101 *Ibid* 62.

102 *Ibid* 78.

103 *Ibid*.

104 *Ibid* 60.

105 *Ibid* 61.

106 *Ibid*.

107 *Ibid* 67.

108 *Ibid* 68.

109 *Ibid* 69.

optimal exploitation of mineral resources; and
(iv) protecting the environment and the communities living close to mining operations.[110]

The respondent further argued that with respect to compensation, the obligation to provide immediate or prompt compensation is met where: first, the state provides an investor without undue delay; with access to an effective mechanism for the determination whether compensation is due, and if so, the amount required. Second, should the mechanism determine that compensation is due, it is paid within a short period after the amount has been fixed with interest, taking into account the value of money at that time.[111]

The respondent further argued that the Mining Charter's divestment requirements treated all investors, whether South African or foreign equally.[112] Moreover, the respondent argued that even if the Mining Charter was found to treat foreign investors differently from South African investors, the difference in treatment would fall well within the requirement of advancing critical public interests.[113]

In this regard, the respondent concluded that there was no direct expropriation of the old-order mineral rights. The respondent pointed out that direct expropriation requires the complete deprivation of all rights enjoyed by the investor along with transfer of ownership.[114] In this regard, it was argued that neither complete deprivation nor transfer of ownership can be shown since the operating companies have retained the same core entitlement to prospect or mine granite on an exclusive basis under a different name.[115]

Regarding indirect expropriation, the respondent argued that there was no indirect expropriation for three reasons: first, a non-discriminatory regulation such as the one in issue before the tribunal cannot be expropriated without a prior promise that the regulation would not be adopted in future.[116] Second, that there can be no indirect expropriation unless the investor has been substantially deprived of his/her rights in the investment.[117] Last, there can be no indirect expropriation where the government action in question is a rational and proportional means of pursuing legitimate public regulatory purposes.[118]

The *Piero Foresti* case was not finalised as anticipated, because on 2 November 2009, the claimants sought the respondent's consent to discontinue the proceedings in accordance with Article 50 of the Additional Facility Rules.[119] The claimants argued that, although they had not been provided with full relief for their alleged injuries, they nevertheless sought discontinuance, because on 12 December 2008, the respondent granted the claimants new-order mineral rights without requiring the claimants to sell 26 per cent of their shares to HDPs.[120] The discontinuance of the case was granted. It is important to state at this juncture that the academic community was robbed of the chance to benefit from the distillation of the case by the court due to the premature withdrawal of the case by the applicants.

110 *Ibid.*
111 *Ibid* 70.
112 *Ibid* 72.
113 *Ibid.*
114 *Ibid* 74.
115 *Ibid.*
116 *Ibid* 75.
117 *Ibid.*
118 *Ibid.*
119 *Ibid* 79.
120 *Ibid.*

5 2 International Cases Dealing with Similar Issues Raised in the *Piero Foresti* Case

Similar issues as those raised in the *Piero Foresti* case were also dealt with in the case of *Methanex Corporation v United States of America,*[121] *UNCITRAL,*[122] 2005 (*Methanex* case). In this case, the Tribunal had to deal with the host State's obligations under Article 1110 which makes provision for expropriation if certain requirements are met, and that expropriation should be accompanied by compensation.[123] The Article further stipulates that the host State has an obligation not to take measures tantamount to expropriation without paying compensation. Article 1105(1) of the North American Free Trade Agreement (NAFTA) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party.

The Tribunal in the *Methanex* case used the previous NAFTA case of *SD Myers Inc v Government of Canada*, UNCITRAL, 2004 (*SD Myers* case) as a yardstick where the Tribunal took a broad competitive business approach to assessing "likeness" so that businesses loosely in competition with one another were seen as "in like circumstances".[124] The Tribunal held that it was sufficient that the investments were otherwise "identical" in terms of their physical character.[125]

In the *Pope* case, the Tribunal described its view on the application of the national treatment standard. In this regard, the Tribunal held that the application of the national treatment provision of NAFTA should be undertaken in two stages where a Tribunal considers: (i) whether a state party has accorded less favourable treatment to investors or investments on the basis of nationality, and, if so; (ii) whether the investor or investment accorded less favourable treatment was "in like circumstances" with domestic investors or investments accorded more favourable treatment.[126]

The Tribunal in the *Methanex* case declared that discrimination between domestic and foreign investors is not, in itself, a breach of any standard in customary international law.[127] It further held that:

> As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would.[128]

In the *Methanex* case, however, the Tribunal expressly rejected the general appropriateness of directly applying trade-law concepts to investment law obligations. Instead, it opted for a much narrower and more refined approach in which it required a comparison to other existing domestic investments in the same situation.[129] The narrow and contextual approach to the determination of in "like circumstances" is similar to the way South Africa interprets the substantive equality as discussed above.

