

# **Bilateral investment treaties in the new constitutional dispensation: The Promotion and Protection of Investment Bill 2013**

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To the Creator who gave me life, I may not know your ways but I know I owe my existence to you. This is also dedicated to my ancestors, who gave me a gift of blood which I shall continue to carry with responsibility. Thank you.

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## **ABSTRACT**

After 1994 the South African government concluded a number of bilateral investment treaties (hereafter referred to as BITs) with the intention of attracting and subsequently increasing levels of foreign direct investment (FDI) into the country. The BITs were concluded in the hope of facilitating economic growth for the country and were intended to assure foreign investors that foreign investments are protected in the new South Africa, especially after the country had been internationally secluded and sanctioned for many years.

Some years later South Africa cancelled its BITs with European countries and introduced *The Promotion and Protection of Investment Bill* 2013 (PPIB) as proposed legislation to replace the BITs for the protection of foreign investments. The PPIB was inspired by the outcome of the review conducted by the government on the BITs South Africa had concluded. The findings of that review were that the BITs were inconsistent with the *Constitution of Republic of South Africa, 1996* (Constitution), and for that reason had legal and policy implications for South Africa. In this light, the government concluded that the BITs were unbalanced and that they restricted the government from fulfilling aspects of its constitutional mandate, such as expropriating property and transferring ownership to historically disadvantaged South Africans (HDSA). The government addressed this issue by enacting the PPIB to protect foreign investors' property while at the same time giving the government the power to regulate foreign investment in a manner that allowed it to carry out its mandate under the Constitution. This study examines the contents of the PPIB, attempting to assess if it efficiently balances the property rights envisaged in the Constitution and the rights under the BITs.

**Key words:** BITs, expropriation, compensation, MPRDA, PPIB.

## TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS .....</b>	<b>i</b>
<b>ABSTRACT.....</b>	<b>ii</b>
<b>LIST OF ABBREVIATIONS .....</b>	<b>vi</b>
<b>Chapter 1: Introduction .....</b>	<b>1</b>
<b>Chapter 2: Property rights of aliens: Expropriation .....</b>	<b>5</b>
<b>2.1       Introduction.....</b>	<b>5</b>
<b>2.2       Bilateral investment treaties .....</b>	<b>7</b>
<b>2.3       The standard of treatment.....</b>	<b>7</b>
<b>2.4       Expropriation and compensation .....</b>	<b>11</b>
2.4.1   Expropriation.....	12
2.4.1.1   Direct Expropriation .....	12
2.4.1.2   Indirect Expropriation .....	13
2.4.2   Compensation .....	14
<b>2.5       Conclusion.....</b>	<b>19</b>
<b>Chapter 3: South African framework on the protection of property rights..</b>	<b>21</b>
<b>3.1       Introduction.....</b>	<b>21</b>
<b>3.2       International Law and the South African Constitution .....</b>	<b>21</b>
<b>3.3       Property rights in South Africa before 1994: Expropriation             and Compensation .....</b>	<b>25</b>
3.3.1   Expropriation.....	25
3.3.2   Expropriation Act of 1965.....	25
3.3.3   Expropriation Act of 1975.....	26
3.3.3.1   Public purpose requirement.....	26
3.3.3.2   Compensation in terms of the <i>Expropriation Act</i> .....	27

<b>3.4</b>	<b><i>Constitutional protection of property .....</i></b>	<b>28</b>
3.4.1	<i>Interim Constitution.....</i>	28
3.4.2	<i>Section 25 of the 1996 Constitution.....</i>	29
3.4.2.1	Deprivation .....	30
3.4.2.2	Expropriation.....	31
3.4.3	<i>Public interest and public purpose.....</i>	34
3.4.4	<i>Compensation in terms of the Constitution.....</i>	36
3.4.5	<i>Factors relevant to determining the amount of compensation.....</i>	39
3.4.5.1	The current use of the property .....	39
3.4.5.2	The history of the acquisition and use of the property .....	40
3.4.5.3	The market value of the property.....	41
3.4.5.4	The purpose of the expropriation .....	42
<b>3.5</b>	<b><i>Conclusion.....</i></b>	<b>43</b>
<b>Chapter 4:</b>	<b>Property rights established under South African BITs .....</b>	<b>45</b>
<b>4.1</b>	<b><i>Introduction.....</i></b>	<b>45</b>
<b>4.2</b>	<b><i>BITs and their purposes.....</i></b>	<b>45</b>
<b>4.3</b>	<b><i>South African BITs .....</i></b>	<b>46</b>
4.3.1	<i>Expropriation in South African BITs.....</i>	46
4.3.2	<i>Compensation in BITs.....</i>	48
4.3.3	<i>Fair and equitable treatment.....</i>	49
4.3.4	<i>National treatment provision.....</i>	50
4.3.5	<i>International arbitration .....</i>	51
<b>4.4</b>	<b><i>Why South Africa reviewed its BITs.....</i></b>	<b>51</b>
4.4.1	<i>The MPRDA and Piero Foresti v Republic of South Africa .....</i>	51
4.4.2	<i>Review of the BITs .....</i>	55
<b>4.5</b>	<b><i>Conclusion.....</i></b>	<b>56</b>

<b>Chapter 5: Promotion and protection of Investment Bill.....</b>	<b>58</b>
<b>5.1        <i>Introduction.....</i></b>	<b>58</b>
<b>5.2        <i>Features of the Promotion and Protection of Investment Bill</i></b>	
<b>            <i>2013.....</i></b>	<b>59</b>
5.2.1 <i>Interpretation clause.....</i>	59
5.2.2 <i>Purpose of the Bill .....</i>	59
5.2.3 <i>Expropriation.....</i>	61
5.2.4 <i>Compensation .....</i>	62
5.2.5 <i>National treatment.....</i>	64
5.2.6 <i>Security of investment .....</i>	64
5.2.7 <i>Public interest and public purpose.....</i>	65
<b>5.3        <i>BITs features excluded from the PPIB.....</i></b>	<b>66</b>
5.3.1 <i>Fair and equitable treatment.....</i>	66
5.3.2 <i>International arbitration: Dispute resolution.....</i>	67
<b>5.4        <i>Conclusion.....</i></b>	<b>70</b>
<b>Chapter 6: Conclusion.....</b>	<b>72</b>
<b>BIBLIOGRAPHY.....</b>	<b>77</b>
<b><i>Literature .....</i></b>	<b>77</b>
<b><i>Case law .....</i></b>	<b>87</b>
<b><i>Legislation .....</i></b>	<b>88</b>
<b><i>International instruments .....</i></b>	<b>89</b>
<b><i>Reports/Papers.....</i></b>	<b>89</b>

## LIST OF ABBREVIATIONS

BEE	Black Economic Empowerment
BITs	Bilateral Investment Treaties
Comp Int'l LJ SA	The Comparative and International Law Journal of Southern Africa
CJAS	Canadian Journal of African Studies
Den J Int'l L Pol'y	Denver Journal of International Law and Policy
DSO	Directorate of Special Operations
DTI	Department of Trade and Industry
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
HDSAs	Historically Disadvantaged South Africans
ICSID	International Centre for the Settlement of Investment Disputes
IMS	International Minimum Standards
MPRDA	Mineral and Petroleum Resources Development Act
NPA	National Prosecuting Authority
Nw J Int'l L and Bus	Northwestern Journal of International Law and Business
OECD	Organisation for Economic Co-operation and Development
PELJ	Potchefstroom Electronic Law Journal
PPIB	Promotion and Protection of Investment Bill
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPS	South African Police Service
UK	United Kingdom
UN	United Nations
UNCTRAL	United Nations Commission on International Trade Law
US	United States of America

## Chapter 1: Introduction

Prior to 1994 there was disinvestment in South Africa in response to the sanctions that were imposed on the country. The actions of the apartheid regime had led to the diplomatic, cultural and economic isolation of South Africa.<sup>1</sup> The major trading states<sup>2</sup> had imposed economic sanctions on South Africa by the year 1986.<sup>3</sup> The United States of America (US) Congress had enacted economic sanctions against the apartheid government,<sup>4</sup> and Britain, the Commonwealth and European countries had established voluntary measures restricting trade with South Africa.<sup>5</sup> These international sanctions against apartheid made it difficult for South Africa to coordinate multilateral policies or attract foreign investment.<sup>6</sup> When in 1990 South Africa began to institute reforms the process of international isolation began to reverse, and the introduction of a constitutional regime in 1994 put an end to the sanctions. After 1996 South Africa was accepted back into the global community, and investment began to flow back into the country. In order to secure and encourage (FDI), the government signed a number of BITs.

A bilateral investment treaty (BIT) is an agreement establishing the terms and conditions of private investment by nationals and companies of one state in another state.<sup>7</sup> This type of investment is called foreign direct investment.<sup>8</sup> The innovative nature of BITs requires an explicit commitment on the part of host governments to guarantee the security of foreign investments against unlawful expropriation of the investors' property.<sup>9</sup> The first BIT to come into existence was between the United Kingdom (UK) and Pakistan, in 1959.<sup>10</sup> Most analysts believe that the core purpose of

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1 Klotz *Norms in International Relations* 4.

2 Britain, the Commonwealth and various European countries agreed to voluntary measures restricting trade with South Africa. Japan had already restricted direct investment in 1968.

3 Klotz *Norms in International Relations* 3.

4 Klotz *Norms in International Relations* 3.

5 Klotz *Norms in International Relations* 3.

6 Klotz *Norms in International Relations* 3.

7 Reisman *et al International Law* 460.

8 Reisman *et al International Law* 460.

9 Newcombe and Paradell *Law and Practice of Investment Treaties* 372.

10 It is not surprising that the United Kingdom opted for BITs to protect British investment, abroad because in 1951 British oil assets had been nationalised by Iran. See Peterson *South Africa's bilateral investment treaties* 6.



BITs is to attract FDI into the host country in order to promote economic growth, whereas investors are of the view that the main purpose of BITs is the protection they provide especially from the risks linked with investing in a foreign country.<sup>11</sup>

South Africa signed a number of BITs post-apartheid with the view of attracting FDI. The new government decided to rectify deeply entrenched racial inequalities and the economic management under apartheid and took initiatives to attract FDI as an economic strategy.<sup>12</sup> In order to redress the injustices of the apartheid government and build open and equitable society policies such as *Black Economic Empowerment* (BEE)<sup>13</sup> were introduced. This could be done in fulfilment of the mandate placed on it by constitutional provisions such as section 25 of the *Constitution of Republic of South Africa*, 1996(Constitution), which aims to strike a balance between rectifying the injustices of the past including the deprivation of property, and the protection of existing property rights from arbitrary deprivation and expropriation. The Constitution gives power to the state to expropriate property for a public purpose or in the public interest. Simply put, section 25(2) stipulates the conditions under which property may be expropriated and the requirement for compensation when property is expropriated. Section 25(3) states that compensation must be just and equitable, entailing that an equitable balance be struck between the public interest and the interests of those affected. Section 25(4)(a) expounds that the public interest includes the nation's commitment to land reform and other reforms designed to achieve equitable access to South Africa's natural resources. Finally section 25(5) mandates the state to take reasonable legislative and other measures within its available resources to provide an environment that enables citizens to gain access to land on an equitable basis.<sup>14</sup>

The BITs that South Africa signed were not compatible with the expropriation and compensation provisions of the Constitution described above. For example, they required payment that reflected the market value of the expropriated property and not

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11 Ginsburg 2005 *International Review of Law and Economics* 108.

12 Poulsen *Sacrificing Sovereignty By Chance* 260.

13 Green 2015 <http://www.thisisafricaonline.com/Business/Legal-Bulletin/Bilateral-investment-treaties-coming-back-to-bite>.

14 Hall 2004 *CJAS* 659.

just and equitable compensation, as stipulated in section 25, and "public interest" in the BITs did not include the land reforms mentioned in section 25(4).

It was the legal action of the *Piero Foresti, Laura de Carli v Republic of South Africa* ICSID ARB (AF) /07/01 (*Foresti*) case that brought the matter to a head, convincing the government that BITs it had signed were unfairly restrictive and favoured only the investors.<sup>15</sup> Foreign investors alleged that government was in violation of the BITs because the *Mineral and Petroleum Resources Development Act* of 2004 (MPRDA) was unlawfully expropriating their mineral rights without compensation. The MPRDA is an example of the BEE policies that the South African government implemented. The MPRDA was enacted to ensure sustainable development and equal access to the country's mineral and petroleum resources for all South Africans by transferring a certain percentage of ownership in the mining industry to historically disadvantaged people.<sup>16</sup> In doing so the MPRDA provided a limited period of time to holders of old-order prospecting rights and mining rights to have these converted into new-order rights under this Act.<sup>17</sup> The government alleged that this was not expropriation because the government was not acquiring ownership. Concluding that the BITs entered into post 1994 were skewed towards investors and that aspects of the agreements were incompatible with the Constitution's demands for transformation, the government reviewed the BITs and consequently introduced the *Promotion and Protection of Investment Bill* 2013 (the PPIB).

The aim of the PPIB is to achieve an appropriate balance between the rights, obligations of investors and the need to provide adequate protection of foreign investors on the one hand, and on the other hand ensuring that the constitutional obligations are upheld and that the government retains the policy space to regulate in the public interest.<sup>18</sup> Ultimately the research question addressed in this study is as follows: Does the PPIB strike such a balance?

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15 Allix *Business Day* 4.

16 Marais 2015 *PELJ* 2983.

17 Ruff, Kron and Golsong 2014 <http://www.nortonrosefullbright.com>.

18 UNCTAD 2012 <http://unctad.org>.

The primary objective of this study is to critically investigate the provisions of the PPIB and determine if the Bill should be adopted in its current form and thus become an Act, or if there are provisions that need to be reconsidered. As secondary objectives, the study will determine whether international law recognises the expropriation of foreign property by territorial states and if international law provides guidelines on how compensation is to be effected. Further, South Africa's domestic laws will be compared with its BITs and the PPIB will be analysed to test if it has addressed or harmonised the differences between the two.

Chapter Two of this study focuses on the protection of aliens' property rights under international law. On the basis of this consideration of international law, Chapter Three will analyse property rights under the South African legal framework and Chapter Four will focus on the protection of property rights under South Africa's BITs. Chapter Five will analyse the provisions of the PPIB and determine whether the PPIB could succeed in its quest to promote investment and protect investors' rights while simultaneously promoting development as required by the Constitution of the democratic South Africa. Chapter Six concludes the study.

It is important for this study to identify some key areas of strength and weakness in the PPIB and to make recommendations that focus on improving it with a view to its becoming an Act that will successfully give effect to section 25 of the Constitution and at the same time protect the rights of foreign investors.

Primary sources such as international instruments and agreements, statutes, declarations and treaties, and secondary sources such as books, the internet, journal articles, newspapers, conference and seminar proceedings and reports were used in the preparation of this mini dissertation.

## Chapter 2: Property rights of aliens: Expropriation

### 2.1 Introduction

A state has a sovereign right to "either allow or disallow the nationals of another state (aliens) into its territory, to regulate their presence and actions"<sup>19</sup> and the right to expropriate property owned by foreign nationals on its territory. "The right to expropriate alien's property is a corollary of state sovereignty."<sup>20</sup> However, such a sovereign right is bound by domestic law, legal procedures, treaty law and international law.<sup>21</sup> A failure by one state to abide by the law when expropriating aliens' property will result in its committing an international wrong against another state. A state that commits a wrongful act against another becomes internationally responsible to that state.<sup>22</sup> Such an international responsibility may be direct or indirect.<sup>23</sup> A state will incur indirect responsibility when it injures an alien, which act would be considered an injury against the state of that alien.<sup>24</sup> A state also incurs responsibility for injury to the property of an alien.<sup>25</sup> If a state unlawfully expropriates the property of an alien without paying compensation, it is liable for the infringement of the international minimum standard (IMS).<sup>26</sup> The IMS outlines the standard of treatment to be accorded to aliens. However, setting an acceptable standard for the treatment of aliens is an issue of contention between developed states and developing states. These different views have an impact on the outcome of expropriation in terms of compensation.

Prior to the development of modern public international law, aliens did not have legal capacity and rights. It was around the 16<sup>th</sup> and 17<sup>th</sup> centuries when international law standards for the treatment of aliens started developing.<sup>27</sup> The development in trade and investment required that the status of foreign citizens abroad needed to be addressed.<sup>28</sup> International law established an obligation for states to respect certain

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19 Strydom *International Law* 265.

20 Strydom *International Law* 265.

21 Strydom *International Law* 265.

22 Dugard *International Law* 269.

23 Dugard *International Law* 270.

24 Dugard *International Law* 270.

25 Dugard *International Law* 303.

26 Dugard *International Law* 303.

27 Newcombe *Regulatory Expropriation* 46.

28 Newcombe *Regulatory Expropriation* 46.

fundamental norms, especially with respect to standards of human treatment and the protection of human rights such as property rights.<sup>29</sup> Human rights treaties, BITs and diplomatic protection offer remedies for the violation of human rights.<sup>30</sup>

Diplomatic protection remains a mechanism of international law that is still employed by States to secure just treatment for their nationals abroad.<sup>31</sup> Although there is no right to diplomatic protection, as part of instruments under international law, diplomatic protection may be used by people upon the violation of their property rights in foreign countries by foreign governments.<sup>32</sup> However, foreign investors prefer an investment law route that allows direct and easy access to international arbitration such as BITs, and the existence of this method has consequently made diplomatic protection less popular.<sup>33</sup> Multilateral treaties and BITs have replaced diplomatic protection with reference to investment.<sup>34</sup> Under contemporary international law, multilateral treaties and BITs regulate property, property rights and the settlement of disputes such as those arising from the expropriation of foreign investors' property.<sup>35</sup> The expropriation of foreign investor's assets and the consequent compensation are contentious matters in investor-state relationships, however.<sup>36</sup> Most constitutions, BITs and municipal laws of territorial states contain detailed legal processes and procedures setting out compensation standards and how expropriation should be undertaken,<sup>37</sup> and the procedures, standards of compensation and interpretation of international law differ from country to country. This chapter will discuss the protection of property offered under the BITs and the standard of treatment accorded to aliens and their property under international law. The chapter will further demonstrate that international law allows expropriation or the nationalisation of aliens' property. Lastly, this chapter will discuss the two different standards adopted by different states in the determination of compensation when property is expropriated.

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29 Lillich (ed) *International Law* 112.

