



**UNIVERSITY OF KWAZULU-NATAL
COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW**

**SOUTH AFRICA'S FOREIGN INVESTMENT POLICY (FIP): A CRITICAL LEGAL
ANALYSIS OF THE COUNTRY'S FIP AND ITS EFFECTS ON PARTICULAR TRADE
RELATIONSHIPS.**

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DATE OF SUBMISSION: 29 NOVEMBER 2014.

DECLARATION

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ACRONYMS

	ACRONYM	DEFINTION
1.	BIT	Bilateral Investment Treaty
2.	BRICS	Brazil, Russia, India, China, South Africa
3.	FDI	Foreign Direct Investment
4.	GATS	General Agreement on Trade in Services
5.	GATT	General Agreement on Tariffs and Trade
6.	ICSID	International Centre of Settlement of Investment Disputes
7.	IMF	International Monetary Fund
8.	ITO	International Trade Organisatio
9.	MAI	Multilateral Agreement on Investment
10.	MFA	Multi – Fiber Arrangement
11.	TRIMS	Agreement on Trade – Related Investment Measures
12.	WTO	World Trade Organisation

KEYWORDS:

Bilateral investment treaties, developing countries, foreign direct investment, multilateral trading system, world trade organisation

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CHAPTER ONE

1. INTRODUCTION

1.1 Research Topic

This dissertation is based on South Africa's change in approach to foreign investment in context of its obligations as a developing nation and in lieu of these changes, how the country's plans will affect its position in the multilateral system.

1.2 Topic Idea

South Africa's Foreign Investment Policy (FIP): Critical legal analysis of the country's FIP and its effects on particular trade relationships.

1.3 Background

Foreign investment has experienced two critical growth spurts in the last two centuries. The first growth spurt could largely be accrued to expansion of economic opportunities created by national laws which was aimed at governing foreign investment. The other critical growth spurt was the change of dynamic supported by new international rules on telecommunication and transport¹. The further development of foreign investment was then stifled by the staging of two World Wars which compromised the new internationalised economy and limited trade relations between countries. Post 1945 foreign investment was gently re-established as the world reconstructed itself.² It would then take another 50 years before foreign investment peaked.³ This could largely be contributed to the technological boom and the reduction costs in the transporting of goods.⁴ These fresh outlays of investments were accompanied by several bilateral treaties which grew from 500 in 1990 to about 2000 in the year 2000.⁵ An interesting

¹ R Dolzer *Principles of International Investment Law* 3 ed (2008) 44

² R Dolzer (noted 1 above) 44

³ R Dolzer (noted 1 above) 44

⁴ R Dolzer (noted 1 above) 45

⁵ R Dolzer (noted 1 above) 45

point of this period was that approximately 80 per cent of foreign investment in developing countries went to a dozen states, predominantly in Asia, whilst Africa experienced a decline in investment.⁶

In support of this, over the last 20 years there have been a number of signed investment protection treaties entered into between countries, generally these are bilateral investment treaties (BITs). Due to the increase of BITs, there has been a steady rise of foreign investment. This development of foreign investment has been in conjunction with key developments in international law. International law has grown to encompass the multilateral trading system and several organisations, such as the World Trade Organisation (WTO), the International Monetary Fund (IMF), and the World Bank, all of which are in place to support the development of the multilateral trade system and international law. These developments impact foreign investment as it is no longer characterised by a limited set of rules and few bilateral treaties which lacked in case law. An example of such development is the International Centre of Settlement of Investment Disputes (ICSID)⁷ which has also grown expansively; this is evident in the number of cases that have been dealt with.⁸ This growth and development has created a binding nexus between international and national foreign investment policies.⁹ It is important to note that the growth and development of the ICSID has not been without certain issues arising between foreign investors and host nations. These issues pertain to host nations that find themselves vulnerable to arbitration due to the BITs agreements conflicting with the host nations domestic laws and policies.

The incorporation of foreign investment law into domestic law and the manner in which these domestic and international rules interplay is a central point of this paper. Organisations like the

⁶ R Dolzer (noted 1 above) 46

⁷ International Centre for Settlement of Investment Disputes is an international arbitration institution which hosts and assists the arbitration of legal disputes between international investors.

⁸ R Dolzer (noted 1 above) 46

⁹ The nexus between foreign investment law and international law stems from three legal sources; investment contracts between foreign investors and the relevant country, domestic legislation dictating foreign investment, and lastly international law and its investment treaties. In terms of investment in international law, this is predominantly dealt with via treaties that are aimed at protecting the foreign investor. There are also an extensive number of treaties that indirectly deal with investment.

The next tier deals with domestic law and its efforts to promote and regulate foreign investment. Ultimately all laws of the land influence foreign investment however, states need to have specific legislation that regulates foreign investment in a positive manner that is consistent with international law.

The final tier of law is investment contracts between individual investors and the host state. Contracts of this nature are subject to the domestic law applicable and are negotiated between the host state and the investors.

WTO, via negotiations, attempt to bridge the gap between these rules and international law.¹⁰ However, how successful the WTO is at supporting host nations in this plight is arguable. Many host nations are developing countries and emerging markets that are dependent on foreign investment from developed countries. Many developing countries have grown tired of the lack of empowerment offered by the WTO, they feel that the WTO favours developed countries.¹¹ This argument forms the foundation of this paper and will be explored comprehensively to assess the relevance of the WTO in terms of developing countries and foreign investment.

As an international organisation, the WTO intended to and soon became the primary international body at the forefront of free trade. Its formation represented a formalisation of the multilateral trading system that had previously not existed. It became the meeting point of various ideologies, relationships and rules. Furthermore, it promoted and dictated the terms of trade by drawing up rules for international trade.¹² However, the organisation faced much criticism from many developing countries who believe that the WTO is a puppet of the richer, more developed countries.¹³

A foundational principal of The WTO is its open market policy, this means by extending the reach of the market to reach across borders there can be international division of labour. This is attractive to many countries as it allows them to specialise and focus on industries to which they are most suited to.¹⁴ The concept of free trade has been a contentious subject in international trade for many years and while many economists are in favour of free trade, many groups oppose it for various reasons that are beyond the scope of this paper.¹⁵ Parties in favour of the organisation policies understand free trade to be a trading partnership that seeks equity in international trade by offering better trading conditions and securing the rights of marginalised members of the WTO.¹⁶ However, this principle is also largely opposed by domestic industries who feel they suffer the most at the expense of free trade. Such opponents of free trade believe that trade relations between the rich and poor countries are based on toxic

¹⁰ R Dolzer (noted 1 above) 46

¹¹ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹² Lumina C, 'Free Trade or Just Trade? The World Trade Organisation, human rights and development (Part 1)' (2008) 12 *AJOL* 20, 22

¹³ Ibid 22

¹⁴ Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

¹⁵ Noted 11 above, 23

¹⁶ Noted 11 above, 23

relationships of dependency and as such there is very little protection offered to the developing countries.¹⁷

Despite the criticism of the free trade ideal, the WTO is a strong proponent of free trade and the WTO system promotes the lowering of trade barriers to allow for trade to flow more freely. Ultimately the WTO is expected to provide the forum for negotiating and promoting trade liberalisation, as well as the manner it should be executed.¹⁸ These issues form the foundational understanding of the WTO and will be analysed in context of its effect on developing countries.