5 3 Critical Analysis of the Case

Even though the Tribunal in the *Piero Foresti* case did not have a chance to pronounce on the issues raised, it exemplified how disputes may arise when the host State attempts to advance its obligations to regulate in the public interest. Regulation of foreign investment is tricky for host States and may at times lead to conflicts between foreign investors and host States or its individual citizens. For example, economic conditions may change within host States and alter

121 *Methanex Corporation v United States of America* of 2005.

122 UNCITRAL is the core legal body of the United Nations system in the field of international trade law. Its main function is to modernise and harmonise rules on international business.

123 *Methanex* case (Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and the NAFTA) 3. Article 1110 provides that no [p]arty may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation") except: (a) for public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation.

124 *SD Myers* case para 74.

125 *Methanex* case para 19.

126 *Pope & Talbot Inc v Canada, Second Submission by the United States*, UNCITRAL 1976 page 3.

127 *Ibid.*

128 *Ibid* 25–27.

129 *Methanex* case para 7.

both the feasibility and the content of existing laws and policies.

Generally, IIAs are premised on a reciprocal relationship between the contracting parties for the benefit of foreign investors in the other's States. Once the foreign investment has been established, the host State has an obligation to create favourable economic conditions and protect the investment within its territory.[130] At the same time, the host State has obligations to regulate investment in the public interest. This may lead to investment disputes between the host State and a foreign investor as seen in the *Piero Foresti* case.

The *Piero Foresti* case is a perfect example of the challenge of balancing the rights of foreign investors on the one hand and regulating in the public interest on the other. Aligning the rights of foreign investors and those of the host State has been a long-standing practice, however, it can be complicated at times. This is because States allow foreign investments to improve economic development in the host State, while foreign investors invest in another country to enhance their own competitiveness and market share.[131] The question that begs an answer is: How then does one balance the conflict between the host State's right to regulate in the public interest with those of the foreign investor? One may argue that the host State is entitled to protect its citizenry like in the *Piero Foresti* case.

The *Piero Foresti* case was the first case to confront the regulation of FDI in South Africa in the post-1994 era in a direct manner. This new development in the regulation of foreign investment raises the question of whether South Africa's domestic legislation is wide enough to allow the operation of FDI but narrow enough to allow it to regulate in the public interest. Even though the *Piero Foresti* case was discontinued, the case prompted the South African government to embark on an investment policy review process in 2010.[132]

6 THE APPLICATION OF THE NATIONAL TREATMENT PRINCIPLE UNDER THE PROTECTION OF INVESTMENT ACT

The investment policy review process was an attempt to identify loopholes in the BITs that the South African government had concluded, and to decide whether to continue with BITs as instruments to regulate foreign investment.[133] The South African government felt that the scope of the old generation of BITs is too wide and may lead to many FDI disputes in the future. South Africa thus realised a need to limit the scope of international investment law.

The South African government, the DTIC and the Department of International Relations and Cooperation, after a three-year investment policy review process, took a decision to terminate some of its BITs with European countries, and introduced the Protection of Investment Act.[134] One reason for terminating these BITs is that the Protection of Investment Act updates and modernizes South Africa's legal framework for FDI, while increasing the protection and promotion of both foreign and domestic investments.[135] Another reason is that they were close to their termination dates and would otherwise have been automatically extended in terms of their renewal clauses.

For example, the South Africa–Germany BIT[136] contains a twelve-month notice period with a run-off protection for existing protected investments of twenty years,[137] while the SA–Netherlands BIT[138] contains a six-month notice period with a ten-year automatic renewal

130 Choudhury 2009 *The Alberta Law Review* 656.

131 *Ibid.* To read more on this see Guzmann "Why do LDC Sign Treaties that Hurt Them" 1998 *Virginia Journal of International Law* 639–688; and Sanjaya and Narula "Foreign Direct Investment and its Role in Economic Development: Do We Need a New Agenda?" 2004 *The European Journal of Development Research* 447–464.