30 Dugard 2013 [www.un.org/law/avl](http://www.un.org/law/avl).

31 Dugard 2013 [www.un.org/law/avl](http://www.un.org/law/avl).

32 Dugard 2013 [www.un.org/law/avl](http://www.un.org/law/avl).

33 Dugard 2013 [www.un.org/law/avl](http://www.un.org/law/avl).

34 Dugard *International Law* 310.

35 Dugard *International Law* 310.

36 Lillich (ed) *International Law* 112; Fitzmaurice 1932 *British Yearbook of International Law* 93.

37 Ngwenya *Protection of Foreign Investment* 133.

## **2.2 *Bilateral investment treaties***

There has been an increase in the number of BITs concluded over the past decade to an estimated number of about 2000 agreements.<sup>38</sup> One of the main purposes of BITs is to guarantee compensation to foreign investors in cases of expropriation or nationalisation.<sup>39</sup> They also ensure the protection of foreign investors against the political and other perils common in some developing countries.<sup>40</sup>

Some countries prefer using their own model agreements when negotiating individual BITs.<sup>41</sup> Ordinarily, BITs deal with four substantive issues: the conditions for the admission of investors to the host state, the standards of treatment for investors, expropriation, and the arrangements for resolving investment disputes.<sup>42</sup> For instance, a significant number of BITs lay down a procedure for the direct settlement of investment disputes between a host state and investors by an established tribunal, by the International Centre for the Settlement of Disputes (ICSID), or by an *ad hoc* tribunal.<sup>43</sup> Some merely stipulate that arbitration will be used to settle investment disputes between the host state and the state of the nationality of the investor (the shareholder or corporation) over the interpretation or application of the BIT.<sup>44</sup>

The standard of treatment to be accorded to aliens and their property is fully described by BITs. It is also important to discuss the standard of treatment of aliens and their property in foreign territories under international law.

## **2.3 *The standard of treatment***

The acceptable standard of treatment to be given to aliens in territorial states is a controversial issue in the international realm; it interconnects with diplomatic protection, international human rights and refugee law, as well as state responsibility.<sup>45</sup> This controversy emanates from the variety of the opinions held among states on what

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38 Dugard *International Law* 310.

39 Peterson *South Africa's Bilateral Investment Treaties* 35.

40 Peterson *South Africa's Bilateral Investment Treaties* 35.

41 Peterson *South Africa's Bilateral Investment Treaties* 36.

42 Mina *African Centre for Economics and Finance* 1.

43 Dugard *International Law* 310.

44 Dugard *International Law* 310.

45 Strydom *International Law* 266.

is acceptable conduct with regard to the treatment of aliens. On the one hand developing states are of the opinion that the national standard of treatment is what is required. Simply put, "national standard" in this context denotes that an alien cannot claim rights that are more extensive than the rights provided to nationals of the territorial state. On the other hand, developed states argue in support of the IMS, which allows an alien "to claim a higher standard of treatment when the national standard falls below what is internationally acceptable". The court recognised the IMS in *Nyamakazi v President of Bophuthatswana*.<sup>46</sup> It was held that the international standard relating to the treatment of aliens demands that if a state admits an alien into its country, it has to conform in its treatment of him or her to "the internationally determined standard". This means that the state is not permitted to give an alien treatment that measures up to the ordinary standards of the country.<sup>47</sup>

The *US-Mexico General Claims Commission*<sup>48</sup> (*US v Mexico*) is also an important case, because it addressed the dispute surrounding the acceptable standard of treatment of aliens. The US claimed that the Mexican authorities had failed to exercise due diligence in the arrest and prosecution of the murderer of a US citizen. The Commission noted that it was difficult to strike a balance between the two views, one being the recognition of international law pertaining to negligence and the other being the sovereign power of Mexico to prosecute crimes committed in its own territory. Nevertheless the Claims Commission<sup>49</sup> held that the governmental act in dispute must be tested against international standards for the treatment of an alien, and that the act should be construed as an international delinquency in the sense that it:<sup>50</sup>

...should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.

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46 *Nyamakazi v President of Bophuthatswana* 1992 4 SA (SCA) para 25.

47 *Nyamakazi v President of Bophuthatswana* 1992 4 SA (SCA) para 25.

48 US-Mexico General Claims Commission (*US v Mexico*) 1926 3 ILR 213.

49 US-Mexican General Claims Commission (*US v Mexico*) 1926 3 ILR 213 para 4.

50 US-Mexican General Claims Commission (*US v Mexico*) 1926 3 ILR 213 para 4.

One can conclude that according to the Claims Commission treatment that is not recognised as internationally acceptable falls short of IMS requirements under international law.

In 1985 the United Nations General Assembly adopted a *Declaration on Human Rights of Individuals who are not Nationals of the Country in which they Live*.<sup>51</sup> This Declaration also addressed the standard of treatment of aliens in foreign countries. It provides that human rights covered in the *Universal Declaration of Human Rights* and other international instruments must be accorded to non-citizen individuals by the nation in which they reside.<sup>52</sup> It is not clear whether all the rights of aliens as provided in the *Universal Declaration on Human Rights* form part of IMS in customary international law.<sup>53</sup> Some countries have vigorously disputed the existence of international standards, but others argue that they have become part of customary international law.<sup>54</sup> Dugard<sup>55</sup> argues that principles covered by the *Universal Declaration of Human Rights* which have become part of international customary law are part of the IMS. These principles include non-discrimination on the grounds of race, the right to a fair trial, and more.<sup>56</sup> The prevailing different views with regard to IMS confirm the ambiguous nature of the substantive scope of the IMS regarding aliens' property rights.<sup>57</sup>

The standard of treatment is likewise often used in conjunction with the FET. It is included in a significant number of BITs.<sup>58</sup> The IMS is understood as being the extension of FET, which in essence consists of fairness and good faith conduct when handling the matters of foreigners.<sup>59</sup> Article 1105(1)<sup>60</sup> of the 1994 *North American Free*

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51 UN General Assembly, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live: resolution/adopted by the General Assembly, 13 December 1985, A/RES/40/144 available at: <http://www.refworld.org>.

52 Dugard *International Law* 301.

53 Dugard *International Law* 301. These principles include non-discrimination on the ground of race, the right to a fair trial, etc.

54 Mussi "International Minimum Standard of Treatment" [asadip.files.wordpress](http://asadip.files.wordpress.com) 4.

55 Dugard *International Law* 301.

56 Dugard *International Law* 301.

57 Dugard *International Law* 301.

58 Chapters Four and Five will further expand on the FET principle. Different interpretations have been given to this principle in arbitration proceedings where foreign investors have claimed having been denied such treatment by the host state.

59 Ngwenya *Protection of Foreign Investment* 132.



*Trade Agreement* (NAFTA) between the US, Canada and Mexico mandates parties to give investors treatment that is in line with international law, which includes the FET and full protection and security.<sup>61</sup> This concept developed from the era when states used to enter into treaties relating to navigation, friendship and commerce.<sup>62</sup> Many schools of thought have found this concept challenging to define and to interpret.<sup>63</sup> It is for this reason that the FET principle has been so widely discussed in the literature and has so frequently being the subject of arbitral disputes.<sup>64</sup> FET is "frequently invoked [by developed states] as a standard of treatment in investment disputes, often with reference to the international standard of treatment".<sup>65</sup> Developing states, on the other hand, are inclined to reject the use of the standard by arbitral tribunals. They argue that the interpretation of FET by such tribunals is not customary international law.

The arbitral jurisprudence provides that key elements of the FET are determined by the following duties of the territorial state:<sup>66</sup>

- a) Promises and undertakings made by the territorial state, and upon which the investor has relied, must be honoured since they create legitimate expectations on the part of the investor.
- b) Treatment of a foreign investor must be non-discriminatory and non-arbitrary.
- c) Judicial and administrative procedures must follow due process and allow for access to a judicial remedy.
- d) The legal framework and procedures of the territorial state must be transparent and clear as to what is expected of the investor.
- e) State measures affecting investments must be reasonable and rationally linked to their objectives and not disproportionately burdensome to the investor.
- f) Where compensation is due, it must be paid promptly, adequately and effectively.

Although it is not clear what FET entails with regard to the property rights of aliens, it is generally accepted that the standard of treatment to be given to aliens in respect of

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60 North American Free Trade Agreement of 1994 (NAFTA) between US, Canada, Mexico.

61 Strydom *International Law* 266.

62 Strydom *International Law* 274.

63 Strydom *International Law* 274.

64 Strydom *International Law* 274.

65 Strydom *International Law* 274.

66 Strydom *International Law* 274.

their personal rights has to be fair and legal, and that the content supporting this is to be found in international human rights instruments and international customary law.<sup>67</sup>

There is agreement that international law does not prohibit the expropriation of aliens' property.<sup>68</sup> However, an area of debate is what conditions must be fulfilled to prevent such expropriation from being unlawful.<sup>69</sup>

## **2.4 Expropriation and compensation**

The *Mike Campbell v Zimbabwe* case<sup>70</sup> heard by the Southern African Development Community (SADC) Tribunal exemplifies some of the key elements of the arguments in international law pertaining to lawful expropriation and the protection of foreign investment. According to the Zimbabwean Constitution:<sup>71</sup>

...land identified for resettlement purposes is subject to compulsory expropriation by the state after which full title in the land resides in the state and no compensation is payable except for improvements effected on such land. The affected land owner is barred from challenging such an acquisition in court and the courts have no jurisdiction for entertaining such a challenge.

The applicants alleged that their land was acquired by the state pursuant to this provision. They contended that Zimbabwe as a member state of the SADC had infringed the *Treaty of the Southern African Development Community*<sup>72</sup> (SADC Treaty), because they had not been allowed access to Zimbabwean courts to challenge the legitimacy and authority of the compulsory acquisition of their land by the government.<sup>73</sup> They further argued that the acquisition was racially discriminatory against white farmers and that they were not given compensation for their expropriated property.<sup>74</sup>

The Tribunal found that the Zimbabwean government had violated the right to access to justice by denying the applicants the right to seek redress for the deprivation of their property. Furthermore, it was held that the respondent state had also breached its

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67 Dugard *International Law* 301.

68 Dugard *International Law* 303.

69 Dugard *International Law* 303.

70 *Mike Campbell v Zimbabwe* SADC (T) Case No 2/2007, 48 ILM (2009) 534.

71 16B of Amendment No 17 (2005).

72 *Treaty of the Southern African Development Community* of 1992.

73 Strydom *International Law* 275.

74 Strydom *International Law* 275.

obligations under international instruments and treaties signed by Zimbabwe. For instance, article 6(2) of the SADC Treaty requires members not to condone any kind of discrimination. With regard to the compensation issue the Zimbabwean government agreed that applicants were entitled to compensation as per the requirement of international law. However, they contended that the former colonial power (Britain) had a duty to pay compensation according to the agreement reached in 1978. The Tribunal ruled that the Zimbabwean government's exclusion of compensation in its constitutional amendment was not consistent with the legal position in international law.<sup>75</sup> This case indicates that states are bound by the rules of international law that protect personal rights and override domestic laws if they are in violation of these rights.

#### *2.4.1 Expropriation*

Expropriation is one of the most severe forms of interference with property rights, especially if carried out without compensation.<sup>76</sup> For expropriation to be lawful certain conditions must be fulfilled under international law, along with modern treaty law.<sup>77</sup> Failure to abide by these conditions may result in negative publicity about the state's treatment of alien property that may tarnish the state's reputation and affect the judgment of foreign investors.<sup>78</sup>

Expropriation of an alien's property is the compulsory deprivation of an alien's legal title to property or a unilateral taking of possession by a state.<sup>79</sup> Expropriation can be done by the state indirectly or carried out directly in terms of legislation.<sup>80</sup>

##### *2.4.1.1 Direct Expropriation*

Direct expropriation occurs when "an official act by a state decides to take the title of a foreign investor's property, leaving the investors without any title".<sup>81</sup> Direct expropriation occurs when for example the following actions take place: a government

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<sup>75</sup> Strydom *International Law* 275.

<sup>76</sup> Strydom *International Law* 273.

<sup>77</sup> Strydom *International Law* 273.

<sup>78</sup> Strydom *International Law* 273.

<sup>79</sup> Boleslaw *International Law* 145.

<sup>80</sup> Boleslaw *International Law* 145.

<sup>81</sup> Strydom *International Law* 273.

takes over a factory or a company ownership, depriving the investor of all the benefits of ownership and control; in instances of the compulsory transfer of property rights from an investor to a state or a third party; in cases of the nationalisation of an entire industry or sector.<sup>82</sup>

Nationalisation has been defined as expropriation of a major national resource, which is thereafter to be managed by the state in the national interest, and which is carried out as part of a state's programme of economic and social reform.<sup>83</sup>

#### 2.4.1.2 Indirect Expropriation

Indirect expropriation does not affect the investor's title, but rather interferes with the full meaningful enjoyment of the property right. It may affect the investor's anticipated profit. Francis<sup>84</sup> contends that:

...indirect expropriation involves but is not limited to state measures with the effect of substantially depriving an investor of the value of the investment by regulatory interference such as the revocation of a license and the erosion of the investor's rights over time through a series of actions.

The following are the key factors taken into consideration in determining whether indirect expropriation has taken place:<sup>85</sup>

- a) Did the measure result in an interference with the investor's enjoyment of the investment?
- b) Was the loss (in value, management, use or control) substantial?
- c) Was the loss permanent or long-lasting? and
- d) Was the governmental measure taken in the public interest?

Consideration of these factors leads to the inference that the investor's title will not necessarily be regarded as expropriation that requires compensation if the interference is not discriminatory or disproportionate and was taken in the interest of public welfare.<sup>86</sup> Unless there is a specific agreement not to expropriate, a state may

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82 Francis 2012 [www.investmentpolicyhub.unctad.org](http://www.investmentpolicyhub.unctad.org).

83 Boleslaw *International Law* 145.

84 Francis 2012 [www.investmentpolicyhub.unctad.org](http://www.investmentpolicyhub.unctad.org).

85 Strydom *International Law* 274.

86 Strydom *International Law* 274.

expropriate any property situated in its territory of either its citizens or of foreign nationals, as long as it does so for a public purpose and subject to compensation.<sup>87</sup> The right to expropriate is one of the powers that states can exercise under state sovereignty as an aspect of their prerogative to govern their territories as they deem necessary.<sup>88</sup> This prerogative can be controlled by an international rule to which the nations have tacitly and/or explicitly agreed.<sup>89</sup>

The court in *Elettronica Sicula S.p.A (ELSI) (United States of America v Italy)*<sup>90</sup> held that the following general requirements must be met for a valid expropriation to take place:

- a) It must not be done arbitrarily,
- b) It must be done in terms of a due process in law,
- c) it may not be an act that shocks or surprises a sense of juridical propriety.

It was noted that although all states have the power to expropriate property within their territory,<sup>91</sup> globally there is no consensus on the issue of compensation. For this reason it remains a complex and very controversial issue.<sup>92</sup> For years there has been an unresolved debate between developing countries and industrialised capital-exporting nations over an appropriate standard of compensation.<sup>93</sup>

#### 2.4.2 Compensation

Developed nations contend that the expropriation of the property of aliens should be done in terms of international standards prescribed by international law.<sup>94</sup> Customary international law, widely referred to as the Hull Formula by developed states,<sup>95</sup> requires

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87 Fowler And Bunck *Law, Power, and The Sovereign State* 59.

88 Fowler And Bunck *Law, Power, and The Sovereign State* 59.

89 Fowler And Bunck *Law, Power, and The Sovereign State* 59.

90 *Elettronica Sicula S.p.A (United States of America v Italy)* 1989 ICJ Rep para 15.

91 Boleslaw *International Law* 147.

92 Western and Third World countries present different positions. The West suggests that there is always a duty to compensate. Third World states' views vary when it comes to payment. Whereas communist states reject the duty to compensate per se, they have usually granted some form of compensation.

93 Boleslaw *International Law* 147.

94 Dugard *International Law* 303.

95 This rule is based on Hull's response to the expropriation of his American-held oil interests by Mexico in the 1930's, where he argued that "prompt, adequate and effective compensation" was required under international law.

compensation to be paid at market value.<sup>96</sup> Developed nations further assert that the expropriation of the property of aliens must be non-discriminatory in nature, be for a public purpose, and be accompanied by the payment of compensation.<sup>97</sup> This compensation must be prompt, adequate and effective.<sup>98</sup> South African BITs provide a similar standard of compensation in the expropriation of foreign investments.<sup>99</sup>

On the other hand, developing nations or previously colonised countries hold a different view, namely that the standard must be set by the municipal law of the country that expropriates the property.<sup>100</sup> South American countries have challenged the standards of compensation articulated by developed states. They argue that it does not reflect customary international law.<sup>101</sup> They support the Calvo Doctrine which, they argue, is real customary international law.<sup>102</sup> According to the Calvo Doctrine,<sup>103</sup> aliens are entitled only to the protection of property provided nationally.<sup>104</sup> Those who support this doctrine would object to an IMS that endorses the Hull formula.<sup>105</sup>

Developing countries<sup>106</sup> may opt to exercise their sovereignty by way of nationalising foreign-owned industries through land reform, and through the pursuit of economic nationalism.<sup>107</sup> The idea behind this is that land and all other resources in the territory belong to that nation. Therefore no foreign entity can own resources and/or land in another nation permanently. In this case, the foreign entity will be subject to the legal regulations, customs and principles of the host nation and may not claim any protection or compensation that is more than that available to citizens of that nation.

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96 Ngwenya *Protection of Foreign Investment* 135.

97 OECD 2004 <http://dx.doi.org/10.1787/780155872321>.

98 OECD 2004 <http://dx.doi.org/10.1787/780155872321>.

99 Ngwenya *Protection of Foreign Investment* 136.

100 Ngwenya *Protection of Foreign Investment* 136.

101 Newcombe *Law and practice of investment treaties* 13.

102 Newcombe *Law and Practice of Investment Treaties* 13.

103 It is named after the Argentinean jurist and diplomat Carlos Calvo.

104 National protection/National Treatment dictates that aliens can expect treatment only equal to that afforded to nationals.

105 Clause 149 of the Calvo Doctrine.

106 For instance, in 1956 Egyptian President Gamal Abdel Nasser nationalised the Universal Suez Ship Canal Company, which was owned by French citizens. Venezuela also took various steps in the direction of the nationalisation of its oil industry, which was owned by foreign nationals.

107 Foighel *Nationalization* 112.

With regard to compensation, the IMS has been questioned specifically by two resolutions of the General Assembly dealt with below.<sup>108</sup> The *Resolution on Permanent Sovereignty over Natural Resources* 1803(XVII)<sup>109</sup> (Resolution 1803) recognises some of the IMS requirements and provides that:<sup>110</sup>

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

Resolution 1803 confirms that the expropriation of the property of aliens must be in the public interest, but it does not state that expropriation must be non-discriminatory in nature. Further, the resolution concludes that in terms of municipal law, compensation must be appropriate, which is seemingly less than the requirement that it be adequate, effective and prompt.<sup>111</sup> Any disputes that may arise in this respect should be resolved, according to the resolutions, by international dispute resolution mechanisms, after all the municipal remedies of the nation that expropriates have been utilised with no success.<sup>112</sup>

The *Charter of Economic Rights and Duties of States*, which is contained in Resolution 3281(XXIX) of 1974 (Resolution 3281),<sup>113</sup> does not support the standard of compensation advocated by the developed states. Resolution 3281 provides that every state has a right:<sup>114</sup>

...to nationalise, expropriate or transfer the ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled by the domestic law of the nationalising state and by its

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108 Evans *International Law Documents* 89, 91.