In dealing with developing countries and their relationship with the WTO many of them have become disenchanted with the number negotiations that haven taken place without yielding positive results for countries in need of assistance.¹⁹ The negotiations have failed to show the many benefits of trade liberalisation and the imbalance in power is still prevalent in the WTO. Moreover the WTO has faced difficulty in accommodating trade issues concerning investment.²⁰

South Africa's is a prime example of a frustrated developing country. This has resulted in them challenging their relationship with the WTO. As a result of these growing frustrations South Africa took a strong stance on the future of the Doha Development Agenda at the WTO's 9th Ministerial Conference.²¹ South Africa was of the opinion that the conference needed to reach a fair and equitable deal, as there are growing fears regarding the WTO's credibility and relevance to international trade.²² Regardless of whether a deal was reached or not, South Africa and the rest of the African continent still wish for a more beneficial deal that assists developing countries to a greater extent by holding the developed countries to a greater obligation.²³

¹⁷ Noted 11 above, 23

¹⁸ www.wto.org, accessed on 14 March 2014

¹⁹ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

²⁰ Ibid

²¹ D Keet 'South Africa's official position and role in promoting the World Trade Organisation' available at www.tni.org, accessed on 14 March 2014

²² Ibid

²³ Geordin Hall Lewis 'South Africa: WTO – DA Response to Key Issues at 9th Ministerial Conference, DA Press Release' available at <http://allafrica.com>, accessed on 16 March 2014

The next focal point of the paper is the WTO's legal framework and its approach to foreign investment. The WTO already has existing provisions that deal with foreign investment, the Agreement of Trade-Related Investment Measures (herein after referred to as TRIMS), which elaborates on GATT provisions.²⁴ These provisions will be scrutinised in light of the changing geopolitical structure of foreign investment and the role of developing nations in stimulating foreign investment.²⁵

Furthermore, The WTO's several rounds of negotiations and the regulation of foreign investment will be discussed in context of developing nations and their interactions with the WTO. The "Singapore issues" will be discussed as it is regarded as one of the most contentious issues of the WTO negotiations. These negotiations dealt with the issue of investment and the manner in which the WTO's approach to investment. In accounting for current day practices, attention will be paid rules applied to foreign direct investment through government to government BITs.²⁶

Foreign investment has great significance for developing countries as it has become a vital source of external financing for developing countries.²⁷ Moreover it goes beyond assisting capital formation and sustaining resources; it promotes the transferring of production technology, skills, and increases country's ability to innovate and creates access to international markets.²⁸ Foreign investment has the ability to transform developing countries' economies²⁹ and is the reason countries are in the process of taking the necessary steps to make themselves more attractive to investors. Therefore the global market is extremely competitive, especially for developing countries.³⁰ Moreover with the liberal policies becoming gradually impotent in attracting foreign investment, governments are considering alternative approaches to facilitate foreign investment.³¹

²⁴ Athanasios Arvanitis 'FDI in South Africa: Why has it been so slow' available at www.imf.org, accessed on 16 March 2014

²⁵ Ibid

²⁶ Ibid

²⁷ www.imf.org, accessed on 6 June 2014

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

South Africa has remained one of the leaders of Foreign Direct Investment (FDI) in Africa, despite the fact that they have suffered a decrease in FDI in the past three years. They also find themselves enjoying substantially more international attention via FDI than their continental siblings. It is this sort of attention that can facilitate the country to play a pivotal role on a regional, continental and international scale.³²

Furthermore, South Africa offers a sophisticated, unique, and diverse emerging market. It possesses a first world economic infrastructure, an abundance of natural resources and is situated in a key location, thus making it a prime investment location.³³ However, there is still a need for South Africa to reassert itself on a global scale.

With the world's attention increasingly being focused on South Africa and Africa in general, several states and multinational companies are battling it out to increase their activity on the continent.³⁴ South Africa's locational advantage allows it to be a natural gateway to the rest of the continent. This has been a key factor behind South Africa's elevation in status in the changing global landscape. In April 2011, the BRIC group of countries of Brazil, Russia, India and China agreed to admit South Africa as the newest member (therefore altering the name to BRICS).³⁵ An opportunity of this nature provides a prime opportunity South Africa to assert their interests, as well as the continent's interest during this time of change in the geopolitical and economic structure.³⁶

The South African Government, cognisant of this opportunity and in light of their frustration as developing country, has reacted by presenting the Promotion and Protection of Investment Bill, which will replace their BITs with several developed countries.³⁷ These treaties have constituted the crux of the relationship between South Africa and its foreign investors and the Bill has thereby been met with mixed reactions as South Africa realigns itself with its fellow

³² 'National Development Plan 2030, Our Future – make it work', available at www.npconline.co.za accessed on 31 March 2014

³³ Ibid

³⁴ Wang Yong 'South Africa's Role in the BRICS and the G-20: China's view' available at www.saia.org.za, accessed on 15 March 2014

³⁵ Ibid

³⁶ Ibid

³⁷ Pieter Steyn 'The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa' available at www.werksmans.com, accessed on 3 March 2014.

BRICS members and other key nations.³⁸ Based on the former, the research seeks to critically analyse whether the potential promulgation of this Bill is a step in the right direction for South Africa and whether the potential promulgation is in favour of the current multilateral trading system.

1.4 Rationale

South Africa is undergoing a transition that has national, regional, continental and international ramifications. The research for this paper critically explores the rationale for South Africa's change of approach in terms of foreign investment. Specifically, the paper aims to shed new light on this approach by analysing old practices. Furthermore in reviewing this transformation, the research will include a critical examination of the Bill by ascertaining its positive and negative aspects.

This ultimate objective of the paper is to inform readers whether there truly is need for South Africa to adapt to a new global structure or whether we are merely cowering to more developed, powerful economies of the world. Special attention will be cast on South Africa's recent membership to the new emerging markets alliance; consisting of Brazil, Russia, India, China and South Africa, better known as BRICS. The paper will evaluate the manner foreign investment relations may be improved upon in light of the responsibilities as a developing nation and member of BRICS.

1.5 Statement of Purpose

The purpose of this dissertation is to critically review South Africa's change in approach to foreign investment by analysing past, present and future practices, including the imminent promulgation of The Protection and Promotion of Investment Bill. This review is made in context of South Africa's ambitions as a developing nation and as the newest member of the BRICS group.