132 Mossallam "Process Matters: South Africa's Experience Exiting its BITs" 2015 *The Oxford University Press* 10; See Poulsen "Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality" (PhD Thesis) *The London School of Economics and Political Science.*

133 Mossallam "Process Matters: South Africa's Experience Exiting its BITs" 2015 10.

134 The Protection of Investment Act was gazetted on 15 December 2015.

135 Steyn "The New Promotion and Protection of Investment Bill for Local and Foreign Investors in South Africa" http://www.polity.org.za/article/the-new-promotion-and-protection-of-investment-bill-an-assessment-of-its-implications-for-local-and-foreign-investors-in-south-africa (accessed 03-06-2021). Another reason is that they were close to their termination dates and would otherwise have been automatically extended in terms of their renewal clauses.

136 South Africa–Germany Bilateral Investment Treaty, Treaty Series No. 33 of 1961 http://investmentpolicyhub.unctad.org/Download/TreatyFile/1416 (accessed 03-06-2021).

137 Mossallam "Process Matters: South Africa's Experience Exiting its BITs" 13.

138 South Africa–Netherlands Bilateral Investment Treaty (the SA–Netherlands BIT) http://investmentpolicyhub.unctad.org/Download/TreatyFile/2082 (accessed 03-06-2021).

period and a fifteen-year run-off period for investments made before the termination date.[139] The South Africa–United Kingdom BIT[140] contains a twelve month application period after the notice of termination and a twenty-year run-off protection period for existing investments.[141]

6 1 Controversy Surrounding the Protection of Investment Act

When the South African government introduced the Protection of Investment Act, it was generally applauded for finally introducing a national legislation which was aimed at regulating investment in general, and FDI in particular. The introduction of the Protection of Investment signalled the government's commitment to boosting the economy, and its intention to be part of the international economic community after years of isolation during the apartheid era. According to the then Minister of DTIC, First name? Carim, the Protection of Investment Act would provide "adequate protection to all investors, including foreign investors", and it will ensure that "South Africa's constitutional obligations, like sustainable development,[142] are upheld, while allowing government to retain the policy space to regulate in the public interest."[143] Some economists were worried that this would affect the flow of foreign investment into South Africa. However, in this regard he argued that there is no connection between the growth of South Africa's economy and the BITs,[144] although some of these countries are South Africa's largest trading partners.[145]

The Protection of Investment Act was also criticised for failing to provide adequate protection to foreign investors.[146] Foreign governments, private entities, economists and scholars have raised concerns regarding the cancellation of South Africa's BITs; arguing that the cancellation is likely to affect the legal rights of foreign investors, whose main concern is security of tenure for their investments.[147]

Hills-Lewis posits that the Protection of Investment Act, instead of offering more protection to foreign investors, diminishes their protection.[148] He argues that domestic laws should generally provide greater investment protection than international law.[149] The Protection of Investment Act must provide a clear assurance that capital relating to investment and returns can be repatriated so that investors should not lose their basic rights.[150] The European Union Chamber of Commerce (EU Chamber)[151] argues that the Protection of Investment Act will not promote or protect foreign investment in South Africa.[152] The EU Chamber pointed out that new investment agreements with South Africa have been put on hold, while disinvestment decisions are next on the agenda.[153]

The EU Chamber of Commerce further argues that:

> Limiting the rights and expectations of committed and long-term investors and the predictability of changes which may affect their investments, including expropriation, the

139 Articles 14(2) and 14(3) of the SA–Netherlands BIT.

140 South Africa–United Kingdom Bilateral Investment Treaty, Treaty Series 35 of 1998 http://investmentpolicyhub.unctad.org/Download/TreatyFile/2280 (accessed 04-06-2021).

141 Article 14 of the SA–UK BIT.

142 See s 2 of the Constitution.

143 SAGNA "Bill to Help Modernize SA's Investment Regime: Davies" http://www.sanews.gov.za/south-africa/bill-help-modernise-sas-investment-regime-davies (accessed 24-04-2020).

144 *Ibid.*

145 Forde "Investment Bill: Thick as a Brics?" http://www.financialmail.co.za/fmfox/2015/11/12/investment-bill-thick-as-a-brics (accessed 03-03-2021).