109 The Resolution on Permanent Sovereignty over Natural Resources 1803(XVII) (1962).

110 Evans *International Law Documents* 89, 91.

111 Evans *International Law Documents* 89, 91.

112 Evans *International Law Documents* 89, 91.

113 Paragraph 2(2)(c) of *Resolution* 3281(XXIX) of (1974). This Resolution is supported by the General Assembly Resolution 3171(XXVIII) of 1973, and the Declaration on the Establishment of a New Economic Order contained in Resolution 3201(S-VI) (1974).

114 The *Charter of the Economic Rights and Duties of States*, contained in Resolution 3281(XXIX) (1974).

tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

Resolution 3281 does not prescribe that expropriation must be in the interest of the public or that it must be non-discriminatory. Like Resolution 1803 on compensation, Resolution 3281 provides that compensation should be based on the municipal law of the nation that expropriates and that it must be appropriate.<sup>115</sup> Disputes arising from these issues are to be dealt with in terms of the municipal law of the nation that expropriates. The tribunal in *Texaco Overseas Petroleum et al v Libya* 1977 *I.L.R.*<sup>116</sup> held that this resolution is more political in nature than the judicial statement of the legal position. Libya, which was the defendant *in casu*, issued decrees nationalising all rights, interests, and property of the Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company (CAOC) given to them jointly by the government under 14 deeds of concession, in defiance of the contract agreements between the parties.<sup>117</sup> Further, Libya declined to be subjected to arbitration and refused to appoint an arbitrator.<sup>118</sup> The applicants claimed that the nationalisation of their property was a violation of international law. The Libyan government contended that the dispute could not be submitted to arbitration because the issues raised included sovereign acts by Libya, and only Libyan law was applicable.<sup>119</sup> The arbitrator acknowledged that the right of a nation to nationalise was absolute.<sup>120</sup> He stated that it emanated from international customary law, which is realised through general practices that are recognised as law by the international community.<sup>121</sup>

However, the arbitrator asked whether the act of sovereignty which established the nationalisation also allowed a nation to ignore the international commitments expected of it within its sovereignty perimeters.<sup>122</sup> The arbitrator held that under both

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<sup>115</sup> Resolution 3281.

<sup>116</sup> *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 8.

<sup>117</sup> *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 8.

<sup>118</sup> *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 41.

<sup>119</sup> *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 43.

<sup>120</sup> *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 45.

<sup>121</sup> *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 46.

<sup>122</sup> *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 46.



international law and Libyan law, Libya had the authority to create international commitments that included commitments with foreign private entities.<sup>123</sup> Therefore, this type of commitment could be considered as a demonstration of their sovereignty rather than a negation of its sovereignty.<sup>124</sup> Against this background, a nation could not raise its sovereignty in defence of its disrespecting commitments that were undertaken of its free will through the exercise of this same sovereignty.<sup>125</sup> The arbitrator found that Libya had undertaken certain commitments which could not be disregarded by the nationalisation measures.<sup>126</sup>

This prevailing position, then, is that the expropriation of the property of aliens should be in the public interest, but that nations have the power to decide what the public interest is.<sup>127</sup> In addition, expropriation must be non-discriminatory in nature. This is a customary international law requirement that is to be observed by all states.<sup>128</sup> With regard to the compensation that must be paid for the expropriation of the property of aliens, the amount should be appropriate, which means that the amount to be paid as compensation would be less than that due if the customary requirement of prompt, adequate and effective compensation were still in effect. In the case of the *Government of the State of Kuwait v The American Independent Oil Company (Aminoil)*,<sup>129</sup> the issue of what appropriate compensation might be was discussed, and it was held that it depends on the merits of every case, specifically looking at the legitimate expectation of the parties.<sup>130</sup> The Tribunal noted two approaches by different nations:<sup>131</sup>

...one of which seeks to reduce compensation almost to the status of a symbol, and the other assimilates the compensation due for a legitimate take-over to that due in respect of an illegitimate one.

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123 *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 89.

124 *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 90.

125 *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 90.

126 *Texaco Overseas Petroleum et al v Libya* 53 of 1977 *I.L.R* para 90.

127 OECD 2004 <http://dx.doi.org>.

128 OECD 2004 <http://dx.doi.org>.

129 *Government of the State of Kuwait v The American Independent Oil Company* para 159,160.

130 The Tribunal found indications in the Concession Agreement and in the attitude of Aminoil that Aminoil's aim was to obtain a "reasonable rate of return" and not speculative profits (a moderate estimate of profits). The Tribunal determined that this was Aminoil's expectation. In the light of this expectation the appropriate compensation had to be assessed. See *The Government of the State of Kuwait v The American Independent Oil Company* 1984 ILR 518 para 159,160.

131 *Government of the State of Kuwait v The American Independent Oil Company* para 34 1984 ILR 518 para 143; Ripinsky and Williams *Damages in international investment law* 15.

Kuwait nationalised the Concession<sup>132</sup> with an envisaged payment of fair compensation.<sup>133</sup> On the basis of the arbitration agreement *Aminoil* initiated arbitration proceedings contesting the nationalisation of the Concession.<sup>134</sup> To determine the standard of the compensation for a lawful nationalisation the Tribunal referred to Resolution 1803.<sup>135</sup> This Resolution provided that in cases of nationalisation, the owner shall be paid appropriate compensation.<sup>136</sup> The latter was calculated by the Tribunal on the basis of the replacement cost of *Aminoil's* assets (the net book value method was rejected as inadequate). The Tribunal rejected the standard that required compensation at market value because it did not consider the amount of the actual investments (aside from the assets) made by *Aminoil* over the life of the concession or the extent to which it had recovered its original capital investments.

## **2.5 Conclusion**

It can be concluded from a scrutiny of the principles regulating the treatment of aliens' property under public international law, BITs, and the decisions of international tribunals (analysed above) that the expropriation of the property of aliens must still be in the public interest, although states have a wide discretion to determine what will be in the public interest. The requirement that the expropriation must be non-discriminatory in nature can be regarded as a customary international law requirement that must be complied with by all states. The compensation that must be paid for the expropriation of the property of aliens must be appropriate, and that is a lesser requirement than that it should be prompt, adequate and effective. What compensation would be considered appropriate would according to the *Aminoil* case depend on the circumstances of each case, emphasis being placed on the legitimate expectation of the

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132 In 1948, Kuwait granted to *Aminoil*, a USA company, a 60-year-old concession for the exploration and exploitation of oil and gas in Kuwait. The price for the concession was based on a fixed royalty for every ton of oil recovered. The Concession Agreement also contained a stabilisation clause that prevented Kuwait from unilaterally annulling or altering the terms of the agreement. In later years, from 1961 to 1973, both parties agreed and changed the fixed royalties' principle to 60/40 profit sharing and further agreed to increase the government take. In 1977 Kuwait demanded a further increase of its take under the "Abu Dhabi formula" agreed by OPEC countries. *Aminoil* did not consent.

133 *Government of Kuwait v American Independent Oil Company* 1984 ILR 518 para 143.

134 Ripinsky and Williams *Damages in International Investment Law* 2.

135 Fales 1983 *Nw J Int'l L and Bus* 17.

136 Visser 1988 *Comp Int'l LJ* SA 82-87. Also see para 4 of Resolution 1803.

parties. Provided with this background, the study will in the next chapter examine South African legislation and the Constitution on the protection of aliens' property rights to establish if the South African legal framework is in line with the international standards discovered here.

## **Chapter 3: South African framework on the protection of property rights**

### **3.1 Introduction**

The expropriation of property cannot take place outside the parameters of section 25 of the Constitution, which offers the protection of property to everyone living in South Africa. The property clause in the Constitution will be discussed with reference to the repercussions of the apartheid regime, because South Africa's history played a significant role in the making of the property clause. Further, section 25 has served as the foundation upon which the government has enacted legislation to give effect to it. The MPRDA is one of the initiatives the government put in place to realise the constitutional demands for land reform programmes, land redistribution, land tenure reform and land restitution.<sup>137</sup> The effect these laws have on foreign investors and their property will be investigated. With the principles of international law discussed in the previous chapter in mind, this chapter will analyse the South African legal framework for the protection of property rights with specific reference to expropriation.

### **3.2 International Law and the South African Constitution**

During the apartheid government administration, South African courts were not involved in the international legal order. They could not apply or implement international law, which includes human rights law and the resolutions of the United Nations (UN). In addition, the apartheid government did not conclude BITs. The new administration recognised international law. The *Constitution of the Republic of South Africa* 200 of 1993 (*Interim Constitution*) recognised international law in the provisions of sections 82(1)(i) and 231(2). The 1996 Constitution also entrenched international law into the domestic law. Before describing how international law features in the South African Constitution, it is important to discuss how international law is incorporated into municipal law more generally.

Three theories may be utilised to describe how international law relate to municipal law. They are the dualism, monism and harmonisation theories. Monism means that there is

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<sup>137</sup> Sections 25(5), (6), (7), (8) and (9) of the Constitution; Currie and De Waal *The Bill of Rights Handbook* 563, 565.

one legal system and public international law is automatically incorporated into municipal law. On the other hand, dualism holds the view that municipal law and public international law are two separate law systems and that public international law must therefore be incorporated into municipal law by legislation before it can be applied. The harmonisation theory aims at uniting dualism and monism. South Africa follows the harmonisation theory. Section 232 of the Constitution relies on the monism theory in the application of customary public international law. Section 232 of the Constitution provides that "customary international law is part of South African law if it is not contrary to the Constitution or to an Act of parliament," but Section 231 stipulates that an international agreement that South Africa is a party to must be changed to municipal law through legislation prior to its enforcement in South African courts. The Constitution also provides that treaties signed by South Africa become law when they are enacted into law by the national legislature. Further, South Africa is bound by the international agreements which were binding on the Republic when the Constitution took effect.<sup>138</sup> Various provisions in the Constitution<sup>139</sup> prominently recognise public international law.<sup>140</sup> For example, Section 233 of the Constitution stipulates that when a court interprets any legislation it must ensure that the interpretation is consistent with international law.

The case of *Hugh Glenister v President of the Republic of South Africa*<sup>141</sup> confirms the importance of public international law in South Africa. *In casu*, the court had to decide whether the domestic incorporation and ratification of an international agreement according to the Constitution formed domestic statutory or constitutional rights and obligations.<sup>142</sup> The court had to judge whether the South African constitutional positive duty to promote, respect, fulfill and protect the rights in the Bill of Rights formed constitutional obligations and rights as informed by the states' obligations under the *United Nations Convention against Corruption*.<sup>143</sup> Thirdly, the court had to decide

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<sup>138</sup> See ss 231(1), (2), (3), (4) and (5) of the Constitution.

<sup>139</sup> The Constitution regulates the impact of international law on South Africa. See ss 39(1), 231, 232 and 233.

<sup>140</sup> See ss 39(1), 198(c), 199(5), 200(2), 203(1), 231, 232, 233 and 235.

<sup>141</sup> *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 54.

<sup>142</sup> *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 54.

<sup>143</sup> *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011); See Section 7 of the Constitution.

whether the Constitution,<sup>144</sup> and by implication international law, imposed a duty on South Africa to establish and maintain an independent organisation to combat corruption and organised crime.<sup>145</sup> The last issue was whether legislation that established an organisation to combat crime was constitutionally valid in the light of South Africa's obligations under the *United Nations Convention against Corruption* and other international obligations.<sup>146</sup>

The case was based on the following facts. The government founded the Directorate of Special Operations (DSO) in order to enhance the efforts of the existing law enforcement agencies to deal with organised offences. The DSO had powers to probe and institute criminal proceedings pertaining to organised crimes and or other specific crimes. After a while the rationale behind the DSO's founding, its duties, its positioning in the National Prosecuting Authority (NPA) instead of in the South African Police Service (SAPS) was questioned, as well as the connection between the DSO and the SAPS. It was alleged that the DSO was not independent because of its location at the NPA. This led to the disbandment of the DSO, which took effect when the *National Prosecuting Authority Act* 32 of 1998 (NPA Act) was amended. The *South African Police Service Act*, 68 of 1995 (SAPS Act) was also amended to create Chapter 6A, which formed a specialised force called the Directorate for Priority Crime Investigation (DPCI) in the SAPS. These Acts were challenged by the applicants. They contended that the NPA and SAPS amendment Acts were unconstitutional and that they were in violation of the state's international obligations. The applicants further contended that DPCI was not independent, considering its position in the SAPS and the legislative provisions that governed it. They alleged that the international law obligation to institute an independent anti-corruption unit was embedded in the Constitution by the South African ratification of the *United Nations Convention Against Corruption* and the enactment of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 (PRECCA). The confirmation of South African government desire to be in compliance with and to become a party to the *United Nation Anti-Corruption Convention*, the

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144 *United Nations Convention Against Corruption* (2003) UN Doc A/58/422.

145 *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 54.

146 *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 54.

*Convention Against Transnational Organised Crime*<sup>147</sup> can be seen in the PRECCA's preamble. The Court noted that four provisions of the Constitution regulate the impact of international law on South Africa, section 39(1)(b), section 231, section 232 and section 233. The court held that:<sup>148</sup>

...the incorporation of an international agreement in terms of section 231 (4) created ordinary domestic statutory obligations and did not transform the rights and obligations in it into constitutional rights and obligations. Further, the structural and operational attributes of the DPCI did not satisfy the independence requirement.

The court decided that instruments for eradicating corruption were found in different international instruments as well as domestic laws. Further, the court deliberated that the Constitution did not clearly stipulate that a self-governing corruption combat unit must be established. However, the Constitution provided an obligation on the state to create strong, effective and independent methods and systems to combat and eradicate corruption.<sup>149</sup> This duty emanated from the international agreements that bind South Africa as well as the Constitution. The court decided that the enacted laws were unconstitutional and that they did not ensure and or define the necessary independence of the DPCI.<sup>150</sup> The court indicated that the ratified International Agreements<sup>151</sup> should have been utilised for the realisation of the constitutionally-imposed necessity of independence of the DPCI.<sup>152</sup> This case and the Constitution recognise international law as part of South African law, and it is under this authority that the principles of international law discussed in the previous chapter apply in South Africa. Section 39 of the Constitution requires courts and tribunals to consider international law when interpreting the Bill of Rights; hence its importance in expropriation.

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147 *United Nation Anti-Corruption Convention, the Convention Against Transnational Organised Crime* (2000) UN Doc A/55/383.

148 *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 96.

149 *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 175.

150 *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 251.

151 The court noted that although not binding, paragraphs 6 and 17 of the Organization for Economic Co-Operation and Development, *Specialised Anti-Corruption Institutions: Review of Models* (2008) (OECD Report) gave meaning to the requirement of independence and gave content to the obligations in the Conventions.

152 *Hugh Glenister v President of the Republic of South Africa* CCT 48/10; 1712 (ZA 2011) para 178.

### **3.3 Property rights in South Africa before 1994: Expropriation and Compensation**

#### **3.3.1 Expropriation**

The word "expropriation" is used in South African law to describe "the process whereby a public authority or institution takes property for public purposes without consent being required in return for the payment or compensation".<sup>153</sup> However, it should be noted that the state does not have general common law authority to expropriate.<sup>154</sup> The expropriator can expropriate property only when the goal is for a public purpose.<sup>155</sup> When rights in property are acquired by the government, either all or only some, the person from whom they are acquired loses those rights.

#### **3.3.2 Expropriation Act of 1965**

The former South African colonies and independent republics<sup>156</sup> had individual expropriation legislation.<sup>157</sup> The *Expropriation Act* 55 of 1965 (1965 Act) was the first framework Act that applied to the whole of South Africa.<sup>158</sup> The 1965 Act provides that expropriation will be lawful only if the property is expropriated for a public purpose and compensation is given.<sup>159</sup> The 1965 Act does not explain what the public purpose requirement entails.<sup>160</sup> Section 8 of the Act stipulates that the amount of compensation to be paid should not surpass the total amount which the property would have realised had it been sold on the date of notice in the open market by a willing seller to a willing buyer.<sup>161</sup> The 1965 Act was replaced by the current *Expropriation Act* 63 of 1975 (*Expropriation Act*).

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153 Breedt *The Development of a New Expropriation Framework* 12.

154 Breedt *The Development of a New Expropriation Framework* 12.

155 Breedt *The Development of a New Expropriation Framework* 15.

156 The Cape Colony, the Republic of Free State, the Zuid Afrikaanse Republiek and Natal.

157 For example, the *Land Clauses Consolidation Act* of 1845; the *Lands and Arbitration Clauses Act* 6 of 1882; the *Land Clauses Consolidation Law* 16 of 1872; the *Expropriation of Lands and Arbitration Clauses Proclamation* 5 of 1902; and the *Codification of Statutes of the Republic of the Orange Free State* 16 of 1891.

158 Slade 2014 *PELJ* 174. Also see Davis *Comparative Study* 16, 20.

159 Section 2 of *Expropriation Act* 55 of 1965 authorised the Minister to expropriate or take the right to use temporarily any property for a public purpose, subject to compensation.

160 Slade 2014 *PELJ* 174.

161 Breedt *The Development of a New Expropriation Framework* 17.



### 3.3.3 Expropriation Act of 1975

Expropriation was governed by the *Expropriation Act*<sup>162</sup> before 1994, and that is still the case today. The *Expropriation Act* provides for the expropriation of land and other property for a public purpose. It entrusts the Minister of Public Works and the executive committee of a province with the power to expropriate.<sup>163</sup> Further, it sets down the requirements that must be met before expropriation can be regarded as lawful. These requirements are that the expropriation must be for a public purpose and that compensation must be paid.<sup>164</sup> These two requirements are dealt with comprehensively below.<sup>165</sup> It should be noted that some provisions in the *Expropriation Act* are not consistent with the Constitution. Hence, a constitutional interpretation is applied where possible and the *Expropriation Bill* B4-D of 26 January 2015, which is now at an advanced stage, aims to bring expropriation as stipulated in the *Expropriation Act* in line with the Constitution.