³⁸ Stefan Terblanche, 'Promotion and Protection of Investment Bill, Negative reaction to unwarranted' available at www.theintelligencebulletin.co.za, accessed on 5 March 2014

1.6 Research questions

1. To what extent has International law evolved to accommodate developing countries and how has the World Trade Organisation in particular promoted investment in developing countries.
2. In what manner has South Africa dealt with the issue of foreign investment, in light of the changing geopolitical structure.
3. To what extent does BRICS promote Foreign Direct Investment in South Africa.

1.7 Research Goal / Hypothesis

This paper hypothesises that:

- The WTO's future will be in question if it fails to give precedence to the needs of developing countries.
- There is a need for a single international investment framework.
- South Africa is acting in its own best interests by altering their approach to foreign investment.
- South Africa is realigning itself with the new world powers.

1.8 Research Methodology

The research required for this study is desk-based. This paper requires a focus on, newspaper articles, cases, journal articles and textbooks. In context of a key portion of my paper, there is a need for interpreting and then analysing the relevant Bill and other supporting or likeminded legislation to determine South Africa's strategy regarding foreign investment. Furthermore, there needs to be a foundational understanding of both law and economics to do justice to the principles that form key arguments of this research paper.

1.10 Literature Review

The thesis will depend on a number of literatures in order to assess the research problem and provide suitable recommendations.

The first source / work that need to be consulted is the National Development Plan. This critical analysis by the National Planning Commission (NPC) is a great point of departure for this research paper as it discusses South Africa's current position in the world and elaborates on what needs to be done to execute its national, regional, continental and international goals. It presents a practical approach, cognisant of the realities facing South Africa. In this proposal from government, the NPC prioritises on aspects which will allow South Africa to work to its strengths. The proposal acknowledges the essential challenges facing South Africa; poverty and job creation and the need for these issues to be addressed in order for South Africa to become a global powerhouse. It goes on to discuss what South Africa would need to encourage foreign investment by maintaining a harmonious relationship between the Government and the private sector. Many argue this should be expanded on a regional scale in order to link with other booming nations and establish core relationships with their immediate neighbours. For South Africa to hold its own amongst its fellow members of BRICS (Brazil, Russia, India, China and South Africa) it would need institutional strengthening such as enhancing the research capabilities of several Departments in order to encourage greater investment. This can also be assisted by expanding South Africa's trade and investment and by improving roads and railways on a national scale. It is clear South Africa aspires to be a global leader; however the article suggests that they do not possess the power of other developing nations and need to focus on building relations with other key nations. By prioritising on certain nations, they will avoid being diplomatically compromised. This analysis has the ability to separate the domestic realities from South Africa's geopolitical ambitions, therefore creating a good context of what is needed to encourage foreign investment.³⁹

A second source that needs to be critically analysed and which is of primary importance to the thesis is the Protection and Promotion of Investment Bill, 2013. The aim of the Bill is to encourage investment by providing protection to both the host nation and investor, in turn promoting foreign investment in South Africa. This will be applicable for all investments made

³⁹ National Development Plan 2030, Our Future – make it work', available at www.npconline.co.za accessed on 31 March 2014

with a commercial purpose and applies to all transactions made before or after the Bill is passed - public or private, domestic or foreign. The Bill's primary focus is to act in the public's interest and afford equal treatment to foreign investors and South African citizens. This will be critically assessed on a case to case basis, taking into account the nature and effect of the foreign investment, as well as the aim of the investment. The equal treatment for both South African citizens and foreign investors means that both parties are afforded equal security and restitution. Aggrieved parties are afforded a review in front of a competent court, as well as the option of dispute resolution. This constitutes a primary source which proves to be extremely useful as it lays out the legislative framework for both past and future investments. The Bill is further evident of South Africa's attempt to streamline the investment process with foreign bodies and more importantly, empower itself. This in turn, provides a key justification as to why South Africa has cancelled their Bilateral Treaties with many European nations who they felt hard done by.⁴⁰

Furthermore, the analysis by Mr P. Steyn creates continuity from the initial analysis and summary of the Bill and sheds light on the interpretational issues, amongst other criticism that the Bill faces. South Africa's attempts to modernise its relationship with several countries is at the expense of bilateral treaties which originally cemented the relationship between South Africa and its biggest trading partner the European Union. This does not sit well with many leading European nations as they feel exposed by the new Act. An example may be the need for foreign investors to comply with local laws, such as Black Economic Empowerment. Steyn highlights these issues in several sections of the Bill; in terms of national treatment of foreign investors the government dictates what would be "applicable" and therefore can manipulate the concept of national treatment to suit certain investors. Steyn goes on to discuss the interpretation of "expropriation", as the Bill proposes a more rigid interpretation to the traditional understanding in Customary International law. This interpretation avoids South Africa having to deal with international arbitration. However this is not to say the Bill prohibits international arbitration, instead it empowers itself by requiring the Government's consent before international arbitration can take place. Another interpretational issue in terms of Section 2 of the Bill which may allow for certain nations to override the Bill. Another issue of contention may be found in the difference between South Africa's approach and the Southern African Developing Community (SADC) who are in favour of International Arbitration.

⁴⁰ The Protection and Promotion of Investment Bill, 2013

Steyn's article has exposed several key issues that need to be addressed for this Bill to be a success; the article itself provides context and the danger of European fall out. Furthermore the article exposes the shortcomings of the Bill that may lead to crucial clauses being circumvented. The reason for moving away from Bilateral Treaties is also explained. Ultimately Steyn shows the need for a clear, concise investment framework for South Africa to build on.⁴¹

The previous article by Steyn highlighted some of the key issues that shed a negative light on the Bill; however the article by S Terblanche of the Intelligence Bulletin proposes a more positive approach. Terblanche offers practical reasoning that provides greater context before one draws a final conclusion on the Bill. The article acknowledges the need for South Africa to adjust to the shift in International Relations and believes that the Bill fits this purpose. Furthermore it rebuts the claim that investors' rights are non-existent in the Bill. It suggests there has been an over exaggeration in pre-empting the Bill when the reality is South Africa is indeed altering its focus towards its fellow members of BRICS. This move affords South Africa protection that it never found when dealing with the European Union. This shift by South Africa is an overt attempt to fill the gap between developing and developed nations. Historically this was extremely difficult with global organisation such as the World Bank and International Monetary Fund that favoured the developed nations. These legislative efforts are evident that South Africa is aligning itself with the new global powerhouses, as well as the Government's greater objectives and constitutional obligations. Terblanche goes on to suggest that there is life after the European Union as the Bill protects investors from all countries, especially countries that are heavily invested in South Africa. Furthermore South Africa is merely doing what several other countries have already done and with South Africa's impeccable legal record, there is no reason to doubt the legal systems ability to deal with the possible responsibility bestowed by the Bill.⁴²

The article from Arvantis, A is of particular interest as it deals with the role of FDI in the development of South Africa's economy by assessing key aspects such as market size and natural recourses. Furthermore it analyses the overall growth of FDI or lack thereof in South

⁴¹ Pieter Steyn 'The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa' available at www.werksmans.com, accessed on 3 March 2014.