146 Mckenzie "Protection of Foreign Investments in South Africa" https://www.lexology.com/library/detail.aspx?g=f40f8ce0-af37-4778-a89b-a491d600c791 (accessed 11-06-2021).

147 Feris "Challenging the Status Quo – South Africa's Termination of its Bilateral Trade Agreements" https://www.dlapiper.com/en/us/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo/ (accessed 11-06-2021).

148 RDM News Wire "ANC Rams anti-Investment Bill through Committee, DA Charges" http://m.polity.org.za/article/anc-rams-anti-investment-bill-through-committee-da-charges-2015-11-03 (accessed 04-11-2019).

149 *Ibid.*

150 Parly Reports SA "The Promotion and Protection of Investment Bill Open Up a Major Row" http://parlyreportsa.co.za/finance-economic/promotion-and-protection-of-investment-bill-opens-major-row/ (accessed 18-03-2020).

151 The European Union Chamber of Commerce (hereinafter referred to as the EU Chamber of Commerce).

152 Parly Reports SA "The Bill will not Promote or Protect Investment" http://www.politicsweb.co.za/documents/this-bill-wont-protect-or-promote-investment-euc?utm_source=Politicsweb+Daily+Headlines&utm_campaign=c383b1bce0-DHN_Sept_17_2015&utm_medium=email&utm_term=0_a86f25db99-c383b1bce0-130082905 (accessed 18-03-2020).

153 Forde "Investment Bill: Thick as a Brics?".

> current Act could invariably attract short-term investors, who do not pay much attention to investment frameworks, either because of the short turnaround time of their investments, or because they enjoy other preferential arrangements.[154]

All these arguments are valid. The South African government needs to take the interest of society into account, but should also ensure that foreign investors are protected to a certain extent from irregularities of the host State. Therefore, South Africa has a duty to regulate investment in the public interest, and to correct the injustices caused by the apartheid government. It is really a question of balancing the rights of foreign and domestic investors by the South African government.

6 2 The National Treatment Provision under the Protection of Investment Act

The Protection of Investment Act has included the national treatment standard although its scope is limited. Section 8(1) of the Protection of Investment Act contains a national treatment principle, and provides that "foreign investors and their investments must not be treated less favourable than South African investors in like circumstances." In this instance, the Protection of Investment Act recognises the principle of equality, and which generally include both domestic and foreign investors. The sameness of treatment is in relation to the establishment, management, acquisition, expansion, conduct and/or operation of investment in South Africa.

In terms of the Protection of Investment Act, "in like circumstances" requires an overall examination of the merits of the case; by taking into account all the terms of a foreign investment. These include: (i) The effect of foreign investment in South Africa and the cumulative effects of all investments;[155] (ii) the sector that the investments are in;[156] (iii) the aims and factors of any measure relating to foreign investments;[157] (iv) the effect on third persons, the local community, employment and the environment.[158]

The drafters of the Protection of Investment Act understood the historical character of South Africa, and made an exception to the right to equality. The Act thus provides exceptions to the application of the national treatment principle. In section 8(4), the Act states that the meaning and application of the national treatment principle must not be interpreted in a manner that will require South Africa to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from any of the following circumstances: (i) Taxation provisions in any international agreement or arrangement or any law in South Africa;[159] (ii) government procurement processes;[160] subsidies or grants provided by the government or any organ of State;[161] (iii) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the country.

Section 12 of the Protection of Investment Act deals with the right to regulate. It grants the South African government powers to exclude foreign investors from benefiting from any law or other measure aimed at promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage.[162] It further precludes them from enjoying any special advantages accorded in South Africa by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.[163]

In essence, the Protection of Investment Act simply seeks to ensure that any special development vehicles it has created for advancing South Africans do not end up benefiting foreign investors instead. The Protection of Investment Act speaks to the modern day investment regulatory framework. It grants protection to foreign investors while retaining control of its economic environment. The legislators were mindful of South Africa's constitutional obligation

154 *Ibid.*
155 Section 8(1)(a) of the Protection of Investment Act.
156 Section 8(1)(b) Protection of Investment Act.
157 Section 8(1)(c)-(d) Protection of Investment Act.
158 Section 8(1) (e)-(h) of the Protection of Investment Act.
159 Section 4(a) of the Protection of Investment Act.
160 Section 4(b) of the Protection of Investment Act.
161 Section 4(c) of the Protection of Investment Act.
162 Section 12(1) of the Protection of Investment Act.
163 Section 4(f) of the Protection of Investment Act.

to regulate in the public interest.