#### 3.3.3.1 Public purpose requirement

The Minister of Public Works has legal authority to expropriate immovable and movable property for public purposes in terms of section 2(1) of the *Expropriation Act*. When the Minister expropriates property, he has a legal duty to compensate. The *Expropriation Act*<sup>166</sup> provides that a public purpose consists of any purpose that is linked to the administration of any lawful action by an organ of the State.<sup>167</sup> The court in *White Rocks Farm (Pty) Ltd and others v Minister of Community Development*,<sup>168</sup> specified that a public purpose can have a broad or a narrow meaning, depending on the circumstances of each case. Under the broad meaning, it would include all things that affect and or benefit the public, while the narrow meaning applies to government

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162 *Expropriation Act*.

163 Sections 2(1) and 1.

164 Slade *Justification of Expropriation* 140; Modipane *Critical Exposition* 1; section 2 of the *Expropriation Act*.

165 See section 3.3.3.1 and 3.3.3.2 of this study.

166 Section 1 of the *Expropriation Act*.

167 Section 1 of the *Expropriation Act*; Slade *Justification of expropriation* 140.

168 *Slabbert v Minister van Lande* 1963 3 SA 620 (T) *White Rocks Farm (Pty) Ltd and others v Minister of Community Development* 1984 3 SA 785 (N) para 64.

purposes.<sup>169</sup> Because the preservation and conservation of water systems affect the people of South Africa as a whole, the court decided that the establishment of a mountain catchment area falls within the broad meaning of the public purpose requirement, and therefore falls under a public purpose provided under section 2(1) of the *Expropriation Act*.<sup>170</sup> In the *Administrator, Transvaal v Van Streepen*<sup>171</sup> the court stated that expropriation must be for a public purpose or the public interest. The public interest is not mentioned in the *Expropriation Act*, but Slade<sup>172</sup> argues that:

the court equated the broad understanding of the public purpose requirement with the public interest, while the reference to the public purpose is limited to the narrow understanding of the public purpose requirement as it was understood in earlier case law.

As can be seen, the court treated "public interest" and "public purpose" as meaning one and the same thing. The Constitution, however, makes a distinction between these two. Public interest is included in the Constitution.<sup>173</sup> The second requirement for expropriation after public purpose is the payment of compensation.

### 3.3.3.2 Compensation in terms of the *Expropriation Act*

The *Expropriation Act*,<sup>174</sup> as indicated above,<sup>175</sup> authorises the Minister to expropriate property subject to compensation. The determination of compensation is based on market value and actual financial loss according to section 12(1)(a), and section 12(1)(b) provides for the calculation of compensation on the actual loss suffered.<sup>176</sup> In a nutshell, the *Expropriation Act* standard of compensation is market value and the financial loss suffered by the party. Du Plessis<sup>177</sup> states that:

The 1965 and 1975 *Expropriation Acts* incorporated the concept of market value and the so-called willing buyer willing seller principle. The willing buyer willing seller principle forms the basis of the calculation of market value in South African expropriation law today.

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169 Slade 2014 *PELJ* 175.

170 Slade 2014 *PELJ* 175.

171 *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd* 1990 4 SA 644 (A) 662.

172 Slade 2014 *Justification of Expropriation* 35,36.

173 Section 25(2) of the Constitution.

174 Section 2 of the *Expropriation Act*.

175 See section 3.2.1 of this study.

176 Modipane *Critical Exposition* 18.

177 Du Plessis *Compensation for Expropriation* 30.

Market value has been held by various courts to mean payment in full, meaning the amount for which something can be sold on an open market. Market value was the key factor utilised in the *Expropriation Act* to determine compensation until the Constitution of 1996 came into law.

The factors considered in the Constitution to determine compensation differ from those in the *Expropriation Act*. One example of the difference is the way in which market value is used in the *Expropriation Act* and the Constitution.<sup>178</sup> The standard of compensation under the *Expropriation Act* is inconsistent with the Constitution, but the *Expropriation Act* must be interpreted in line with the Constitution. Below is an analysis of the constitutional provisions on expropriation and compensation.

### **3.4 Constitutional protection of property**

#### **3.4.1 Interim Constitution**

The provision in the Bill of Rights pertaining to protecting property was contested, because some wanted protection against state interference in property while others wanted to allow the government to address issues relating to the dispossession of property and historical injustices.<sup>179</sup> This debate eventually led to the inclusion of the property clause in the Bill of Rights.<sup>180</sup> Section 28(3) of the *Interim Constitution* stated that "where any rights in property are expropriated pursuant to a law, such expropriation shall be permissible for public purposes only". Like the *Expropriation Act*, this provision permits expropriation only for a public purpose and not for the public interest or for land reform purposes. Section 28 also guaranteed protection of property positively. The introduction of the 1996 Constitution brought a new dimension to the South African property law with regard to expropriation.<sup>181</sup> The Constitution protects

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178 Du Plessis *Compensation for Expropriation* 30.

179 Chaskalson 1994 *SAJHR* 131-132; Van der Walt "Property Rights, Land Rights and Environmental Rights" 478-480.

180 Budlender "The Constitutional Protection of Property Rights" 1.

181 Section 25 of the Constitution. Also see Badenhorst, Pienaar and Mostert *The Law of Property* 9.

private ownership and broadens the public interest land reform objectives in section 25.<sup>182</sup>

### *3.4.2 Section 25 of the 1996 Constitution*

Section 25 protects property against arbitrary deprivation,<sup>183</sup> sets out the requirements for a valid expropriation<sup>184</sup> and lays down principles regarding the calculation of compensation.<sup>185</sup> It also makes provision for land and other reforms.<sup>186</sup> Section 25(4) of the Constitution is an interpretation provision that applies to both the protective<sup>187</sup> and land reform provisions.<sup>188</sup> Section 25(4)(a) stipulates that "public interest" includes the "nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources."<sup>189</sup> This provision justifies expropriation for land reform purposes while protecting existing property relations in sections 25(2) and (3).<sup>190</sup> Sections 25(5) to (9) further provide grounds for land reform in South Africa.<sup>191</sup> Further, section 25(4)(b) provides that the term "property" is not limited to land only, which means that intellectual property, commercial interests, incorporeal and corporeal movables are all under the protection of the property clause.<sup>192</sup>

Expropriation cannot take place outside the parameters of section 25 of the Constitution, which expresses a negative protection of property, and in which the right to acquire, hold and dispose of property is not guaranteed, as opposed to section 28 of the *Interim Constitution*. In other words, no individuals have a positive claim against the state to provide them with property.

The section 25 protection of property is not to protect private property from all state interference, but only to protect it against state interference which is improper, illegitimate, invalid and/or unfair. The property clause recognises state interference with

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182 Du Plessis *Compensation for Expropriation* 68.

183 Section 25(1) of the Constitution.

184 Section 25(2) of the Constitution.

185 Section 25(3) of the Constitution.

186 Sections 25(5), (6), (7), (8) and (9) of the Constitution.

187 Sections 25(1), (2) and (3) of the Constitution.

188 Sections 25(5), (6), (7), (8) and (9) of the Constitution.

189 Silberberg and Schoeman *The Law of Property* 523.

190 Silberberg and Schoeman *The Law of Property* 523.

191 *Msiza v Director General for Department of Rural Development* 2012 LCC para 14.

192 Silberberg and Schoeman *The Law of Property* 523.

private property in the form of expropriation and deprivation. Section 25(1) stipulates that no one may be deprived of property except in terms of law of general application, and that no law may permit the arbitrary deprivation of property.

#### 3.4.2.1 Deprivation

Deprivation can be defined as an interference with property that emanates from the exercise of regulated state powers in the public interest. It requires limitations on the right to use, enjoy or exploit property. In its simple form, deprivation limits the use, exploitation and enjoyment of property by the owner in the public interest. Examples of laws that may give rise to such deprivation are nuisance laws, zoning laws and fire regulations.<sup>193</sup> The deprivation is performed in the interest of a large group of people, but it does not require the payment of compensation in return. A deprivation can also infringe on only some of the ownership entitlements.<sup>194</sup>

Section 25(1) is important to a constitutional analysis of the violation of the right to property. Deprivation and expropriation must meet all of the requirements set out in this section to prevent their being arbitrary.<sup>195</sup> If the deprivation is inconsistent with section 25(1), such a deprivation will be regarded as invalid and unconstitutional, except when it is justifiable under section 36(1) of the Constitution.<sup>196</sup> Property rights can be limited only by law of general application.<sup>197</sup> In this regard, law includes legislative provisions, statutes, customary law and common law.<sup>198</sup> The limitation must be in line with the Constitution. It must also gain authority from the democratically elected legislature.<sup>199</sup>

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193 Marais 2015 *PELJ* 2983; Van der Walt *Constitutional Property Law* 195-197.

194 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* 2002 7 BCLR 702 (CC); 2002 4 SA 768 (CC) para 61; Silberberg and Schoeman *The Law of Property* 544.

195 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* 2002 7 BCLR 702 (CC); 2002 4 SA 768 (CC) paras 57-60; Silberberg and Schoeman *The Law of Property* 545.

196 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* 2002 7 BCLR 702 (CC); 2002 4 SA 768 (CC) paras 57, 60; Silberberg and Schoeman *The Law of Property* 545.

197 Sections 25 and 36 of the Constitution.

198 Silberberg and Schoeman *The Law of Property* 545.

199 Silberberg and Schoeman *The Law of Property* 545.

Section 25(1) provides that generally applicable laws imposed on private property rights shall not be arbitrary.<sup>200</sup> This means that there must be a need for a sufficient cause of deprivation, and this should not just be an illustration of a reasonable nexus between a governmental purpose and the way in which it should be realised.<sup>201</sup> One can safely submit that the non-arbitrary requirement provided by section 25 is a formal procedural safeguard, in that it regulates the exercise of the state's powers.<sup>202</sup> The court in *AgriSA v Minister for Minerals and Energy*<sup>203</sup> (*AgriSA*) deliberated on the application of section 25 of the Constitution to the MPRDA. It was agreed by all parties in this case that the deprivation that took place as the result of the application of the MPRDA was not arbitrary because it was done in accordance with a law of general application.<sup>204</sup> The claim was based on the allegations that the company's old-order rights had been expropriated when the MPRDA took effect. The court had to decide whether the application of the MPRDA had resulted in the expropriation of the applicants' property. The court held that deprivation did not amount to expropriation unless there was a compulsory acquisition of rights in property by the state, and that the MPRDA made the state the custodian of mineral resources (on behalf of the people of South Africa). The state did not acquire ownership of the resources, and therefore there was no expropriation of property.<sup>205</sup> The court also noted that section 25 does not distinguish between deprivation and the expropriation of property, but only provides that compensation is payable when expropriation takes place.<sup>206</sup>

#### 3.4.2.2 Expropriation

Expropriation is not defined in the Constitution. In *Harksen v Lane*<sup>207</sup> it was defined as "the compulsory acquisition of rights in property by a public authority." Generally, expropriation is an application of sovereign authority by a state, where the state acquires property from one person or a small group of persons in the public interest or

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200 Silberberg and Schoeman *The Law of Property* 545.

201 Silberberg and Schoeman *The Law of Property* 545.

202 Silberberg and Schoeman *The Law of Property* 545.

203 *South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

204 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 24, 53.

205 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 68, 69.

206 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 93.

207 *Harksen v Lane* 1998 1 SA 300 (CC) para 32.

for a public purpose.<sup>208</sup> Such state acquisition is subject to the payment of compensation under section 25(2)(b). Expropriation may happen through administrative action or direct statutory provisions that are based on law of general application.<sup>209</sup> In any of these scenarios, expropriation must meet the section 25 requirements and it must be accompanied by compensation that also meets the section 25(3) terms.<sup>210</sup> Accordingly, administrative deprivations of ownership must be lawful, reasonable and procedurally fair.<sup>211</sup> A distinction between expropriation and deprivation was made<sup>212</sup> in the *First National Bank of South Africa Limited Wesbank v Minister of (FNB)*,<sup>213</sup> Where the constitutional court stipulated a methodology for adjudicating section 25 disputes, as follows:

- (a) Does that which is taken away amount to property for the purpose of section 25?
- (b) Has there been a deprivation of such property?
- (c) If there has, is such a deprivation consistent with the provisions of section 25(1)?
- (d) If not, is such a deprivation justified under section 36 of the Constitution?
- (e) If it is, does it amount to expropriation for the purpose of section 25(2)?
- (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under section 36?

This method depends on understanding expropriation to be an aspect of deprivation, which means that all expropriations are deprivations, but only a few deprivations amount to expropriation. In this context, section 25(1) must be used as a starting point in settling property disputes. Such deprivation must fulfil the requirements for a valid deprivation and must be justified in terms of section 36(1) of the Constitution.

Decisions in *AgriSA* and *FNB* cases highlighted the approach used by the courts in differentiating between deprivation and expropriation. However, the challenge of distinguishing these two as discussed in *AgriSA* stems from state regulatory action or

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208 Marais 2015 *PELJ* 2983.

209 Silberberg and Schoeman *The Law of Property* 564.

210 Silberberg and Schoeman *The Law of Property* 564.

211 Silberberg and Schoeman *The Law of Property* 564.

212 Whether a property infringement amounts to either deprivation or expropriation has lost significance because of a ruling in *FNB*, since distinguishing between them became relevant only at a later stage of the inquiry.

213 Marais 2015 *PELJ* 2983; *First National Bank of South Africa Limited Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

interference with property that may not necessarily result in state acquisition of the property.<sup>214</sup> Notwithstanding the majority decision - that the acquisition in *AgriSA* did not amount to expropriation - three judges did not accept this conclusion as an inflexible general rule that<sup>215</sup> acquisition by the state is an essential requirement for expropriation in all cases.<sup>216</sup> This interpretation is consistent with the Australian law under section 51(xxxi)<sup>217</sup> of the *Commonwealth Constitution* of 1900, which gives the power to the Commonwealth or Federal Parliament to make laws regarding the "acquisition of property on just terms from any State or person for any purpose in respect of which the parliament has the power to make laws".<sup>218</sup> This provision does not use the word "expropriation" but "acquisition" and provides that only "just terms" are only needed for the understanding of property interference which amounts to the acquisition of property.<sup>219</sup>

This means that for the acquisition to take place, it is not important for the Commonwealth or any other person who has acquired the property to be precisely akin to what was lost by the affected party.<sup>220</sup> This requirement will be met as long as what is acquired entails some identifiable benefit or advantage which will be the case when the benefit relates to the ownership or use of the property.<sup>221</sup>

The court in *AgriSA* failed to recognise that the government action in the case amounted to indirect expropriation. This is an internationally accepted concept in international investment law.<sup>222</sup> Article 10(3) of the *Draft Convention on the International Responsibility of States for Injury to Aliens* (1961) provides:<sup>223</sup>

...a taking of property includes not only an outright taking of property but also any such unreasonable interference, use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference. In

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214 Marais 2015 *PELJ* 2983; Ngwenya *Protection of Foreign Investment* 61.

215 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 78, 80, 81.

216 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 78, 80, 81.

217 Section 51 (xxxi) of the Commonwealth Constitution (1900).

218 Marais 2015 *PELJ* 3014.

219 Marais 2015 *PELJ* 3014.

220 Marais 2015 *PELJ* 3020.

221 Marais 2015 *PELJ* 3020.

222 Ngwenya *Protection of foreign investment* 220.

223 Article 10(3) of *Draft Convention on the International Responsibility of States for Injury to Aliens* (1961).



subsection (b), a taking of the use of property includes not only an outright taking of property but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

The decision taken by the court is problematic as it creates an impression that the parliament can pass laws that allow the government to take private property without compensating the owner claiming that the state did not acquire ownership of the alleged property.<sup>224</sup>

### *3.4.3 Public interest and public purpose*

Section 25(2) of the Constitution stipulates that property may be expropriated only if it is for a public purpose or in the public interest.<sup>225</sup> A public purpose or public interest requirement is regarded as a justification for expropriation,<sup>226</sup> whereas the payment of compensation is merely a result of and not a justification for a valid expropriation.<sup>227</sup> The public purpose or public interest must be compelling in order for it to qualify as the justification of the breach of an individual's constitutionally protected property right. This means that this infringement must be analysed carefully to ensure that the state does not abuse its expropriation power.

It is generally accepted that the function of a public purpose requirement is to ensure that the expropriated property is used to the advantage of the public.<sup>228</sup> If the property is expropriated for the sole purpose of benefitting an individual there is no justification for the expropriation and the expropriation is unlawful.<sup>229</sup> Therefore, an expropriation must be for a public purpose and not a private purpose. An expropriation that is for an improper purpose, such as enriching the state or for the primary benefit of a third party, will be invalid in any case.<sup>230</sup>

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224 Marais 2015 *PELJ* 3020.

225 Section 25(2) of the Constitution; Badenhorst, Pienaar and Mostert *The Law of Property* 540. Compensation must be determined in accordance with s 25(3) of the Constitution, and public interest is described in s 25(4) of the Constitution. Van der Walt *Constitutional Property Law* 503,520.

226 Section 25(2)(a) of the Constitution.

227 *Harvey v Umhlathuze Municipality and others* 2011 1 SA 601 (KZP) para 82; Slade 2014 *PELJ* 185

228 Slade 2014 *PELJ* 185.

229 Slade 2014 *PELJ* 185.

230 Van der Walt *Constitutional Property Law* 503,520.

The difference between a public purpose and the public interest in terms of the Constitution has been frequently asked, and Slade<sup>231</sup> submits that:

It could be said that the public interest is a broader category than public purpose. Given the historical analysis..., the public purpose probably refers to government purposes while public interest probably refers to purposes that benefit the public.

However, Van der Walt<sup>232</sup> on the other hand argues that in principle there should be no distinction between the two. The Constitution does not expound on the meaning of public purpose, but the *Expropriation Act* provides that a public purpose is inclusive of any purpose that is linked to the administration of any law provisions by an organ of state.<sup>233</sup> Du Plessis,<sup>234</sup> referring to Van der Walt,<sup>235</sup> defines public purpose as anything that is made by an organ of state, which is beneficial to the public at large or to the community as a whole.

Section 25(4)(a) of the Constitution provides that "public interest" includes the nation's commitment to land reform and to bringing about equitable access to all South Africa's natural resources.<sup>236</sup> In order for one to fully comprehend the meaning of the above provision one needs to understand what "public interest" means. Given the above, public interest<sup>237</sup> seems to be a broad concept which is difficult to define accurately.<sup>238</sup> At present there is no definition of public interest in the context of section 25(2)(a).<sup>239</sup>

However, it is worth noting that the distinction between the public interest and a public purpose was recognised in the pre-constitutional period in *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd*,<sup>240</sup> where the court stated that:<sup>241</sup>

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231 Slade 2014 *PELJ* 185.

232 Van der Walt *Constitutional Property Law* 462.

233 Section 1 of the *Expropriation Act*; Slade 2014 *PELJ* 170.

234 Du Plessis *Compensation for Expropriation* 39, 94-95; Van der Walt *Constitutional Property Law* 242, 245; Currie and De Waal *The Bill of Rights Handbook* 554.