⁴² Stefan Terblanche, 'Promotion and Protection of Investment Bill, Negative reaction to unwarranted' available at www.theintelligencebulletin.co.za, accessed on 5 March 2014

Africa by assessing the trends and characteristics of FDI in relation to South African initiative. The article looks at the reason why South Africa has faced a decline in foreign investment and ways to alter this, as well as comparing the approach of other developing nations. In context of this paper being orientated around FDI, the article provides a great foundation for the benefits that can be directly linked to foreign investment, benefits such as; strengthening international reserves and promoting growth by encouraging the technological process and industry. Furthermore it highlights the implications of FDI in South Africa by considering the degree of infrastructure, development, trade liberalisation, skills availability and several other factors, all of which provides crucial context needed in understanding FDI.⁴³

Gordhan, P, in his article provides a great foundation to understanding the importance of BRICS in light of the changing geopolitical landscape of the world. It explains the basics behind BRICS and South Africa's entry as a member. It also provides an astute summary of each member's potential to BRICS by explaining their current position in terms of global finances. Furthermore the build up to BRICS is explained covering issues from the fall of the Berlin Wall to the Arab Spring and everything between that culminated to the realignment of global power. Such context cannot be underestimated in light of South Africa's membership and its new approach to foreign investment. Another key aspect of the article is assessing BRICS – what are its purpose and potential, as well as its relationship with South Africa. This includes discussing the relationship between China and South Africa and the current imbalance that exists. South Africa's role cannot be underestimated as they are viewed to be a continental leader and it is their duty to encourage investment in Africa and empower locals to capitalise on these opportunities.⁴⁴

Much like many other articles used, the focus of Palemeter's article is the GATT and the WTO. This article deals with the GATT and WTO from a critical legal aspect which is most important in context of this paper. It constitutes of an analysis of the GATT's main principles and practices, such as the MFN principle and the practice of dispute settlement. The paper shows the progression of these principles by evaluating it. Such an evaluation is to establish whether or not the GATT system is primitive legal system or not. Furthermore this is followed by a similar evaluation of the WTO and its various annexes. Each annex is dissected

⁴³ Athanasios Arvanitis 'FDI in South Africa: Why has it been so slow' available at www.imf.org, accessed on 16 March 2014

⁴⁴ www.bdlive.co.za accessed on the 12 September 2014

and discussed as primary and secondary rules. This application is a solid foundation to understanding the WTO and whether it suffers from fundamental flaws or has the potential to truly assist developing nations.⁴⁵

The article by Lumina, C, addresses both sides to the argument concerning free trade. It starts by explaining the WTO by offering a brief history of the organisation. Within this history the purpose of the WTO is laid out, that being; to improve the standard of living for the people of member states by establishing legally binding rules which promote free trade. The article goes on to address the various agreements of the WTO, with a special focus on multilateral trade relations. Lumina, then goes on to discuss the intense criticism the WTO has faced due to the nature of the agreements. There is a strong belief that the WTO does not protect the developing nations and has a negative impact of people's livelihood. An important aspect of this article is the assessment of the concept of free trade and discussing the reasons certain groups are in favour of the concept and other groups are less fond of the concept. It importantly shows the nexus between free trade and the WTO and their efforts to perpetuate the practice of trade liberalisation.⁴⁶

The article by Thomas proves to be extremely useful as it provides an historical context to South Africa's development in terms of FDI. It speaks of the 1980s as a failed decade of regional cooperation which becomes the premise for the birth of democracy and the pursuit global economic integration. The article moves on to discuss the WTO and its regional agreements with developing nations which is key portion of this paper. It does so by discussing the basics of GATT and key principles such as MFN, the concept of non-discrimination and the exception to basic commitments. These principles are discussed and applied to developing countries to show their effectiveness or lack thereof. The latter part of the article hones in on the SADC region of developing countries and their attempt to establish a framework of cooperation. This is vitally important to the paper as it deals with the African approach to FDI, specifically South Africa who is regarded by its fellow African nations to be "developed" and a leader of the continent.⁴⁷

⁴⁵ D Palmeter 'The WTO as a Legal System'(2000) 24 FIJL 444, 466

⁴⁶ Lumina C, 'Free Trade or Just Trade? The World Trade Organisation, human rights and development (Part 1)' (2008) 12 AJOL 20, 22

⁴⁷

This article by Vickers is extremely pertinent to the topic at hand as it deals with the WTO's Ministerial Conference in Bali which is the most current round of negotiations to have taken place. Many members have left the conference with renewed faith in WTO and the multilateral trading system. The conference dealt with issues that were largely mundane, however priority was also given to key principles of the WTO; Aid for trade and assisting of vulnerable economies. These issues are at the heart of this paper as they constitute a key point of the discussion and analysis of the WTO. Furthermore the Doha Development Agenda faced more criticism due to the disparities that remain between the rich and poor nations. The true utility of this article presents itself via the discussion on African concerns that remain unaddressed. The article discusses the many developing African nations who are frustrated by the imbalance of rules in the multilateral trading system. These nations, including South Africa, are calling for a greater focus on LDCs, duty free markets and strengthening of special and differential treatment provisions. Lastly the article briefly discusses South Africa's need to adapt to the changing economic landscape by focussing on industrialisation and integration as well as concretise their relationship with fellow BRICS members.⁴⁸

Lastly, Michael Webb's article evaluates South Africa's foreign trade position under the Promotion and Protection of Investment Bill and whether it will be a success or an error in judgement by the Department of Trade and Investment. Despite the confusion amidst South Africa cancelling its Bilateral Treaties with several European nations, they are still the go to investment destination for many investors. This article in evaluating the Bill, analyses the utility of Bilateral Treaties and the level of protection given to investors, specifically to protect them against host governments expropriating in a manner that is not fair and equitable. Furthermore, it balances the difference between international arbitration under Bilateral Treaties and the undesired complications and interpretational issues. Webb goes further explaining the purpose of bilateral treaties in drawing foreign investment and to offer comfort to foreign investors, however Webb argues that there is no clear nexus between Bilateral Treaties and Direct Foreign Investment. With the context laid down, the article then questions the effect of the Bill on entities, like the South African Bureau of Standards, which have lucrative relationships with signatories of bilateral treaties and whether such protection would be non – existent under the Bill. It is argued by Webb that the Bill does its best to balance the

⁴⁸ www.igd.org.za accessed on the 12 September 2014

interest of all relevant parties and is merely aligning itself to other progressive nations. The article also defines key issues which need to be addressed and is repeated in the latter articles.⁴⁹