7 DOES THE NATIONAL TREATMENT PRINCIPLE SERVE ANY PURPOSE IN THE SOUTH AFRICAN CONTEXT?

Having discussed major instruments dealing with equality and the rights of foreign investors in South Africa, the question that remains unanswered is whether the national treatment principle can be implemented successfully in South Africa. The article argues that for as long as the B-BBEE Act is in force, it will be difficult to implement the national treatment principle in South Africa. This is because practically speaking, a foreign investor will never be in "like circumstances" with a domestic investor.

For example, a domestic investor and a foreign investor who both invested in the same mining industry, which in theory meets the "in like circumstances" requirement, do not have equal rights even though they have both invested in the same sector. This is because there are certain benefits that are afforded to domestic investors only by virtue of the fact that they form part of the categories of legal persons who are entitled to certain benefits even though the domestic and foreign investors are both investing in the same market. The meaning of "in like circumstances" discussed above leaves little room for the proper application of the national treatment principle in South Africa, taking into account its historical and current socio-economic circumstances.

The national treatment principle has the potential to directly or indirectly affect the domestic investment regulatory framework and other measures which may in turn affect various governmental departments. It is noteworthy that the South African domestic investment regulatory framework and measures are based on legitimate policy reasons and are not necessarily designed for purposes limiting investments or discriminating against foreign investment. The obligation of legislators and other policy makers to shape the domestic regulatory framework or tax measures in a manner which is favourable to gross domestic product (GDP) is a reality for any host State. South Africa as a host State needs to promote sustainable economic development[164] and correct the historical injustices as required by the Constitution. South Africa's economy performs below its potential because of the low level of income earned and generated by majority of its people.

The national treatment principle may at times affect a large number of internal regulations and government measures in the host State.[165] It may also affect the right of host States to national sovereignty[166] and sensitivities, ranging from the way a country governs its investment environmental protection, to consumer protection, food and drug measures, safety measures and tax laws.[167]

The Protection of the Investment Act contains only two of the five common provisions of BITs, namely, the national treatment principle and dispute resolution. The Act is, by its nature, more favourable to domestic investors even though the definition of an investor and investment applies to both domestic and foreign investors. In theory, it appears as if the "in like circumstances" is a good concept. It is problematic in practice because a foreign investor will never be in "like circumstances" with domestic investors, and as such affects the prospect of fully realising the effectiveness of the national treatment principle.

8 CONCLUSION

It is trite that South Africa as a developing country needs foreign investment to boost its economy. To a certain extent, the South African government has recognised this need and has attempted to be part of the international investment community by including the national treatment principle in the Protection of Investment Act. The enactment of the Act was a step in the right direction for South Africa, as it signalled its intention to remain open to receive FDI. The reason behind this enactment of the Protection of Investment Act is legitimate, namely, to provide a more sophisticated regime for investment in South Africa, which would in turn attract

164 Hercules *The Principles of International Trade Law as a Monistic System* (2003) 210.

165 Jackson "National Treatment Obligations and non-Tariff Barriers" 1989 *Michigan Journal of International Law* 208.

166 Dube "Neighbours and Shared Upper Spaces"2025 *Comparative and International Journal? of Southern Africa* 224.

167 Jackson 1989 *Michigan Journal of International Law* 208.

more foreign investment.

The limitation of the application and scope of the national treatment principle in accordance with South African domestic laws is justifiable. However, the insertion of this principle in the Act serves no purpose because in reality a white domestic investor, let alone a foreign investor will never be "in like circumstance" with a black domestic investor. Thus including the national treatment principle in the Protection of Investment Act will not work for a country like South Africa as it is set up differently from other countries. Its history is characterised by apartheid which economically excluded HDPs. What the South African government needs to do is to balance the economic scale which was unfairly tipped in favour of the white minority as a result of the apartheid. The Protection of Investment Act is however, one of the balanced national investment instruments in Africa. In order to achieve its purpose, the national treatment provision should be removed from the Protection of Investment Act as it will be difficult to practically implement it.