235 Van der Walt *Constitutional Property Law* 225, 232.

236 Slade 2014 *PELJ* 170.

237 Southwood provides that public interest is the interests of the individuals comprising the community as a whole and not in its organised capacity; Southwood *Compulsory acquisition of rights* 15.

238 Nginase *The Meaning of 'Public Purpose' and 'Public Interest'* 61.

239 Nginase *The Meaning of 'Public Purpose' and 'Public Interest'* 61.

240 *Administrator, Transvaal v Van Streepen (Kempton Park)* 1990 2 All SA 526 (A).

241 *Administrator, Transvaal v Van Streepen (Kempton Park)* 1990 2 All SA 526 (A) para 47, 48.

The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. [It does not appear] that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case. One can conceive of circumstances in which the loss and inconvenience suffered by A through the acquisition of a portion of his land to relocate the services of B, who would otherwise have to be paid massive compensation, could be justified on the basis of it being in the public interest.

Given this background, one can conclude that the public interest is a broader category than a public purpose, because section 25(4) specifically provides for reform measures as part of the public interest.<sup>242</sup> Badenhorst, Pienaar and Mostert<sup>243</sup> believe that a public purpose may refer to government purposes whereas public interest may denote whatever benefits the public at large, and that the two terms can be used interchangeably. Due to this lack of precision in determining what the public interest really involves, some scholars<sup>244</sup> submit that the legislature is entrusted with the authority to decide what the public interest may be, while the courts are vested with the power to ensure that the values set by the Constitution are met.<sup>245</sup>

The requirement after public purpose and public interest, as stated above, is that property may be expropriated subject to compensation.<sup>246</sup>

#### *3.4.4 Compensation in terms of the Constitution*

The Constitution requires just and equitable compensation to be paid to owners when their property is expropriated.<sup>247</sup> Section 25 therefore makes expropriation without compensation invalid. Section 25(2) additionally permits both parties to agree on the amount, time and manner of payment, or if parties do not agree the court is bequeathed the power to decide on an appropriate compensation and procedure on behalf of both parties.

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242 Van der Walt *Constitutional Property Law* 260.

243 Badenhorst, Pienaar and Mostert *The Law of Property* 567; Van der Walt *Constitutional Property Law* 260.

244 Badenhorst, Pienaar and Mostert *The Law of Property* 567; Van der Walt *Constitutional Property Law* 260.

245 Mostert and Pope (eds) *The Principles of the Law of Property* 126. Also see Badenhorst, Pienaar and Mostert *The Law of Property* 567. Van der Walt *Constitutional Property Law* 260; South African Institute of Race Relations 2015 <http://irr.org.za/reports>.

246 See section 3.4.3 of this study. S 25(2)(b) of the Constitution.

247 Section 25(2) of the Constitution.

In order to be able to adjudicate that compensation is just and equitable as per section 25 of the Constitution, a number of issues must be considered. These include the public interest, which takes cognisance of the nation's commitment to land reform as well.<sup>248</sup> In essence, the Constitution requires that the interest of an expropriatee and the public must be balanced. The court must first ascertain the market value of the property and then decide whether the market value should be reduced or not, considering of the factors mentioned in section 25(3).

Section 25(3) changed the manner in which compensation was to be calculated in Section 12 of the *Expropriation Act*. *Du Toit v Minister of Transport (DuToit)*<sup>249</sup> is of the utmost importance because of its role in changing the constitutional interpretation concerning the determination of compensation. The court had to determine the amount to be paid to the owner for the removal of gravel from private land for the maintenance of a public road. The landowner asked for compensation at the market value<sup>250</sup> for the gravel removed from his land; whereas the state argued for compensation for the actual loss<sup>251</sup> caused by the taking. The Constitutional Court held that it was not the gravel that was expropriated but the right to the use of the land, and that the compensation offered on the basis of the value of temporary use was just and equitable.<sup>252</sup> The Constitutional Court applied section 25(2) and 25(3), and the landowner was not given compensation based on the market value. Instead the court considered the use of the property as the factor to be considered in determining the just and equitable compensation required by the Constitution. The court emphasised that compensation in terms of section 25(3) is different from that in section 12 of the *Expropriation Act*.<sup>253</sup> The court further held that "one can accept an approach that reconciles section 25(3) of the Constitution with section 12 of the *Expropriation Act*."<sup>254</sup> According to the court, the correct calculation of compensation encompasses the

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248 See section 3.4.4 above; Peterson *South Africa's bilateral investment treaties* 24.

249 *Du Toit v Minister of Transport* 2003 1 SA 586 (C).

250 In terms of s 12(1)(a) of the *Expropriation Act*.

251 In terms of s 12(1)(b) of the *Expropriation Act*.

252 Breedts *The Development of a New Expropriation Framework* 80.

253 *Du Toit v Minister of Transport* 2003 1 SA 586 (C) paras 35, 36.

254 *Du Toit v Minister of Transport* 2003 1 SA 586 (C) para 83.

provisions of the Constitution. Mostert and Pope<sup>255</sup> agree that the approach in *Du Toit* is the right one to follow when calculating the amount payable.

There seems to be an agreement that less than market value compensation may be awarded to affected parties where a compelling public interest requires an expropriation of property.<sup>256</sup> Examples of such public interest are land reforms purpose or reforms for the purpose of racial redress.<sup>257</sup> The court upheld this view in *Msiza v Director-General of Rural Development*.<sup>258</sup> The court's duty in this case was to determine the just and equitable compensation that property owners were entitled to. The respondents in this case claimed that a just and equitable compensation was the payment of market value and the state agreed to pay market value. The court addressed the issue by stating that:<sup>259</sup>

Market value is not the basis for the determination of compensation under section 25 of the Constitution where property or land has been acquired by the State in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a Court assesses just and equitable compensation. It is not correct to submit, as was done on behalf of the landowners, that the jurisprudence of this Court has installed market value as a preeminent consideration.

The court held that section 25 of the Constitution provides that compensation must be paid for expropriation if it is for the benefit of the public. The court noted that monetary compensation comes from the public pockets and is constitutionally aimed to serve a discreet legal purpose. This means that not all possible potential losses must be paid. After considering all the facts, the court reached the conclusion that the just and equitable compensation was less than market value.<sup>260</sup> In terms of section 25(3)(a) to (e) of the Constitution there are factors other than market value to be considered when ascertaining just and equitable compensation.

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255 Mostert and Pope (eds) *The Principles of the Law of Property* 127-128; Van der Walt *Constitutional Property Law* 260.

256 Alexander *The Global Debate* 42; Mostert *The Constitutional Protection and Regulation of Property* 344, 348; Chaskalson 1995 *SAJHR* 232.

257 Alexander *The Global Debate* 42; Mostert *The Constitutional Protection and Regulation of Property* 344, 348; Chaskalson 1995 *SAJHR* 232.

258 *Msiza v Director-General of Rural Development* 2016 LCC.

259 *Msiza v Director-General of Rural Development* 2016 LCC para 46.

260 *Msiza v Director-General of Rural Development* 2016 LCC para 47.

### 3.4.5 Factors relevant to determining the amount of compensation

#### 3.4.5.1 The current use of the property

Section 25(3)(a) calls for evidence of a specific use or uses of a property on the date of expropriation, as this is the date when compensation becomes payable.<sup>261</sup> The use of property is important. It may well have an influence in reaching the equitable balance between public interest and the interest of the expropriate.<sup>262</sup>

A property may have more than one use,<sup>263</sup> therefore the function of the property must have an influence in determining compensation.<sup>264</sup> The use of property must be considered in conjunction with the market value to assess a just and equitable compensation package rather than for the purpose of setting the market value.<sup>265</sup>

The court considered the use of property in the *Msiza* case when determining a just and equitable compensation. The respondents had purchased Rondebosch farm when the application for the award of the land in terms of the *Labour Tenants Act* 3 of 1996 by the applicants was already pending. At the time of the purchase the respondents were aware that a portion of the land was being used by the applicant and his family.<sup>266</sup> As a result thereof, the respondents did not use that particular land. The court noted that this "limited any loss because the respondents never used the land in the first place".<sup>267</sup> From the time of the purchase to the present, the affected land has been used by the applicant and his family for agricultural purposes.<sup>268</sup> The evidence before the court was that the applicant and his family were going to continue to farm and graze cattle on the land.<sup>269</sup> The respondents claimed the market value of the property on the basis of the developmental potential of the land in question, but the court rejected suggestions that the actual loss was its developmental potential. The court held that the actual loss was its agricultural potential. The court noted that the current use was to be distinguished

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261 Breedts *The Development of a New Expropriation Framework* 83.

262 Breedts *The Development of a New Expropriation Framework* 83.

263 Silberberg and Schoeman *The Law of Property* 575; Van der Walt *Constitutional Property Law* 261.

264 Budlender "The constitutional protection of property rights" 59.

265 Southwood *Compulsory Acquisition Of Rights* 19-20.

266 *Msiza v Director-General of Rural Development* 2016 LCC para 49.

267 *Msiza v Director-General of Rural Development* 2016 LCC para 50.

268 *Msiza v Director-General of Rural Development* 2016 LCC para 51.

269 *Msiza v Director-General of Rural Development* 2016 LCC para 51.

not only from the historical use of the property, but also from the future use of the property.<sup>270</sup> The court held that the intention was to arrive at a just and equitable determination of the compensation, free from the pervading influences of speculative forces which could distort the value of the property.<sup>271</sup> The court held that the current use of the land was agricultural.

#### 3.4.5.2 The history of the acquisition and use of the property

According to section 25(3)(b), a just and equitable compensation will take into consideration the history of the acquisition of the property. It is challenging to determine whether the expropriatee is entitled to the award of more or less compensation in cases where the property was historically used unproductively but is now being used productively.<sup>272</sup> It has been submitted that the history of the expropriatee's acquisition is what is applicable, not that of his predecessor.<sup>273</sup> Therefore, the evidence necessary to be considered is along the lines of when the property was acquired, from whom, what the price was, and what the terms and the financing of the acquisition were. Section 25(3)(b) makes it clear that there is a particular aim that compensation must fulfil, "a specific apartheid wrong that must be made right".<sup>274</sup> This provision is more relevant to expropriation for land reform purposes, because the history of the acquisition will be regarded in cases where the compensation to be awarded is for land which was attained by forced removals or land that was granted during the apartheid era.<sup>275</sup> Where land was leased or sold to white farmers for less than the market value, it would be unfair to compensate those individuals at the market value.<sup>276</sup> Section 25(3)(b) safeguards against allowing the beneficiaries of apartheid land law to benefit twice.<sup>277</sup>

Opposing the award of the market value requested by the landowners in *Msiza's* case, the court instead used the history of the acquisition and use of the property to

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270 *Msiza v Director-General of Rural Development* 2016 LCC para 52.

271 *Administrator, Transvaal v J van Streepen (Kempton Park)* 1990 4 SA 644 (A) para 661.

272 *Administrator, Transvaal v J van Streepen (Kempton Park)* 1990 4 SA 644 (A) para 661.

273 Southwood *Compulsory acquisition of rights* 19-20.

274 Du Plessis "The public purpose requirement" 11.

275 Breedts *The Development of a New Expropriation Framework* 85.

276 Breedts *The Development of a New Expropriation Framework* 85.

277 Du Plessis "The Public Purpose Requirement" 11.

determine compensation. The court considered the actual amount of money that had been used by the respondents to purchase the land. The landowners asserted that the payment made to purchase their land should not be considered as a market related transaction, because there had been personal relations between them and the person who sold them the land. The court dismissed their argument by emphasising that the court had to work with the actual payment made in 1999, when the landowners bought the land. The court also took into consideration the fact that during the period of 15 years when the land owners had occupied the land they had not made any significant investment in it. Lastly, the court took into consideration the facts that the applicant and his family had resided on the farm since 1936, and that the landowners had been aware of their application at the time of purchase.<sup>278</sup> Based on this reasoning, the court held that the amount claimed by the respondents was not fair in terms of the requirements of section 25.<sup>279</sup> After considering the history of the acquisition and the use of the land, the court held that compensation at market value would fall short of striking an equitable balance between the interests of the respondents and those of the public.<sup>280</sup>

### 3.4.5.3 The market value of the property

Market value is a crucial element in the calculation of compensation for expropriated property in terms of the *Expropriation Act*. However, the new constitutional position does not regard it as the main factor or the only factor. Instead, it is considered together with other equally vital factors. Du Plessis<sup>281</sup> states that:

...it was agreed that compensation should be "just and equitable", taking into account certain factors, of which market value was only one. 'Just and equitable' compensation will not only take market value into consideration but all the other factors.

In *Ex parte Former Highlands Residents; In Re: Ash v Department of Land Affairs*<sup>282</sup> the court held that although some countries use market value as the main factor to

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278 *Msiza v Director-General of Rural Development* 2012 LCC para 61.

279 *Msiza v Director-General of Rural Development* 2012 LCC para 61.

280 *Msiza v Director-General of Rural Development* 2012 LCC para 61.

281 Du Plessis *Compensation for Expropriation* 51, 53.

282 *Ex Parte Former Highlands Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) para 122.



determine compensation, in South Africa market value is merely one of the factors taken into account. The court noted that the interest of the expropriatee necessitates a full indemnity which may increase the compensation above market value by redressing factors such as financial loss, while on the other hand<sup>283</sup> the public interest may reduce the compensation to an amount which is less than market value.<sup>284</sup> The court in *Ex Parte Former Highlands Residents; In Re: Ash v Department of Land Affairs*<sup>285</sup> was of the view that *Khumalo v Potgieter*<sup>286</sup> has solved the problem by adopting an approach that requires market value to be calculated first, because it is quantifiable, and thereafter adjusting the amount to be paid in compensation in terms of the other factors mentioned in section 25(3).<sup>287</sup>

#### 3.4.5.4 The purpose of the expropriation

Southwood<sup>288</sup> notes that the word "purpose" is intended to cover the immediate purpose for which the property is taken. When expropriating property, "purpose" must be given a generous and purposive interpretation, looking into the underlying principles and values of the Constitution in its context, together with the history of and background to its adoption, and in a manner that secures for individuals a full measure of protection.<sup>289</sup> Du Plessis<sup>290</sup> argues that when property is expropriated for a land reform purpose or any other reform purpose, the balance between the public interest and the interests of those affected might be achieved by allowing the public purpose factor to reduce the market value compensation. The argument put forward is thus that the purpose of the expropriation plays a considerable role in calculating just and equitable compensation in land reform cases.<sup>291</sup> The next question would be what happens when a foreigner's property is expropriated but not for land reform purposes?

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283 *Ex Parte Former Highlands Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) para 122.

284 See section 3.4.4 above.

285 *Ex Parte Former Highlands Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC)

286 *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) para 12.

287 *Ex Parte Former Highlands Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) para 40.

288 Southwood *Compulsory Acquisition of Rights* 22.

289 Southwood *Compulsory Acquisition of Rights* 22.

290 Du Plessis "The Public Purpose Requirement" 11.

291 Du Plessis "The Public Purpose Requirement" 11.

Would compensation at less than market value be considered just and equitable? Du Plessis argues that:<sup>292</sup>

...when expropriation is performed for run-of-the-mill, business-as-usual projects (like building a road, a railway or parking), then market value would probably be just and equitable since that would strike the balance between the public interest and the interests of those affected.

BITs anticipate actions similar to those alluded to by Du Plessis above, and justly require the payment to be at market value. Surprisingly, in the *Du Toit* case the court reduced the compensation from the market value and invoked section 25(3)(e), even though the expropriation that took place was not for land reform purposes but for building a public road. On the basis of the arguments above it is concluded that the compensation awarded in *Du Toit* was not just and equitable compensation as required by the Constitution. It is submitted that when foreign property is expropriated, a foreign investor is entitled to the payment of the market value of the expropriated property, unless the expropriation was for land reform purposes. It is unclear, however, how the government will bypass the BITs in cases where foreign property was expropriated for land reforms or any other reform under section 25(3)(e). This issue will be investigated in Chapter 5 of this study.

### **3.5 Conclusion**

The constitutional provisions discussed above serve as a guarantee that foreign investors will not be subjected to arbitrary acts by the government, especially if the arbitrary acts are aimed at depriving them of their investments. When expropriating property, the courts ought to consider section 33 of the Constitution, which stipulates that everyone has a right to administration that is lawful, reasonable and procedurally fair.<sup>293</sup> The South African law mandates the government to take actions that are just and procedurally fair when dealing with matters that affect citizens, and this restriction must also apply to the expropriation of foreign property.

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292 Du Plessis "The Public Purpose Requirement" 11.

293 Ngwenya *Protection of Foreign Investment* 60-61.

The South African position on expropriation can be summarised as follows. Before 1994, under the auspices of the *Expropriation Act*, expropriation was lawful only if it was carried out for a public purpose and resulted in compensation paid at the market value of the expropriated property. This approach is reflected in South African BITs. Conversely, section 25 of the 1996 Constitution stipulates different factors which are to be taken into consideration in determining just and equitable compensation. The Constitution permits the deprivation of property only when it is exercised through a law of general application, and it prohibits the enactment of any law which authorises arbitrary deprivation. Notably, the expropriation of land should be in the public interest or for a public purpose, and such expropriation must be compensated in a just and equitable manner, showing an equitable balance between the public interest and the interests of those affected. When determining such just and equitable compensation, the factors listed in section 25(3)(a) to (e) should be taken into consideration. Land reform is one of the objectives the Constitution aims to achieve. In cases where the public interest is compelling, such as land reform, "less than market value" compensation may be paid to the affected parties.<sup>294</sup>

This chapter of the study has shown that the interpretation of the property clause is not without challenges. As seen in *AgriSA*, it is difficult to strike a balance between protecting private property and the demands of public interest, especially in expropriation cases that are aimed at addressing the historical injustices created by apartheid.

In a nutshell, aliens' property is also protected by section 25, and section 25 also gives the government the right to expropriate aliens' property following the procedure and guidelines stipulated in the Constitution.

South Africa's legal frameworks and international law on the protection of the property of aliens having been analysed, the next chapter will investigate the protection of property available to foreign investors under the South African BITs.

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294 Mostert *The Constitutional Protection and Regulation of Property* 344, 348; Chaskalson 1995 *SAJHR* 232; Alexander *The Global Debate* 42.