⁴⁹ www.withoutprejudice.co.za accessed 4 March 2014

CHAPTER TWO

2. TO WHAT EXTENT HAS INTERNATIONAL LAW EVOLVED TO ACCOMMODATE DEVELOPING COUNTRIES AND HOW HAS THE WORLD TRADE ORGANISATIONS IN PARTICULAR PROMOTED INVESTMENT IN DEVELOPING COUNTRIES

2.1 Introduction

There exists an inextricable link between international law and foreign investment. Interestingly, the many international organisations that pride themselves as being the champions of international law have largely side lined the issue of investment. Whether this has been intentional or not, investment has only recently come to the fore of international relations and organisations. Foreign investment has become crucial to many developing countries who wish to assert themselves in the multilateral trading system. This issue of investment forms part of the perpetual plight of developing countries in the World Trade Organisation (WTO). In light of this, the chapter intends to assess to what extent has international law evolved to accommodate developing countries and how has the WTO in particular promoted investment in developing countries

Firstly, the history of the multilateral trading system will be discussed to provide a foundation in terms of international trade and investment. Special attention is paid to the involvement of developing countries during this period. Secondly, it is important to discuss the relevant international organisations' involvement in developing international trade and investment. Attention will be given to the General Agreement on Trade and Tariffs (GATT) in terms of developing countries, focusing on foreign investment. Lastly, the WTO will be analysed and discussed in terms of its establishment, the main principles of the organisation, the extent to which it assists developing nations, and whether it has afforded greater credence to foreign investment than its predecessors.

2.2 *The Multilateral Trading System*

2.2.1 *Early development of the multilateral trading system*

The formation of the WTO represented a formalisation of the multilateral trading system that was previously non-existent.⁵⁰ This establishment became the meeting point of various ideologies, relationships and rules which in the case of the WTO was law, economics and politics.⁵¹ The manner of the interactions between these disciplines has been one of the main criticisms faced by the WTO.

In light of these criticisms, it seems appropriate to look at the multilateral trading system's development. This development can be attributed to three key occurrences; the first being state sovereignty which allowed each state to dictate their interactions and development.⁵² Interactions and development became the crux of binding agreements between states. These interactions required international law to create various tiers of rules and norms that empowered nations and promoted diplomacy.⁵³ This resulted in various organisations that were founded on actual treaties and enforced positive law being established.⁵⁴ The WTO is an example of the many organisations that tussle for space and attention on the global stage.

The second aspect of development, and crux of the multilateral trading system, stemmed from the concept that countries could have the opportunity to mutually benefit from each other by facilitating freer trade.⁵⁵ This meant the markets were more open and generally liberalised in the best interests of countries. The open market argument is supported by the promotion of cooperative economic ideas and the establishment of a rule-based system that intends to facilitate trade on an international level.⁵⁶

⁵⁰ Craig Van Grassek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

⁵¹ Ibid

⁵² 'The WTO and GATT: A Principled History' available at www.brookings.edu, accessed on 10 May 2014

⁵³ Ibid

⁵⁴ Craig Van Grassek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

⁵⁵ 'The WTO and GATT: A Principled History' available at www.brookings.edu, accessed on 10 May 2014

⁵⁶ Craig Van Grassek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

Lastly, the third development dealt with the most contentious aspect – power.⁵⁷ According to Van Grastek, C the economic aspects of the multilateral trading system avoided the issue of who holds power.⁵⁸ This was done to limit powerful nation’s attempts to influence the law as well as other smaller, developing nations. In the context of the previous hegemonies that dictated trade relationships, the system of linked, bilateral trade agreements that countries negotiated during the period of British hegemony was replaced by the United States (US) leadership of the General Agreement on Tariffs and Trade (GATT), which was the precursor to the WTO.⁵⁹ These two powerful states assisted the establishment and enforcement of rules that granted judicial equality and economic opportunity to other states that would have previously been subject to one-sided policies. However, regardless of their intervention and assistance, the current practices of the WTO still favour developed countries despite their neutral policies.⁶⁰

International organisations, like the WTO, are premised around the creation and implementation of international law.⁶¹ In light of this, a review of their legal approach is of significance to this paper and a good point of departure. It is worth noting that the legal duties of the WTO go beyond protecting and creating a stable multilateral trading system, attempting to achieve unity between states, and deterring countries from solely acting in their own interests.⁶² The legitimacy of the WTO is largely dependent on this mandate. Therefore, the WTO must not only enforce these rules but also create an extensive awareness in the hope of achieving a more efficient system.⁶³ Thus, the argument put forward by proponents of the multilateral trade is that the best way to achieve a more efficient system is through negotiations and execution of treaties. Such an approach is aimed at being more open to accommodating both the developed and developing countries concerns.

Thus, to further the above argument, the WTO possesses a certain paradoxical element; it aspires to uphold the principal of state sovereignty and simultaneously be a successful

⁵⁷ Ibid

⁵⁸ ‘The WTO and GATT: A Principled History’ available at www.brookings.edu, accessed on 10 May 2014

⁵⁹ Ibid

⁶⁰ The WTO and its agreements in principle seem to support both the developed and developing countries. However, in practice, the WTO has frustrated developing countries who feel they do not adequately benefit from the agreements. It is submitted that the WTO’s implementation of their agreements are flawed as they consistently favour developed countries.

⁶¹ ‘Chapter 2: The Multilateral Trading System’ available at www.unc.edu, accessed on 10 May 2014

⁶² Ibid

⁶³ Ibid

international organisation.⁶⁴ For an international organisation, like the WTO, it is imperative that the organisation facilitates cross border interaction and negotiations between countries. Interestingly, only in the last 150 years have states warmed up to the idea of a permanent, formal body being established that encroached on their principles of sovereignty and independence in negotiating mutually beneficial commitments.⁶⁵ The founders of the multilateral trading system were also not too fond of international organisations and were champions of independence and sovereignty.⁶⁶ They felt that organisations like the WTO require a level of subordination and compromised sovereignty in an unjustifiable manner.⁶⁷ Therefore, bridging the gap between international organisations and these principals was crucial to the development of the multilateral trading system and international law. The blurring of the principle of state sovereignty proved to be the main hindrance to the multilateral trading system's development.⁶⁸

2.2.2 *The GATT*

Before the formalisation of the WTO and the multilateral trade system, there were several moments of success and unfortunately also several failures that lead to the contemporary system. Therefore the build up to the WTO will be discussed in terms of developing countries, the relevant rounds of negotiations, and whether or not these negotiations included the issue of foreign direct investment.

The Allied Powers at the end of the Second World War had the opportunity to redesign the world structure. They wished to create a post-war system of international organisations that shared the characteristics of their respective national governments.⁶⁹ The United Nations General Assembly was intended to be the legislature, the International Criminal Court would be the judiciary and the World Bank and International Monetary Fund would be the equivalent

⁶⁴ Ibid

⁶⁵ Craig Van Grassek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

⁶⁶ Ibid

⁶⁷ 'Chapter 2: The Multilateral Trading System' available at www.unc.edu, accessed on 10 May 2014

⁶⁸ There were also certain hurdles that hindered the initial development of the multilateral trade system. The fact that international law was a euro-centric concept hindered its development. It meant regions outside of Europe had to overcome colonialism and its many forms of formalised inequality. The result being that international law was initially understood and practiced predominantly within European nations and their selected colonies.