## **Chapter 4: Property rights established under South African BITs**

### **4.1 Introduction**

The signing of the BITs after 1994 by the government was an assurance given to foreign investors that the government would implement economic policies that are ideal for business.<sup>295</sup> In addition to attracting FDI into the country for the purposes of economic development, the government also had a mandate authorised by the Constitution to right all the apartheid injustices, especially the economic inequality that benefitted the majority of the white people, whereas black people were excluded from the mainstream economy.<sup>296</sup> Consequently, the government introduced the MPRDA and BEE to right apartheid wrongs.<sup>297</sup> However, the MPRDA was challenged by the foreign investors, who alleged that the MPRDA and BEE violated their rights under South African BITs by expropriating their property unlawfully. The MPRDA provisions in question will be discussed later in the chapter. In the light of the above, this chapter will analyse South Africa's BITs clauses and determine how far they are inconsistent with South African law. The chapter will also analyse the problems created by the South African BITs to the South African government, which eventually led to a legal dispute with the government, which prompted a review and termination of the BITs by the government.

### **4.2 BITs and their purposes**

South Africa's BITs give a guarantee to foreign investors that their property will be protected against political and other numerous perils vastly common in some developing countries.<sup>298</sup> Some countries prefer using their own model agreements when negotiating individual BITs.<sup>299</sup> South Africa's BITs contain the following five substantive issues; conditions for the admission of investors to the host state, standards of

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295 Ngwenya *Protection of Foreign Investment* 31.

296 Poulsen *Sacrificing Sovereignty by Chance* 260; Green 2015 <http://www.thisisafricaonline.com>.

297 Green 2015 <http://www.thisisafricaonline.com>.

298 Peterson *South Africa's Bilateral Investment Treaties* 1.

299 Peterson *South Africa's Bilateral Investment Treaties* 6.

treatment of investors, expropriation, compensation and arrangements for resolving investment disputes.<sup>300</sup>

### **4.3 South African BITs**

South Africa signed its first BIT, which was called *An Agreement for the Promotion and Protection of Investment* 1994 and was between South Africa and United Kingdom in 1994.<sup>301</sup> Between 1994 and 1998 South Africa concluded a total of 15 BITs, these being with most European countries.<sup>302</sup> South Africa has signed at least 41 investment treaties, of which 17 are presently still in force.<sup>303</sup>

The preambles of the BITs generally provide objectives that the parties seek to achieve, such as achieving strong ties of friendship, developing economic relationships, and protecting investments to increase capital and technology flows. Further, they reveal the intention to increase economic cooperation and create the best environment for investments.<sup>304</sup> They also stipulate the right to repatriate dividends and profits and ensure compensation when the properties of investors are nationalised or expropriated.<sup>305</sup>

#### **4.3.1 Expropriation in South African BITs**

In order for the expropriation of foreign property to be lawful in terms of South Africa's BITs, it must be for a public purpose or in the public interest. A number of the BITs use words such as "public purpose" in connection with expropriation,<sup>306</sup> while others use "public interest".<sup>307</sup> The public interest is normally not defined in South Africa's BITs, and whether a "public interest" is given the same meaning as "public purpose" and vice

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300 Mina 2010 *African Centre for Economics and Finance* 1.

301 Peterson *South Africa's Bilateral Investment Treaties* 4.

302 Department of Trade and Industry 2010 [www.dti.gov.za](http://www.dti.gov.za).

303 Peterson *South Africa's Bilateral Investment Treaties* 6.

304 *An Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa on the Promotion and Protection of Investments*. See the Preamble.

305 Article 6 of the Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of South Africa for the promotion and protection of investments (adopted 20/09/1994; came into force 27/05/1998).

306 See SA–UK BIT.

307 See SA–Sweden BIT.

versa is not known. As previously indicated,<sup>308</sup> the *Expropriation Act* defined a public purpose and the Constitution<sup>309</sup> further stipulated guidelines on what the public interest encapsulates. Article 5 of the Agreement between the Republic of South Africa, *Northern Ireland and the United Kingdom for the promotion and protection of investments* (1998) (SA-UK BIT) provides that:<sup>310</sup>

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation hereinafter referred to as expropriation in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, and shall include interest at a normal commercial rate until the date of payment.

On the other hand, Article 4 of the Agreement between the Republic of South Africa and the Kingdom of Sweden on the promotion and reciprocal protection of investments (1998) (SA-Sweden BIT) does not permit South Africa to deprive investors of investment except in cases where the following conditions are followed:

- (a) The measures are taken in the public interest and under due process of law
- (b) The measures are distinct and not discriminatory; and
- (c) The measures are accompanied by provisions for the payment of compensation, meaning the amount for which something can be sold on a given market transferable without delay in a freely convertible currency.

Further, Article 4 (2) of the *Treaty between the Federal Republic of Germany and the Republic of South Africa concerning the Reciprocal Encouragement and Protection of Investments* (1995) (German BIT) states that:<sup>311</sup>

Investments by nationals or companies of either contracting party shall not be expropriated, nationalised or subjected to any other measure the effects of which would be tantamount to expropriation or nationalisation in the territory of the other contracting party except for the public interest and against compensation.

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308 See section 3.3.3.1 and 3.4.4 of this study.

309 Section 25(4) of the Constitution.

310 See SA-UK BIT.

311 Article 4(2) of the *Treaty between the Federal Republic of Germany and the Republic of South Africa concerning the Reciprocal Encouragement and Protection of Investments* (adopted 11/09/1995).

It is submitted that in the absence of clear definitions and or guidelines on what the public interest is, ambiguous interpretations will likely be made. This may in effect lead to undesirable results for both the government and foreign investors. Also unclear is Article 4(2) of the German BIT, which refers to any measure that impacts on the use of the property and deprives investors of the expected economic benefit. It does not differentiate between deprivation and expropriation, inferring that deprivation would be equal to expropriation and would therefore result in compensation.<sup>312</sup> On the other hand, the Constitution<sup>313</sup> clearly states that deprivation does not require compensation if the measures were pursuant to law and not arbitrary. This is another problem area in South Africa's BITs.

#### 4.3.2 Compensation in BITs

South Africa's BITs provide that expropriation shall be accompanied by prompt, adequate and effective compensation.<sup>314</sup> Article III (2) of the *Agreement between the Republic of Turkey and the Republic of South Africa in relation to the reciprocal promotion and protection of investments* (2002) provides that:<sup>315</sup>

Such compensation shall amount to the market value of the expropriated investment before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest until the date of payment, and shall be made without delay.

The BITs with Finland,<sup>316</sup> Tanzania,<sup>317</sup> Libya<sup>318</sup> and Tunisia<sup>319</sup> also stipulate that the appropriate compensation is market value. The Constitution stipulates to the contrary

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312 Mutsaers *Revisiting Bilateral Investment Treaties* 48.

313 Section 25 of the Constitution.

314 SA-UK BIT.

315 Article III (2) of the *Agreement between the Republic of Turkey and the Republic of South Africa Concerning the Reciprocal Promotion and Protection of Investments* (adopted 23/06/2000).

316 Articles 5(1) and (2) of the *Agreement Between the Government of the Republic of Finland and The Government of the Republic of South Africa On the Promotion and Reciprocal Protection of Investments* (adopted 14/09/1998, entered into force 03/10/1999).

317 Articles 6(1) and (2) of South Africa and Tanzania BIT.

318 Articles 5(1) and (2) of the *Agreement Between the Government of Republic of South Africa and The Great Socialist People's Libyan Arab Jamahiriya for The Promotion and Reciprocal Protection of Investments* (adopted 14/06/2002).

319 Article 5(1) of the *Bilateral Agreement Between the Republic of South Africa the Republic of Tunisia for The Promotion and Reciprocal Protection of Investments* (adopted 28/02/2002).

that compensation should be just and equitable, balancing the public interest and the interests of those affected equitably and considering all relevant circumstances.<sup>320</sup>

South Africa's BITs standard of compensation is inconsistent with the Constitution. The compensation required in the Constitution is different and provides less protection to the investor than the BITs.<sup>321</sup> South Africa's BITs use wording such as an actual value, genuine value, market value and real value, all of which are commonly understood to be synonyms for market value.<sup>322</sup>

#### 4.3.3 Fair and equitable treatment

The FET principle is one of the most important features of South African BITs. Article 2 of the SA-UK BIT<sup>323</sup> provides that investments of nationals or companies of each contracting party shall at all times be accorded FET and shall enjoy full protection and security in the territory of the other contracting party. The FET principle has been the subject of continuing debate because of the varying interpretations tribunals have accorded to it in BITs such as this.

The FET principle was endorsed in the *Havana Charter for an International Trade Organisation* (1948).<sup>324</sup> This charter did not come into force because it lacked support from many countries. However, FET played an important role in the making of BITs and most of the BITs incorporated it. FET means different things to different people. This can be witnessed in the BITs themselves as well as in the interpretations in international arbitration.<sup>325</sup> FET is understood and accepted by some as the IMS of treatment of foreigners and their property.<sup>326</sup> In the case of *Alex Genin, Eastern Credit*

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320 Mutsau *Revisiting Bilateral Investment Treaties* 49; s 25(3) of the Constitution.

321 Mutsau *Revisiting Bilateral Investment Treaties* 49.

322 Mutsau *Revisiting Bilateral Investment Treaties* 49.

323 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa*. (Adopted 20/09/1994, entered into force 27/05/1998).

324 Article 11(2).

327 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v Republic of Estonia ICSID Case no ARB/99/2*.

327 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v Republic of Estonia ICSID Case no ARB/99/2*.



*Limited, Inc. and A.S. Baltoil (US) v Republic of Estonia*<sup>327</sup> the claimant wanted to recover its losses from the Estonian financial investment institution. The ICSID tribunal<sup>328</sup> deliberated on whether the principle of FET had been violated by the Bank of Estonia under the US-Estonia 1994 BIT, but the claim was dismissed. The tribunal held that FET requires the IMS and not the municipal law standard.<sup>329</sup> Again, in the case of *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*<sup>330</sup> the tribunal stressed that the concept of FET conformed to the international treatment principle of IMS. This approach is dismissed by others, who claim that it does not reflect international law because it is not accepted by many. It should be noted that most tribunal decisions take the same approach as that in *Alex Genin case* pertaining to FET.<sup>331</sup>

#### 4.3.4 National treatment provision

The purpose of this provision is to protect foreign investors from laws, regulations and government policies that may treat domestic investors more favourably than foreign investors.<sup>332</sup> The SA-Netherlands BIT provides that:<sup>333</sup>

...each contracting party shall accord to such investments treatment which in any case shall not be less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

This provision does not take into consideration the rights of governments to grant better treatment to citizens in certain circumstances.<sup>334</sup> For instance, section 9(2) of the Constitution provides for affirmative action measures.<sup>335</sup> It incorporates this provision in order to achieve equality and for the protection of categories of persons

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327 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v Republic of Estonia ICSID Case no ARB/99/2*.

328 International Centre for Settlement of Investment Disputes of 1996.

329 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v Republic of Estonia ICSID Case no ARB/99/2*.

330 International Legal Materials 30 (1991) 580-655.

331 Peterson *South Africa's bilateral investment treaties* 4.

332 Mutsau *Revisiting Bilateral Investment Treaties* 45.

333 Article 3(2) of SA-Netherlands BIT.

334 Mutsau *Revisiting Bilateral Investment Treaties* 46.

335 Section 9(2) provides that equality includes all of the rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken; Mutsau *Revisiting Bilateral Investment Treaties* 46.

disadvantaged by unfair discrimination in the past.<sup>336</sup> The Netherlands BIT will affect the application of section 9(2) of the Constitution since it prohibits any form of discrimination irrespective of the basis for such a measure. The government has realised that its ability to regulate its domestic public policy was under serious threat from its BITs obligations, particularly from clauses such as the national treatment clause mentioned above, and from international arbitration clauses. For that reason South Africa has cancelled a number of BITs with many European countries.

#### *4.3.5 International arbitration*

The dispute resolution clauses in South Africa's BITs allow investors to take disputes arising from the protection of the investment or expropriation of property directly to international arbitration instead of using the South African legal system. This was done in the *Foresti* case. The risk with the arbitration clause found in most BITs is that it is utilised only at the request of the investor. The foreign investors in *Foresti* invoked the arbitration clause under the ICSID and initiated legal action against the government when BEE policies and the MPRDA were introduced. The *Foresti* case is important because it was after this legal action that the South African government concluded that the arbitration clause and many other clauses in the BITs undermine the sovereignty of the country. The case will be discussed hereunder.

### **4.4 Why South Africa reviewed its BITs**

#### *4.4.1 The MPRDA and Piero Foresti v Republic of South Africa*

A group of investors from Italy and Luxembourg initiated legal proceedings against South Africa through the ICSID.<sup>337</sup> They filed a claim pursuant to the provisions of the *Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic for the Promotion and Protection of Investments* (1997) (Italy-South Africa BIT) and the *Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments* (1998) (Luxembourg BIT).

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<sup>336</sup> Preamble of the BEE Act.

<sup>337</sup> Brickhill and Du Plessis 2011 *SAJHR* 154.

The investors alleged that South Africa was in breach of both article 5 of the Italy-South Africa BIT and the Luxembourg BIT. Article 5 of the Italy-South Africa BIT provides that the investment of a contracting party shall not be expropriated directly or indirectly if not for public purposes, and if it is expropriated immediate, full and effective compensation must be given to such an investor.<sup>338</sup> Article 5<sup>339</sup> of the Luxembourg BIT also provides that an investor's investment will not be expropriated unless it is for a public purpose against prompt, adequate and effective compensation.

The claimants claimed that because of the enactment of the MPRDA, the respondent expropriated all of their mineral rights unlawfully. They contended that the promulgation of the MPRDA extinguished their mineral rights and gave them a procedural right to apply for conversion of their old-order mineral rights into the much-diminished new-order mineral rights.

The MPRDA is an example of reform legislation. It abolished private ownership of minerals based on land ownership or the holding of severed real rights to the minerals, which existed under the mining law dispensation before the Constitution.<sup>340</sup> It established a mineral law dispensation in which the state was made the custodian of mineral resources and had the discretion to permit exploitative access to such resources to all South African people.<sup>341</sup> The new dispensation is intended to redress inequities of the past in the mining sector and to promote efficient development.<sup>342</sup> With this development, old-order mining rights holders were allowed to have those rights changed into new-order MPRDA rights.<sup>343</sup>

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338 Article 5(1)(2) of Italy South Africa BIT.

339 Investments of investors of either Contracting Party shall 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 a public purpose related to the internal needs of that Party, as legal process, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the actual value of the expropriated investment immediately before the date of expropriation or the date on which the expropriation was made public, irrespective of the first of these two dates. It will include interest at the normal commercial rate until the date of payment, will be made without delay, be effectively realizable and freely transferable at the market applicable on the date of transfer pursuant to the exchange regulations in force.

340 Section 100 of MRDA makes provision for transformation in the mining industry.

341 *AgriSA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) A, 2013 4 SA para 80.

342 Ngwenya *Protection of Foreign Investment* 71.

343 Department of Trade and Industry 2010 <https://www.dti.gov.za>.

The MPRDA was introduced among other reasons to bring South Africa's mineral rights regime in line with the provisions of its Constitution and to provide for the state to fulfil its constitutional role as the custodian of the nation's mineral wealth on behalf of the people of South Africa.<sup>344</sup>

Foreign investors alleged that the old-order mining rights were effectively directly or indirectly expropriated as of 1 May 2009 because at the end of the conversion process no new-order right had been granted and, in consequence, no compensation was granted. They argued that the compensation in South Africa fails to satisfy the standards for compensation required under the BITs.<sup>345</sup> The claimants argued that these old-order mining rights could have been expropriated against an incorrect measure of compensation.

Furthermore, they argued that their shares in the operating companies had also been expropriated under the BEE equity requirements established by the operation of the MPRDA together with the Mining Charter.<sup>346</sup> They pointed out that the Mining Charter mandates foreign investors to sell 26% of their shares in some relevant mining firms to the HDSAs.<sup>347</sup> They alleged that the equity divestiture scheme creates an indirect or direct or partial expropriation of their shares in the operating companies. They concluded that this expropriation of their shares in the operating companies is unlawful in cases where it fails to pay compensation.

In response, the South African government argued that direct expropriation requires the complete deprivation of all the rights enjoyed by the investor, along with the transfer of ownership and control to a different beneficiary. South Africa argued that in this particular case, the transfer of ownership or deprivation had not taken place. Further, the government contended that there can be no indirect expropriation where the action in question is a rational and proportional means of pursuing legitimate public regulatory purposes.

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344 Department of Trade and Industry 2010 <https://www.dti.gov.za>.

345 Peterson *South Africa's Bilateral Investment Treaties* 4.

346 *Piero Foresti* case para 14.

347 Schneiderman 2009 *SAJHR* 246; Peterson *South Africa's Bilateral Investment Treaties* 4.

The government's argument echoed the decision reached by the Constitutional Court in *AgriSA*, when it held that indirect expropriation had not taken place because the property in question had not been acquired by the government but transferred to a third party.

It is unfortunate, however, that the tribunal was never given a chance to deliberate on the validity of the government's argument that it is not expropriation if the state does not acquire the ownership of the property. It is submitted that when the government transferred the operating shares to the HDSAs, that act amounted to indirect expropriation.

As the deadline date for the conversion of the old-order rights approached, the investors lodged their old-order rights for conversion, which was done according to the MPRDA. After this the claimants wished to withdraw their claims, contending that as much as they were not granted full relief for their alleged claims, the government had agreed that the 26% BEE ownership requirement in terms of the MPRDA and the Mining Charter would not be implemented. Black ownership was then limited to 5%. The tribunal did not deliver a verdict on this case because both parties had already agreed to settle before the arbitration proceedings.<sup>348</sup> The case was finally upheld in favour of the claimants' terms.<sup>349</sup> One can argue in this context that South Africa failed dismally to fulfil its constitutional mandate of addressing the injustices of the past in this regard.<sup>350</sup> As the tribunal was not involved in the decision-making, the following question remained unanswered; whether unlawful expropriation had happened, and whether the MPRDA and BEE had violated international law and the provisions of the BIT, or if a different decision could have been made had the tribunal been involved, especially based on the precedents set in international arbitrations.<sup>351</sup>

It is believed that the *Foresti* case could have ended differently for South Africa, when it is called to mind that previous cases pertaining to the actions of host states had

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348 Department of Trade and Industry 2010 <https://www.dti.gov.za>.

349 Harten 2011 [www.iiapp.org](http://www.iiapp.org).

350 Leon *Business Day* 1.

351 Friedman 2010 *Brigham Young University International Law and Management Review* 1-2.

resulted in tribunals ruling in favour of the foreign investors.<sup>352</sup> Poulsen<sup>353</sup> submits that this case could have had dire effects on South Africa had the claim by the Italian investors been successful. It would have opened the floodgates for similar claims to question the redistributive efforts of the post-apartheid regime. In the light of the development of the *Foresti* case, South Africa reached the conclusion that BITs are bad commitments. The government decided to rethink its position regarding BITs, and the review of the BITs was initiated.

#### 4.4.2 Review of the BITs

The government began the process of reviewing the BITs in 2008 after the conclusion of the *Foresti* case. The opinion formed by the government was that the current BIT system left the door open to investors' placing their interests above those of the host state.<sup>354</sup> The Department of Trade and Industry (DTI) concluded that it was apparent that South Africa was facing challenges from foreign investors seeking to rely on the provisions of BITs to claim compensation from South Africa for failing to comply with its obligations.<sup>355</sup> Several BITs were compared with the South African law, and it was established that the expropriation standards in the BITs differ from those in domestic law.<sup>356</sup> The DTI expressed the opinion that the BITs did not make a distinction between deprivation and expropriation, that words such as "measures having an effect equivalent to expropriation" are not recognised in the South African expropriation law, and that nationalisation as found in the BITs is not recognised in the Constitution.<sup>357</sup> It was further articulated that a failure to differentiate expropriation from deprivation would mean that valid government regulation could be seen as indirect expropriation or regulatory expropriation.<sup>358</sup> The opinion reached after the review was that although "adequate policy space is a key developmental tool for developing countries":<sup>359</sup>

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352 Sheffer 2010 *Den J Int'l L & Pol'y* 483.

353 Poulsen *Sacrificing Sovereignty By Chance* 268.

354 Carim *Lessons from South Africa's BIT's Review* 109.

355 Bosman "South Africa" 12.

356 Bosman "South Africa" 12.

357 Bosman "South Africa" 12.

358 Bosman "South Africa" 13.

359 Department of Trade and Industry 2009 <http://www.tradeandindustry.gov.za>.

The current BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for development and that (n)ew investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source local inputs and that under such conditions investment would fail to encourage or enhance development.

It was concluded that South Africa needs to develop a BIT model that will accommodate the country's development needs instead of making compromises in order to provide certainty to investors while neglecting South Africa's own interests.<sup>360</sup> It was further recommended that the government should develop legislation that would ensure that a proper balance was achieved.<sup>361</sup>

After the finalisation of the review, the South African cabinet took the review into account and decided that South Africa would not enter into BITs unless there was a compelling political and economic reason to do so.<sup>362</sup> South Africa's BITs were terminated and the erstwhile partners were offered an opportunity to re-negotiate BITs on the new model.<sup>363</sup> The Cabinet decided that it would develop a new investment Act that would align BITs with the Constitution.<sup>364</sup>

#### **4.5 Conclusion**

This chapter has examined the features of South African BITs in detail and comprehensively analysed the provisions directly linked to expropriation and compensation for the taking of foreign investors' property. One can conclude that the BITs created rights and duties for South Africa and for foreigners; however, these obligations seem to favour foreign investors more than South Africans, as can be seen in arbitration clauses that allow only foreign investors to initiate arbitration proceedings. As shown above, BITs have one criterion for the determination of compensation, which places an obligation on a state to pay the market value for the expropriation of an international investment. In essence, the main challenge is that the BITs are not in line with South African legislation and the Constitution.

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360 Bosman "South Africa" 13.

361 Department of Trade and Industry 2009 <http://www.tradeandindustry.gov.za>.

362 Carim *Lessons from South Africa's BIT's Review* 1, 3.

363 Carim *Lessons from South Africa's BIT's Review* 2-3.

364 Carim *Lessons from South Africa's BIT's Review* 1, 3.

If these inconsistencies had not been addressed by the government, it may have faced more legal disputes such as the one in *Foresti* case from foreign investors for the violation of the BITs. In conclusion, the government is applauded for having addressed these inconsistencies and enacting the PPIB for the regulation of investments.



## Chapter 5: Promotion and Protection of Investment Bill

### 5.1 Introduction

The controversial dissimilarities between South African law and the BITs still exists, even after the *Foresti* case, which regrettably failed to address this issue. Owing to the differences between the BITs and the Constitution with reference to the expropriation of and compensation for foreign property, the government introduced the PPIB as the legal framework to regulate foreign investments. The PPIB was published by the government on 1 November 2013.<sup>365</sup> It intends to merge all foreign investment regulations into a codified framework dissimilar to the plural system that the BITs utilise.<sup>366</sup> It is important to establish if the PPIB succeeds in balancing property rights and the constitutional imperative to redress the unjust distribution of property in the past. The PPIB came into being soon after South Africa had decided to terminate the BITs with some European countries.<sup>367</sup> Immediately it sparked concerns that its promulgation might cause a decrease in FDI.<sup>368</sup> One of the main concerns was that the PPIB does not accommodate acceptable international standards.<sup>369</sup>

It is against this background that this study was conceived of. The aim of the study in this chapter is to investigate the provisions of the PPIB and determine if it addresses the issues of the constitutional protection of property and the protection of property in the BITs. This chapter is divided in two parts. The first part analyses the relevant provisions by looking at the implications of such provisions. It is concluded that the PPIB has weaknesses that need to be eliminated. The last part discusses the provisions that are normally found in BITs but which are excluded from the PPIB, such as FET and international arbitration. This study concludes that the omissions are erroneous and need to be revisited.

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365 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>

366 Webb 2013 *Without Prejudice* 10.

367 It is the view of the South African Government that BITs create problems for South Africa. Webb 2013 *Without Prejudice* 10.

368 Webb 2013 *Without Prejudice* 10.

369 Ensor *Business Day* 3.

## **5.2 Features of the Promotion and Protection of Investment Bill 2013**

### *5.2.1 Interpretation clause*

Clause 2 requires that the interpretation of the PPIB be in accordance with the Constitution or international law.<sup>370</sup> This means that an interpretation of any provision in the PPIB that is not consistent with the Constitution or international law will be invalid.<sup>371</sup> Surprisingly, the Constitutional Court failed to recognise a principle of international law by failing to recognise that indirect expropriation came into effect when the government under the authority of the MPRDA expropriated the property of the investors in the *AgriSA* case.<sup>372</sup> It remains to be seen whether the rules of international law will be upheld when the PPIB is interpreted by the courts, or whether the courts will favour a domestic legislation over international law. It is to be noted that the Permanent Court of International Justice in the *Treatment of Polish Nationals* case<sup>373</sup> held that with reference to generally accepted principles, one nation cannot depend on the provisions of its Constitution or the Constitution of another nation to avoid its obligations as provided under international law or treaties in force, but that such a nation should rely only on international law and international obligations that are accepted.<sup>374</sup> Conversely, international law principles can be challenged in international courts for denying justice, if such is proven.<sup>375</sup>

### *5.2.2 Purpose of the Bill*

The preamble of the PPIB states that the Bill provides:<sup>376</sup>

...for the legislative protection of investors and the protection and promotion of investment; to achieve a balance of rights and obligations that apply to all investors; and to provide for matters connected therewith.

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370 Section 232 of the Constitution stipulates that customary international law is law in the Republic only when it is consistent with the Constitution or an act of Parliament.

371 Department of International Relations 2014 [www.dpr.gov.za](http://www.dpr.gov.za).

372 The court ruled that if the state does not acquire the property but transfers it to a third party, that act cannot amount to expropriation. This is recognised as indirect expropriation; *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 80.

373 *Treatment of Polish Nationals Persons of Polish Origin or Speech in the Danzig Territory* Advisory Opinion 4-02-1932.

374 Bishop, Crawford and Reisman *Foreign Investment Dispute* 543.

375 South African Institute of International Affairs Submission on South Africa's PPIB 2013 6.

376 PPIB preamble.

The PPIB aims to promote investments by developing the existing investment system in such a way as to attract both local and foreign investors by attaining a balance of rights and obligations applicable to every investor in South Africa.<sup>377</sup> The PPIB's preamble recognises the importance of investment in the creation of jobs, economic growth, sustainable development and the well-being of the people of South Africa.<sup>378</sup> In order to promote investment, the PPIB creates an environment that enables its purpose, as well as providing a sound legislative framework that protects all investments, including foreign investments.<sup>379</sup>

However, it is going to be challenging to achieve these objectives, mainly because the PPIB contains provisions that undermine the property rights expressed in the BITs and in international law. Instead of promoting FDI, the PPIB has the potential to repel the FDI that the government is aiming to attract, mainly because of the standard of compensation set in the PPIB.<sup>380</sup> South Africa has not been receiving any significant FDI compared to its counterparts. Some authorities justifiably argue that South Africa does not need BITs because foreign investors from some countries have invested in the country even without signing a BIT, China being a case in point.<sup>381</sup> Some are also of the opinion that signing a BIT has no major economic effect, in the sense that BITs are not noted for inspiring a huge increase in foreign investment.<sup>382</sup> This is evident in The World Bank's 2003 Report on the Global Economic Prospects of the Developing Countries, which determined that even the relatively strong protections in BITs do not really seem to have increased flows of investment to signatory developing countries.<sup>383</sup> The Bank reached this conclusion based on Mary Hallward-Driemeier's study of 20 years of data,<sup>384</sup> which shows that countries that had not signed BITs were no less likely to receive FDIs than countries that had signed BITs.<sup>385</sup> However, since 1994 South Africa

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377 Kleyn and Dean 2014 <<http://blogs.sun.ac.za/iplaw/2014/02/06/promotion-and-protection-of-investment-Bill-2013-a-review/>>.

378 Kleyn and Dean 2014 <<http://blogs.sun.ac.za/iplaw/2014/02/06/promotion-and-protection-of-investment-Bill-2013-a-review/>>.

379 PPIB Preamble. See South African Institute of Race Relations 2015 <http://irr.org.za/repo>.

380 South African Institute of Race Relations 2015 <http://irr.org.za/reports>.

381 Athanasios 2006 <https://www.imf.org/external/pubs/nft/2006/soafrica/eng/pasoaf/sach5>.

382 Poulsen *Sacrificing Sovereignty by Chance* 268.

383 Ngwenya *Protection of Foreign Investment* 109.

384 Ngwenya *Protection of Foreign Investment* 109.

385 Peterson *South Africa's Bilateral Investment Treaties* 10.

has profited tremendously from FDI. For instance, currently the government is able to develop an improved economic situation by way of policies such as BEE and the MPRDA, which have transferred operating shares from foreign investment in the mining industry to HDSAs.<sup>386</sup> Against this background it is submitted that it is crucial for the government to have clear legislation that will help it to attract more FDI into the country.

### *5.2.3 Expropriation*

Clause 8(1) of the PPIB provides that an investment may not be expropriated unless the expropriation is performed in accordance with the Constitution and in terms of a law of general application, for public purposes or in the public interest, against just and equitable compensation effected in a timely manner. Clause 8(2) further provides that the following acts, which are not limited, do not amount to acts of expropriation:

- a. A measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment;
- b. a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health, safety, environmental protection or state security;
- c. the issuance of a compulsory licence granted in relation to intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property; and
- d. any measure which results in the deprivation of property but where the state does not acquire ownership of such property provided that;
  - (i) there is no permanent destruction of the economic value of the investment; or
  - (ii) the investor's ability to manage, use or control his or her investment in a meaningful way is not unduly impeded.

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386 Peterson *South Africa's Bilateral Investment Treaties* 10.

Clause 8 aligns the expropriation provisions applicable to foreign investments with the property clause in the Constitution. Some of these provisions with regard to the expropriation process in South Africa have been included based on the *AgriSA* case decision, and the *Expropriation Bill*.<sup>387</sup> Clauses 8(2)(a) and (d) omits the principles of constructive/indirect expropriation and limits the application of expropriation.<sup>388</sup> Clause 8 will most probably cause disputes, because it is not in line with international law, as discussed above.<sup>389</sup>

#### 5.2.4 Compensation

Clause 8(1) guarantees property owners just and equitable compensation in the event of expropriation, and provides that compensation must be in line with section 25 of the Constitution.<sup>390</sup> The Constitution provides that market value is one of the relevant factors to be considered when determining the amount of compensation payable to the owner of the expropriated property.<sup>391</sup> However, clause 8(2) of the PPIB includes provisions that specify a number of actions that may be undertaken by the state, and suggests that such actions do not amount to acts of expropriation.<sup>392</sup> This means that the PPIB does not guarantee that an investor will be compensated if the taking falls under one of the actions covered by clause 8. Moreover, if the expropriation requirements are met, there is no guarantee that investors will be compensated to the amount of the full market value of their investment when the Constitution's just and equitable compensation standard is applied. However, there are BITs such as the SA-UK

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387 Ngwenya *Protection of Foreign Investment* 109.

388 Ngwenya *Protection of Foreign Investment* 109.

389 See section 2.4.1.2.

390 Clause 8(1) of the PPIB.

391 See section 3.3.3.2 above.

392 Clauses 8(1) and (2) of the PPIB provide that the following acts, which are not limited, do not amount to acts of expropriation: a measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment; i.e. a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security; ii. the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property; and iii. any measure which results in the deprivation of property but where the State does not acquire ownership of such property provided that a. there is no permanent destruction of the economic value of the investment; or b. the investor's ability to manage, use or control his or her investment in a meaningful way is not unduly impeded.

BIT that require compensation to be paid at market value.<sup>393</sup> This is a major distinction between the Constitution and BITs.

The PPIB provides that the compensation payable for expropriation must balance the public interest and the interests of those affected equitably, and must take all relevant circumstances into consideration.<sup>394</sup> However, it is quite challenging for one to "quantify the listed factors in monetary value, therefore, the state officials are granted the discretion to decide the value in any case".<sup>395</sup> The existence of this state discretion may result in the determination of unfair values which are less than the market value of the investments.<sup>396</sup> This view is shared by others, who are of the view that it is better for foreign investors to be assured of full market value compensation than to be given a guarantee of just and equitable compensation, because the exact quantity of the compensation is likely to be less predictable and more likely to be politically influenced.<sup>397</sup>

Clause 8(4) also provides a guarantee that the investor will be paid with interest and that payment should be without delay. This is aligned with the prompt and effective provisions contained in BITs. The challenge is that clause 8(3) of the PPIB requires a number of factors to be taken into consideration before deciding on the amount payable to an expropriatee.<sup>398</sup> This may create a perception to investors that should an expropriation take place the compensation may not be the full market value of the expropriated property.<sup>399</sup> If clause 8(3) of the PPIB is taken into account, this may result in a payment that is less than market value. The PPIB needs to incorporate a provision that will "develop a middle path compensatory standard which would be acceptable to both government and investors".<sup>400</sup>

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393 Jeffery 2013 *Without Prejudice* 19.

394 Clause 8(3) of the PPIB.

395 South African Institute of Race Relations 2015 <http://irr.org.za/reports>.

396 Jeffery 2013 *Without Prejudice* 18.

397 Woolfrey, of the Trade Law Centre of Southern Africa, shares the same views, as may be seen in South African Institute of Race Relations 2011 <http://irr.org.za/reports>.

398 South African Institute of Race Relations 2011 <http://irr.org.za/reports>.

399 South African Institute of Race Relations 2011 <http://irr.org.za/reports>.

400 South African Institute of Race Relations 2011 <http://irr.org.za/reports>.

### 5.2.5 National treatment

The national treatment principle is an international economic law that requires that if a state provides certain rights and privileges to its citizens, it should also provide equal rights and privileges to foreigners.<sup>401</sup> It is submitted that clause 6, which has to do with national treatment, is subject to South African law and not international law.<sup>402</sup> The legislation referred to in clause 6(3) includes the MPRDA, the *Expropriation Act*. The promise of equal treatment is challenged by numerous provisions.<sup>403</sup> Firstly, it is subject to national legislation which means that it can be easily modified by other statutes.<sup>404</sup> Secondly, the PPIB defines "like circumstances" in a complex manner that is ambiguous and does not give foreign investors any clarity on what "like circumstances" are. Ultimately, it is highly unlikely that the national treatment principle will be complied with.<sup>405</sup>

### 5.2.6 Security of investment

South Africa's BITs provide security and full protection to all investors and their property. In the context of the above discussion about national treatment, it is worth noting that clause 7 states that South Africa must provide foreign investors with the degree of security equivalent to that granted to locals, but subject to the available

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401 Sanders *The Principles of National Treatment* 3.

402 The PPIB 6(1) The Republic must give effect to national treatment and treat foreign investors, their investments and returns not less favourably than it treats South African investors in their business operations that are in like circumstances.

6(2) The national treatment referred to in subsection (1) only applies to foreign investors and foreign investments held in accordance with applicable legislation.

6(3) A foreign investor may conduct without restraint various activities of foreign investment in the Republic, subject to applicable legislation.

6(4) For the purpose of this section, like circumstances means the requirement for an overall examination on a case by case basis of all the terms of a foreign investment, including the following factors:

- (a) The effect of the foreign investment on the Republic, including the cumulative effects of all investments;
- (b) The sector that the foreign investment is in;
- (c) The aim of any measure relating to foreign investments; and
- (d) Other factors relating to the foreign investor or the foreign investment in relation to the measure concerned.

6(5) The examination referred to in subsection (3) shall not be limited to or biased towards any one factor.

403 South African Institute of Race Relations 2015 <http://irr.org.za/reports>.

404 South African Institute of Race Relations 2015 <http://irr.org.za/reports>.

404 South African Institute of Race Relations 2011 <http://irr.org.za/reports>.

405 Lang 2014 [www.BowmanGilfillan.co.za](http://www.BowmanGilfillan.co.za).

capacity and resources.<sup>406</sup> It seems, then, that foreign investors may not have a guarantee of equal treatment, since the security level to be provided is not clear. One could argue that the state inserted this clause to minimise its responsibility for safety and security when it comes to foreign investors, as well as considering its available resources and capacity.<sup>407</sup>

International law also compels states to provide security to the property of investors.<sup>408</sup> Clause 7(1) aims to codify this provision into South African law, but it differs from international investment law standards in that the nature of the security in question is to be determined by the available resources and capacity.<sup>409</sup>

### *5.2.7 Public interest and public purpose*

Clause 3(a) of the PPIB provides that the purpose of the Act is to promote and protect investment in a way that is consistent with the public interest and to strike a balance between the rights and obligations of investors. However, the PPIB does not provide a definition of "public interest", despite its being very important in the proposed legislation. Public interest is fundamental to the PPIB's purpose,<sup>410</sup> expropriation provisions<sup>411</sup> and sovereign right to regulate.<sup>412</sup> Webb<sup>413</sup> contends that a degree of uncertainty is created through "the entitlement of government to take any measures in favour of public interest". This provision is drafted so widely that it may be read with the government's rights of expropriation for the benefit of the public interest.<sup>414</sup> Clause 3 coupled with other sections puts more emphasis on the government's regulatory powers than on the legitimate needs of foreign investors for policy certainty and an economic environment conducive to investment.<sup>415</sup>

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406 South African Institute of Race Relations 2015 <http://irr.org.za/reports>.