⁶⁹ Craig Van Grassek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

of a central bank.⁷⁰ The International Trade Organisation (ITO) was intended to be the equivalent of a global trade ministry; however the ITO, like many of these institutions faced several hurdles, the dominant issue being state's concern over their sovereignty.⁷¹ These concerns resulted in a limited set of goals being outlined and executed by its diplomats. Concepts like free trade and a liberal economic system was deemed unrealistic for the ITO.⁷²

One of the goals outlined by the ITO concerned the creation of a multilateral agreement on investment. This was prepared through the ITO when drafting the Havana Charter, with Articles 11 and 12 intended to address foreign investment; unfortunately the Havana Charter was never ratified.⁷³ Had it been ratified the ITO would have played a decisive role in the framework of global investment.⁷⁴

The ITO's failure in terms of investment was one of several reasons that initiated the move from multilateral to bilateral investment treaties (BITs). Post the Second World War BITs became the dominant approach to investment agreements. This was largely due to the fact that the agreements afforded substantial protection to foreign investors, specifically against the threat of expropriation.⁷⁵ The ITO fell away soon after its conception, and countries turned to the GATT.⁷⁶ Intended to be a temporary setup, the GATT formed the central point of reference for the multilateral trading system and a precursor to a new platform that promoted trade on an international scale. Essentially the GATT, despite never intending to span half a century, became the international platform for international trade.⁷⁷

⁷⁰ Bernard Hoekman 'Global Trade Governance', available at <http://globalgovernanceprogramme.eui.eu>, accessed on 12 May

⁷¹ Ibid

⁷² Ibid

⁷³ The charter failed to be enforced as the US government refused to allow the US Senate to ratify the charter. Due to the American rejection of the Charter, no other state ratified the treaty. Certain elements of the Charter would later be used in the GATT.

⁷⁴ R Dolzer *Principles of International Investment Law* (2008) 3 ed (2008) 46

⁷⁵ The contentious issue of expropriation became a fear for many foreign investors as several developing countries, which were still discovering their independence post their colonial rule, considered the concept of nationalising their resources. Another reason was the establishment by the World Bank of the International Centre for Settlement on Investment Disputes (ICSID) to handle the settlement of disputes between host governments and investors. The ICSID provides a neutral platform to settle investment disputes with the assistance of third-party arbitration.

⁷⁶ Craig Van Grassek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

⁷⁷ Ibid

The GATT consisted of three key aspects, the first being the deepening of their tariff commitments by ensuring freer trade between members were possible, secondly the widening of their initial scope to accommodate broader issues and thirdly to increase the number of GATT contracting parties.⁷⁸ As more developing countries realised the importance of trading with the rest of the world they joined the GATT as it grew from an institution of the few to include almost all trading nations by the end of the Uruguay Round (1986–1994) accommodating fully fledged contracting parties and parties in the process of accession.⁷⁹

Thus, for the half century that the GATT was active, foreign investment was not tabled as they (the GATT) maintained a distinct division between trade issues and investment.⁸⁰ Only at the Uruguay Round of the GATT negotiations was investment introduced into the framework.⁸¹

2.2.3 The build up to the Uruguay Round

The founding of the GATT in 1947 was the first of its kind to create a common platform for international regulation. Founded predominantly by developed countries, certain developing countries such as Brazil and South Africa were also founding members.⁸² Despite this, for many years of negotiations before the Uruguay Round, trade was not deemed as an essential element to developing countries' economic development.⁸³ Therefore their lack of ambition in negotiating was evident in the minimal attention given to trading with other contracting parties of the GATT.⁸⁴ Furthermore, these minimal interests were maintained by certain rules of the GATT; the first being that the major traders would negotiate together and present an agreement to the rest. Secondly only “principal suppliers” could adjust tariffs.⁸⁵

⁷⁸ Chantal Blouin 'The Reality of Trade: The WTO and Developing Countries', available at www.nsi-ins.ca, accessed on 20 November 2014

⁷⁹ Bernard Hoekman 'Global Trade Governance', available at <http://globalgovernanceprogramme.eui.eu>, accessed on 12 May 2014

⁸⁰ Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

⁸¹ Ibid

⁸² Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ D Palmeter 'The WTO as a Legal System'(2000) 24 FIJL 444, 466

As negotiations continued, through the 1960's and 1970s the US initiated discussions on investment issues at the Organisation for Economic Co-operation and Development (OECD).⁸⁶ The OECD membership at the time consisted predominantly of developed nations; therefore the majority were in favour of a liberalised investment regime.⁸⁷ The result of this liberal push was the ratification of certain codes; the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations, which were promulgated to encourage member countries to reduce their restrictions on cross-border investment.⁸⁸ The main deficiency with these codes was the failure to include rights and obligations of foreign investors. Furthermore, developing countries, frustrated by the bullying tactics of foreign investors and the activity by developed countries, reacted by bringing investment issues before the United Nations (UN). The UN seemed a logical platform as they afforded all countries equal voting rights in the General Assembly (GA).⁸⁹

The frustration continued as issues concerning developing countries did not frequent the main agenda at the GATT negotiations before 1986.⁹⁰ For example agricultural issues were either excluded or handled via long-term trade arrangements. The Multi-Fibre Arrangement (MFA) handled all clothing and textiles concerns, and several developing countries maintained their special trading relationships with their former colonisers. Developing countries deemed these relationships far more beneficial in comparison to the Most Favoured Nation (MFN) treatment under GATT. Therefore they had no incentive to actively participate in GATT negotiations.

The Tokyo Round (1973 – 1979) coincided with developing countries move towards manufacturing as they were enjoying the benefits of negotiations.⁹¹ Despite their growth and rise in trade strength, the Tokyo negotiations were largely orientated around the European Union (EU) – US leadership. To the extent that the GATT was involved at a superficial level and developing countries' interests were not addressed. Moreover, during the Round, despite developing countries growth, they were not ready to diversify and increase their exports.

⁸⁶ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

⁸⁷ Bernard Hoekman 'Global Trade Governance', available at <http://globalgovernanceprogramme.eui.eu>, accessed on 12 May 2014

⁸⁸ Bernard Hoekman 'Global Trade Governance', available at <http://globalgovernanceprogramme.eui.eu>, accessed on 12 May 2014

⁸⁹ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

⁹⁰ Ibid

⁹¹ Ibid

2.2.4 *The Uruguay Round (1986 – 1994)*

Developing countries at the start of the Uruguay Round were far more eager and willing to trade than in previous decades as trade was of greater importance to their economic development.⁹² Many countries had also prioritised and became dependent on exports and therefore needed to change to an outward approach. Moreover they had been able to assert themselves on a global scale and their trade had a new found significance in world markets.⁹³ It was recognised across the spectrum, for countries to obtain the concessions which they desired, they would first need to offer something in return. Essentially the Uruguay Round became a bargaining process for most.⁹⁴ The levels of necessity during this process varied for developing nations based on their importance and attractiveness to developed countries.⁹⁵ During this round there was a clear interest in developing countries as developed countries pressured them to conform to the GATT's rules to participate in all aspects of the agreement.⁹⁶ This culminated in the Uruguay Round being an unprecedented experience for many developing countries.

A point worth mentioning is the unified approach taken by developing countries in terms of textiles and clothing. During the MFA negotiations developing countries realised that the pattern of successful exporters who dealt with rising costs and barriers would be repeated by new competitive exporters.⁹⁷ Developing countries went on to seize the opportunity by pre-empting these patterns and negotiating with other developing countries. This was at the expense of countries like China, who was not yet a contracting party of GATT, as well as other countries that were not politically tied to the current exporters.⁹⁸ Developed countries, the importers, reacted by attempting to rally opposition to reduce potential losses; however the developing countries found solace and security in other developing countries.⁹⁹ Unfortunately this united approach did not occur in agriculture with the food importing nations.

⁹² S Ostry (2000), *The Uruguay Round North – South Grand Bargain: Implications for Future Negotiations* 1 Ed (2000) 9

⁹³ S Ostry (noted 80 above) 10

⁹⁴ S Ostry (noted 80 above) 11

⁹⁵ Chantal Blouin 'The Reality of Trade: The WTO and Developing Countries', available at www.nsi-ins.ca, accessed on 20 November 2014

⁹⁶ Ibid

⁹⁷ Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

⁹⁸ Ibid

⁹⁹ Ibid

This united position then altered to an interest based approach. Initially developing countries did not entertain any inclusion of services in GATT; however during the negotiations certain advantages were identified.¹⁰⁰ Developing countries saw this as an opportunity to rectify the issues of cheap labour and inefficient sectors. These advantages enticed various groups resulting in the unified approach not applying to developing countries and services.¹⁰¹ Furthermore, on issues like subsidies, developing countries were included in the second stage of negotiations. The second stage traditionally involved the major countries and the inclusion of Brazil and India was significant.¹⁰²

In terms of foreign investment during the Uruguay Round of negotiations, by this stage the UN initiatives regarding investment lost momentum as several developing countries had incurred debilitating amounts of debt. The debt crisis of the 1980s became the justification for the World Bank's structural adjustment of international investment towards a more liberalised approach.¹⁰³ This resulted in developing countries being stranded without external sources of capital and were forced to welcome foreign investment out of necessity.¹⁰⁴

In the early 1980s the US once again lead the push for investment liberalisation, this time under the GATT.¹⁰⁵ The US proposed a work program that included both trade related services and performance requirements that should be imposed on foreign investors.¹⁰⁶ Developing countries like Brazil and India opposed the GATT entertaining any negotiations of that nature as it would be to the exclusive benefit of the US and other developed nations.¹⁰⁷ It was this dissention that resulted in the ambiguities found in the GATT ruling on the Foreign Investment

¹⁰⁰ Chantal Blouin 'The Reality of Trade: The WTO and Developing Countries', available at www.nsi-ins.ca, accessed on 20 November 2014

¹⁰¹ With the stellar growth and involvement of developing countries, the Uruguay Round had acknowledged that the exclusionary nature of the Tokyo Round could not be repeated. As a result of this, developing countries achieved an agreed programme of negotiations with the hope of not having a repeat performance.

¹⁰² Their inclusion could not have been completely unexpected as India and Brazil are progressive countries, who historically have been active negotiators. Furthermore, they led the opposition of developing countries when challenging the inclusion of services and intellectual property in the negotiations agenda.

¹⁰³ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014)

Review Agency of Canada. This ruling ultimately paved the way for negotiations on TRIMS. The TRIMS Agreement will be discussed at a later stage of this paper.¹⁰⁸

Despite the little progress made in terms of investment, one of the primary issues was that the GATT was a contract and not an organisation; therefore countries could not be members but rather parties to a contract.¹⁰⁹ This meant the commitments undertaken lacked definition due to the provisional nature of the agreements. These issues were compounded by the US attempts to expand the multilateral trading system to include issues such as investment, services and intellectual property rights.¹¹⁰ Despite the support of other developed countries, the general consensus was in favour of a new legal regime to implement a wider scope.¹¹¹ This new legal basis was realised in the early 1990s with the conclusion of the Uruguay Round which gave birth to the WTO. Therefore, the platform was laid for the WTO to address issues of investment with the possibility of an investment orientated agreement being discussed.

Thus one could argue that the birth of the WTO was viewed as a significant event in context of the political climate at the time. The WTO followed soon after the end of the Cold War and presented the opportunity to create new relationships between countries without the tension experienced during the GATT years.¹¹² Moreover, the 1990s were viewed as the decade for international organisations to solidify alliances, lead the way in the global public's interest and act according to the rule of law within a global society.¹¹³

Despite the Cold War enthusiasm, the WTO did face substantial uphill in asserting themselves as it was to be the third attempt within the century to rework the world order.¹¹⁴ Moreover countries were concerned with the concept of global governance and the extent their national interests may be compromised.¹¹⁵ This was compounded by differing views on the role of international law in governing a country's taxes, regulating their public goods and

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ BM Hoekman & M Kostecki , *The Political Economy of the World Trading System: from GATT to WTO* 3 Ed (1995) 195

¹¹¹ BM Hoekman & M Kostecki (noted 98 above) 195

¹¹² Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

redistributing their income, amongst other issues. These varying interpretations affected the development of the WTO as an institution.¹¹⁶

The birth of the WTO coincided with the maximum number of BITs being negotiated, as well as the emergence of regional initiatives on investment liberalisations.¹¹⁷ The need for trade and investment liberalisation was at its greatest and most nations depended on investment to ensure their economic development.¹¹⁸ With this in mind the US, under the OECD, led the way for the Multilateral Agreement on Investment (MAI) with the intention of being a comprehensive binding investment treaty. It dealt with the three main aspects, investment liberalisation, protection of investors and dispute resolution.¹¹⁹ Eventually the MAI would be taken over by the WTO as many felt it would be a better platform to enforce the dispute resolution mechanism.¹²⁰

As international support grew the mid-1990s were spent with the WTO intensifying efforts to establish a multilateral investment agreement. At the WTO ministerial conference in Singapore a proposal for multilateral negotiations on investment, as well as competition policy, government procurement and trade facilitation was tabled.¹²¹ Investment was a contentious issue as it offered many economic opportunities but was dependent on cross-border relationships.¹²² Once again India led the resistance which resulted in a compromise being reached.¹²³ Furthermore, a Working Group on Trade and Investment was set up under the WTO

¹¹⁶ These differences are best exemplified in the transatlantic interpretations of the EU who were in favour of a new international institution to replace the underpowered GATT; the US on the contrary were against a new world order. The US and EU's differences stemmed from their domestic experiences as economic integration arose at different times for the two powers. The US's constitution prohibited internal barriers to commerce and established a common external tariff which allowed for stellar economic growth. The rate of economic growth of the US was not matched in Europe and proved far more difficult politically. This was expected as once a common market was established by Europe could they try and catch up with the US. Moreover, Europe viewed regional integration as an achievement and a step closer to a harmonious continent; this fuelled their belief that the world could achieve a similar sense of peace and efficiency.