407 Ngwenya *Protection of Foreign Investment* 46.

408 Department of international relations 2014 [www.dpr.gov.za](http://www.dpr.gov.za).

409 Department of international relations 2014 [www.dpr.gov.za](http://www.dpr.gov.za).

410 Clause 3(a) of the PPIB.

411 Clause 8 of the PPIB.

412 Clause 10 of the PPIB.

413 Webb 2013 *Without Prejudice* 10.

414 Webb 2013 *Without Prejudice* 10; Klare 1998 *SAJHR* 146.

415 Webb 2013 *Without Prejudice* 10; Klare 1998 *SAJHR* 146.



Notably, the PPIB provisions discussed above, together with FET and international arbitration, are often included in BITs, but the latter two concepts are excluded from the PPIB. The reasons why the government excluded these concepts will be investigated in a discussion below.

### **5.3 *BITs features excluded from the PPIB***

#### **5.3.1 *Fair and equitable treatment***

The FET principle requires states to extend protection to foreign investors by respecting the terms of their agreements with investors, as well as by not arbitrarily changing the terms of contracts once the investments are made.<sup>416</sup> The PPIB does not expressly mention the FET. The principle of FET in international investment law enables investors to sue their host states in cases where the host government or legislation arbitrarily changes the conditions in which the investment was made.<sup>417</sup>

The foreign investors in the *Foresti* case alleged at the ICSID arbitration that South Africa had infringed the FET principle. Perhaps the government's deliberate move to omit FET from the PPIB was guarding against the potential risk of future litigation by investors based on FET.

The application and/or violation of FET is arguable,<sup>418</sup> because international arbitration decisions suggest that it differs in different investor-host state relations.<sup>419</sup> Ngwenya<sup>420</sup> rightfully argues that a host state may provide all investors, either foreign or local, with the same treatment, but such treatment could be of a lower standard than that accepted in international law. The problem with his argument is that it might be difficult to convince foreign investors to accept a sub-standard, especially if the treatment they receive is worse than what they are accustomed to in their home countries.<sup>421</sup>

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416 Webb 2013 *Without Prejudice* 10.

417 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

418 Ngwenya *Protection of Foreign Investment* 105.

419 Ngwenya *Protection of Foreign Investment* 105.

420 Ngwenya *Protection of Foreign Investment* 105.

421 Ngwenya *Protection of Foreign Investment* 105.

The BITs offer the assurance of FET to foreign investors. For example, article 2(2) of the SA-UK BIT makes an undertaking that investors will receive FET at all times.<sup>422</sup> This is a general protection in BITs; it is not limited to the SA-UK BIT.<sup>423</sup> As noted, the PPIB does not guarantee international investors FET. Instead it only mentions the government's right to regulate in pursuance of policy objectives.<sup>424</sup> Clause 10 of the PPIB authorises the government to "take measures to redress historical, social and economic inequalities". Satryani and Ambrose<sup>425</sup> justly comment that with this clause, one may expect claims arising from measures undertaken in pursuit of BEE Policy, which would amount to the infringement of the FET standard under South Africa's BITs. Clause 8(2) of the PPIB mentions a number of measures that the government could take that would not be characterised as expropriation.<sup>426</sup> Some of these measures amount in fact to indirect expropriation. Indirect expropriation falls under FET in international law.<sup>427</sup> It is submitted that by excluding FET the PPIB has violated the international law and set up a contradiction with the existing South African BITs.<sup>428</sup>

### *5.3.2 International arbitration: Dispute resolution*

Today international investment disputes are settled through international arbitration.<sup>429</sup> These disputes are normally settled under the ICSID arbitration.<sup>430</sup> *Ad hoc* arbitration is normally settled under the *United Nations Commission on International Trade Law of 1985* (UNCITRAL) rules,<sup>431</sup> or under the ICSID Additional Facility arbitration.<sup>432</sup> South Africa is not a signatory to the ICSID Convention, but it has participated in arbitral

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422 See the UK-SA BIT.

423 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

424 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

425 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

426 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

427 Jeffery 2013 *Without Prejudice* 8.

428 Jeffery 2013 *Without Prejudice* 8.

429 United Nations Conference on Trade and Development 2012 <http://unctad.org>.

430 Governed by the Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, 1965, read together with the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings 2006 <http://www.worldbank.org/icsid>.

431 UNCITRAL Arbitration Rules 2010 [www.uncitral.org/arbitration](http://www.uncitral.org/arbitration).

432 International Centre for the Settlement of Investment Disputes 2006 <http://icsid.worldbank.org>

proceedings brought against the country by foreign investors who make use of the ICSID Additional Facility.<sup>433</sup>

Tribunals make their own independent decisions, and as such they do not create judicial precedents. The decisions made by one tribunal will not be binding on another, even if the facts in play are similar. The lack of having a single supreme body responsible for supervising investment disputes is problematic.<sup>434</sup> The core issue is that the current system does not have a mechanism in place to avoid the making of inconsistent decisions by tribunals.<sup>435</sup> In consequence thereof, these "uncoordinated and unsupervised tribunals at times encroach on the governments' regulatory powers and state regulatory measures" on:<sup>436</sup>

...environmental issues, health and other service delivery to the citizens have been declared illegal in favour of foreign investors' interests by rendering awards which challenge or illegalise legitimate laws passed by states.

Due to the weaknesses of the system, some states have shown their lack of faith in international arbitration and expressed their intention to distance themselves from the international arbitration system.<sup>437</sup> South Africa is one of the countries that has outspokenly displayed a lack of faith in the current international arbitration system.<sup>438</sup> The government excluded international arbitration with the view to balancing the interests of the country with those of foreign investors.<sup>439</sup> It stated that it was not its intention to remove itself from international arbitration as a whole, but would wait until the system had been reformed and was more credible and reliable.<sup>440</sup> In the intervening period, Clause 11 of the PPIB does not give investors access to international arbitration to resolve disputes.<sup>441</sup> As an alternative, the PPIB stipulates that investors are allowed

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433 Ngwenya *Protection of Foreign Investment* 116.

434 Cosmas *Call for Reform* 3.

435 *Lauder v The Czech Republic*, ICSID Reports 66 and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports 121.

436 Cosmas *Call for Reform* 3.

437 Cosmas *Call for Reform* 3.

438 Department of Trade and Industry 2009 <http://www.thedti.gov.za/ads/bi-lateral>.

439 Cosmas *Call for Reform* 3.

440 Cosmas *Call for Reform* 3.

441 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

to take their disputes for mediation or conciliation organised by the DTI,<sup>442</sup> to the courts, or to arbitration in accordance with South Africa's *Arbitration Act* of 1965.<sup>443</sup> The *Arbitration Act* referred to is out-dated.

Radebe<sup>444</sup> states that the *Arbitration Act* is being amended to synchronise it with the PPIB. However, this still presents a problem, because the amended *Arbitration Act* may still give the government powers that will influence the arbitration process, and as a result, foreign investors may feel trapped as they will not be able to initiate international arbitration.<sup>445</sup> The government has defended its position with regard to clause 11. It has stated that the legal processes in South Africa are robust and the courts are independent.<sup>446</sup> The government has further noted that the Constitution of South Africa is one of the most progressive in the world.<sup>447</sup> The government's view is that with these mechanisms in place, foreign investors will have local remedies at their disposal. The government contends that it is undesirable to subject South African policies to international arbitration because of the *ad hoc* nature of the proceedings and the infringement on the government's right to regulate.<sup>448</sup>

While one agrees with the government that South Africa's legal regimes and courts are independent from the government and that they uphold the rule of law at all times,<sup>449</sup> the question whether the courts are equipped to make decisions on an international investment dispute is still open.<sup>450</sup> Of note, the controversial *AgriSA* case might have created a perception to the international community that courts in South Africa are not ready to handle international investment disputes after their having failed to recognise indirect expropriation, a measure recognised in international law. Perceptions are not easy to change. Foreign investors prefer to use international arbitration rather than

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442 Clause 11(1) provides that a foreign investor that has a dispute in respect of action taken by the Government of the Republic or any organ of State, which action affected an investment of such foreign investor, may request the Department or any other competent authority to facilitate the resolution of such dispute by appointing a mediator or other competent body.

443 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

444 Radebe *South African Government News Agency* 1-3.

445 Ngwenya *Protection of Foreign Investment* 117.

446 Ngwenya *Protection of Foreign Investment* 117.

447 Ngwenya *Protection of Foreign Investment* 117.

448 Ngwenya *Protection of Foreign Investment* 117.

449 Mossallam "Process Matters: South Africa's Experience Exiting its BITs" 16.

450 Mossallam "Process Matters: South Africa's Experience Exiting its BITs" 17.

local judicial adjudication. The BITs dispute adjudication authority is in the hands of international arbitrators who are most probably compelled to consider domestic political concerns.<sup>451</sup> The idea of the international arbitration puts investors at ease because without it investors are normally concerned about being put through uncertain and unknown judicial systems.<sup>452</sup>

## **5.4 Conclusion**

This chapter has established that the provisions of the PPIB are inconsistent with those of BITs. The PPIB's purpose was to address the conflicts between South African law and South Africa's BITs, but it has been argued that its provisions are more damaging than likely to solve the actual challenges. The PPIB excludes indirect expropriation from consideration, and the public interest requirement is framed differently from the manner in which it is framed in the BITs. Among other differences, there is the inclusion of land reform.

It has been established that the PPIB provides for compensation that is just and equitable while taking into account all the relevant factors, including market value. It has also been submitted that some of these factors were for the purposes of land reform, which means that the history of a property acquisition is important for determining just and equitable compensation. This factor cannot be applied to foreign investments because it will not lead to the award of the just and equitable compensation required by the Constitution. It is believed that the PPIB should have adopted the BITs approach, which is that the compensation awarded should be the equivalent of the market value of the expropriated property, in order to avoid the inconsistency.

As noted above, the PPIB does not provide the same standard of protection for foreign investors as is provided by various South African BITs, nor equitable compensation that is consistent with international practice.<sup>453</sup> Instead, the PPIB is heavily focused on

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451 Satryani and Ambrose 2013 <http://www.herbertsmithfreehills.com>.

452 Webb 2013 *Without Prejudice* 10.

453 Kleyne and Dean 2014 <[http://blogs.sun.ac.za/iplaw/2014/02/06\\_promotion-and-protection-of-investment-Bill-2013-a-review/](http://blogs.sun.ac.za/iplaw/2014/02/06_promotion-and-protection-of-investment-Bill-2013-a-review/)>.

protecting the sovereign rights of the South African government to regulate for a public interest and is not strongly focussed on the need to balance property rights and the rights established under BITs. In the light of the idea of developing the PPIB into an Act, recommendations will be given in the next chapter that will effectively improve the PPIB's protection of foreign property.

## Chapter 6: Conclusion

The study has reviewed international law, South African law and the PPIB as the proposed legislation protecting property rights for foreign investors. Chapter Two revealed that international law allows states to expropriate foreign inventors' property for a public purpose and that appropriate compensation is paid to the owner of the expropriated property. On the other hand, Chapter Three disclosed that there is a legislative gap in the law regulating expropriation in South Africa, with laws such as the *Expropriation Act* being inconsistent with the Constitution. However, the government is addressing this issue by enacting laws that are consistent with the Constitution.<sup>454</sup> The chapter has shown, however, that the government has the power to expropriate property for "public interest" (that includes land reform and other reforms addressing the injustices of the past) or a public purpose, and that the expropriation must be carried out within the ambit of section 25 of the Constitution. The Constitution further requires the government pay just and equitable compensation that takes into consideration all the relevant factors stipulated in section 25. In contrast, Chapter Four revealed that some of the BITs' provisions are incompatible with the Constitution. One notable inconsistency discovered is that the BITs recognise the concept of indirect expropriation, which is not currently recognised in South African law. The *Foresti* case revealed that the provisions of the BITs on expropriation have severe implications for South Africa, especially on the constitutional right of the government to regulate for economic development. Secondly, the BITs require compensation that reflects the market value of the expropriated property, whereas the Constitution requires compensation that is just and equitable, which is likely to be less than the market value.

The critical analysis of the PPIB in Chapter Five revealed that the PPIB contains clauses that are inconsistent with international law and South Africa's BITs. The Bill lists some of the actions that will not be characterised as expropriation, but some of these actions are characterised in South Africa's BITs as actions that amount to indirect expropriation. The chapter also noted that the PPIB proposes a method of compensation that is in accord with the Constitution by proffering just and equitable compensation.

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<sup>454</sup> See para 3.3.3; See para 5.3.2.

It should be recalled that the main objective of this study was to critically investigate the provisions of the PPIB and determine if it should be adopted in its current form in view of its becoming an Act, and whether the PPIB reconciled the different approaches available under the Constitution and the BITs on the topic of the protection of property, with particular reference to expropriation and compensation. Based on the findings of the study, the following final conclusion is drawn. Most of the BITs are still binding on South Africa and they have international arbitration clauses that foreign investors may use to institute legal proceedings against South Africa for a violation of a BIT by the new PPIB. This is so, even though it is the government's opinion that the BITs were designed to protect foreign investors and lack an adequate balance between the needs of South Africa and of foreign investors. South Africa faces a challenge with the BITs already concluded, because the current PPIB draft is also designed to transfer more power into the government's hands, with provisions such as an expropriation clause that allows the government to somewhat indirectly expropriate foreigners' property without compensating them. The protection of property in the PPIB is subject to qualifications that are not clear and certain, this will lead to different interpretations and consequently this will create problems for the government. The PPIB extends the scope of expropriation and reduces the standard of compensation.<sup>455</sup> This will discourage foreign investors and will be detrimental to the South African economy. The aim of the PPIB is to achieve an appropriate balance between the rights, obligations of investors and the need to provide adequate protection of foreign investors on the one hand, and on the other hand ensuring that the constitutional obligations are upheld and that the government retains the policy space to regulate in the public interest. Ultimately the research question addressed in this study is as follows: Does the PPIB strike such a balance? The final submission is that the current PPIB is more damaging than helpful, and fails to create a balance between property rights under South African law and property rights in the BITs.

Based on the findings and conclusions presented, the following recommendations are made. Clause 6 of the PPIB, like the BITs, gives foreign investors a guarantee of national treatment. This guarantee is limited, however, by the introduction in clause

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<sup>455</sup> See para 5.2.3; See 5.2.4.



6(4) of the "like circumstances" concept. This wording is likely to cause difficulties in interpretation, because investors will want to know what really constitutes or what defines a "like circumstance". There is therefore a need for clarity from the government on how to manage this issue. This should be achieved by using words that are clear. Clause 6 must clearly say what the term "like circumstances" means and how it is to be applied. The PPIB should not incorporate words that are ambiguous.

Another important point that needs attention is the incorporation of the FET principle in the revised PPIB. The guarantee of FET is a central feature of international investment law and is recognised by the United Nations Conference on Trade and Development as one of the "key components of investment protection".<sup>456</sup> One can understand the government's decision to exclude FET because the different interpretations of FET have created controversy, and host states' obligations are often too widely interpreted by international tribunals.<sup>457</sup> However, the better idea is for the government to include an FET clause and interpretation guidelines that will describe FET or state what constitutes FET in a new, revised PPIB. This would reassure foreign investors that South Africa undertakes to treat them and their investment in a way that is consistent with internationally acceptable standards.

Clause 8 of the PPIB narrows the meaning of expropriation by listing a number of actions that do not amount to expropriation. These include some measures that constitute indirect expropriation under international law.<sup>458</sup> The idea that the government can take foreign investors' property and allege that the taking did not amount to expropriation because the government did not acquire ownership but was merely acting as a custodian for third parties<sup>459</sup> is contrary to international law concepts of expropriation and the concept of expropriation in South Africa's BITs. It is recommended that clause 8(2) must be revised and amended. The amendment of this provision must clearly prohibit direct and indirect expropriation unless if it's for public purpose. This proposed amendment is important because investors will know that their investment will be protected against direct and indirect expropriation. The proposed

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<sup>456</sup> See para 5.3.1.

<sup>457</sup> See para 5.3.1.

<sup>458</sup> See para 5.2.3.

<sup>459</sup> See para 3.4.2.2.

amendment is consistent with international law and it is not in violation of the Constitution, therefore the government will not be sued for violating a rule of international law.

Furthermore clause 8, which relies on section 25 of the Constitution, implies that compensation can be set at below market value if factors are taken into account in addition to market value when determining compensation. This produces uncertainty and again is contrary to South Africa's BIT undertakings.<sup>460</sup> It is recommended that the PPIB should provide for compensation to be set at the market value of expropriated property for BITs that are currently still in force. This would provide certainty, especially as such BITs have a binding effect on South Africa. The proposed amendment would save the government from being sued by international investors for violating the BITs, and it would provide certainty. If the compensation standard proposed by the PPIB were to come into force, a foreign investor whose BIT is still effective could successfully sue the government for the violation of that BIT. The government could not successfully raise the Constitution or PPIB as a defence in such a matter.

The PPIB contains many provisions on the application of the "public interest" principle. The challenge is that there is no definition in the PPIB of what "public interest" is or what it is not. The Constitution only provides a list of factors that can be read into the public interest principle, but it does not adequately define this principle. The vagueness of the notion of the "public interest" may be a challenge for investors when disputes arise and investors sue in international arbitration forums.<sup>461</sup> There have also been substantial disagreements within the legal community of South Africa on what constitutes the "public interest".<sup>462</sup> Since the definition is obscure, and considering that this principle features centrally in the PPIB, the recommendation proposed is that the government should explicitly define public interest, and that the definition should be in line with section 25 of the Constitution. This will give foreign investors a sense of certainty and transparency, as opposed to the current wording, which could lead the government into legal disputes.

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460 See para 4.3.2.

461 See para 5.2.7.

462 See para 3.4.3.

Finally, clause 11 outlines the dispute resolution procedures to be followed, but international arbitration is excluded. As noted, the PPIB requires foreign investors to use domestic courts, mediation and arbitration in cases of dispute. Arbitration is to be carried out under the auspices of the *Arbitration Act*. However, this Act has significant weaknesses. It is old legislation, and in its current form it will not assist in solving complex international investment disputes. On the topic of using domestic courts, it is accepted that South African courts are independent, but foreign investors will not feel comfortable to invest in South Africa while they are generally unfamiliar with domestic laws. The PPIB must provide for international arbitration in the list of possible dispute mechanisms supplied in clause 11. It is also recommended that the government should amend the *Arbitration Act* and adopt the UNCITRAL model law. Incorporating UNCITRAL rules into the South African *Arbitration Act* would be helpful, because foreign investors are familiar with these rules. In conclusion, it is submitted that the government should withdraw the PPIB because the current draft is unclear and uncertain, and its enactment as is would probably lead to unfavourable results.

The government has taken a step in the right direction by addressing the inconsistencies between the Constitution and the BITs, and if it addresses the issues highlighted and follows the recommendations made, it could provide a balance between the government's right to regulate and implement policies and the protection of foreign investment.

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