¹¹⁷ R Dolzer *Principles of International Investment Law* 3 ed (2008) 84

¹¹⁸ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹¹⁹ Ibid

¹²⁰ Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

¹²¹ Hoekman, Bernard M. and Kostecki, Michel, (1995), page 195, *The Political Economy of the World Trading System: from GATT to WTO*. Oxford: Oxford University Press.

¹²² K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹²³ BM Hoekman & M Kostecki, *The Political Economy of the World Trading System: from GATT to WTO* 3 Ed (1995) 196

to review and analyse the relationship between investment and trade issues. The Working Group made slow progress at the WTO and certain issues were agreed upon such as investor protection, national treatment and the dispute resolution process. Despite this progress, certain issues and disagreements remained and could not be resolved within their deadlines.¹²⁴

2.3 *The World Trade Organisation (WTO)*

The WTO's birth came after much negotiation and balancing of interests and rights of developing and developed countries. With this foundation explained, the fundamental aspects of the WTO and its effect on developing countries will be dealt with. Special light will be shed on the development and focus on foreign investment during the WTO's establishment until now.

The WTO, unlike the GATT, deals with more than trade and started to trespass on issues dealt with by other international organisations.¹²⁵ The WTO's goal is to expand its scope and jurisdiction to issues such as intellectual property, textiles and public health. Despite the difficulties of creating a harmonious, all incorporating law, the WTO went ahead and broadened its scope as they felt the stature of the WTO would be able to empower and drive these issues.¹²⁶ The WTO, as mentioned earlier, is prefaced on its open market policy¹²⁷, therefore the organisation operates by extending the reach of the market across borders in order to create international division of labour.¹²⁸ This is attractive to many countries as it allows them to specialise and focus on industries to which they are most suited.¹²⁹

¹²⁴ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹²⁵ Pranav Kumar 'Impact of the Uruguay Round on the Multilateral Trading System. The Uruguay Round and Developing Countries', available at www.nsi-ins.ca, accessed on 20 November 2014

¹²⁶ Ibid

¹²⁷ The contemporary version of an open market system is the amalgamation of two theories. Economists Adam Smith's approach to division of labour and absolute advantage provides a large portion of the contemporary beliefs concerning open markets, especially in context of countries that possess natural advantages in the production of certain goods.¹²⁷ The residual portion of the open market approach stems from David Ricardo's concept of comparative advantage; which allows for the countries that lack the ability to be the best at anything may still benefit from the open market system.¹²⁷ This is made possible by these nations still exporting products to other countries which are comparatively better at producing and importing products than they are.

¹²⁸ Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

¹²⁹ Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

2.3.1 The framework of the WTO

The WTO performs several functions and it is laid out in Article III of the Agreement Establishing the WTO. The first being the administration of the WTO agreements that lay down the legal rules for international commerce, as well as the codes of conduct for all WTO members. The WTO is expected to assist the implementation, administration and operation of the agreements so the objectives can be achieved.¹³⁰

The second proverbial hat the WTO wears, is as a permanent forum for multilateral trade negotiations. These forums entertain all matters covered by the WTO agreements, as well as new issues that are still being incorporated into existing agreements.¹³¹ The third functional aspect of the WTO is settling of trade disputes. Much like the forum it provides for negotiations, the WTO acts as a forum for settling trade disputes between its members. Disputes arise when member countries are found to be acting in a manner that is inconsistent with the WTO commitments. In the event a mutually agreed solution is unreachable, members may turn to the dispute settlement forum.¹³²

With these functions laid out, it partially explains the basic principles of the trading system. As alluded to earlier, there are many WTO agreements and legal text that deal with a wide range of activities, such as agriculture, textiles and clothing as well as telecommunications to name a few. Upon reading the relevant documents one will see a consistent pattern of fundamental principles which form the foundation of the multilateral trading system.¹³³

The first of these principle is that of trading without discrimination. The WTO promotes that under all WTO agreements, countries cannot normally discriminate between their trading partners. Therefore what may be offered to one partner must be offered to all. However an exception to this rule does exist, best known as the Most-Favoured-Nation (MFN) principle.¹³⁴

¹³⁰ 'Understanding the WTO', available at www.wto.org, accessed on the 4 Marcg 2014

¹³¹ Ibid

¹³² Ibid

¹³³ Ibid

¹³⁴ This principle can be found in the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. The principle is deemed a priority in the General Agreement on Trade in Services (GATS), Article 2, and in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 4. The manner in which the agreement is handled varies in each agreement however when read in conjunction it covers all three main areas of trade in terms of the WTO.

A continuation of this principle is that of national treatment. This entails that foreigners and locals must be treated equally when it comes to issues of trade. To give local products a fair chance, imported and locally-produced goods must be treated equally. This principle extends to foreign and domestic services and trademark issues.¹³⁵ This is followed by the principle of promoting free trade via negotiations. Negotiations are conducted with the effort of lowering trade barriers to encourage trade. These barriers may take the form of custom duties and measures.¹³⁶

The WTO realised that the promise to not raise a trade barrier can be as important as lowering one as it gives the relevant trading parties clarity with regards to their investments, as well as other opportunities. This is the reason behind transparency and predictability constituting a basic trading principle. This principle creates stability, encourages investment, creates jobs and allows for consumers to have a choice when buying a product. The Multilateral Trading System would not be able to exist without a stable foundation of consistency and predictability.¹³⁷ Furthermore, the WTO is a proponent of fair competition as it is a basic principle of their trade agreements.¹³⁸

There is a clear link between freer trade and economic growth, therefore a core principle of WTO agreements is that of open trading. The WTO is aware that all countries regardless of their economic status possess assets that can be beneficial to domestic markets as well as to compete in overseas markets. The concept of comparative advantage reinforces this principle and state that countries benefit by first utilising their assets in order to concentrate on what they produce best. Once this is established they can then trade these products for similar products that other countries produce best.¹³⁹

The majority of the WTO Agreements were negotiated during the Uruguay Round and signed at the Marrakesh Ministerial Meeting in April 1994. This entailed approximately 60 decisions and agreements including a revised approach to the original GATT. The "Final Act Embodying

¹³⁵ 'Principles of the Trading System', available at www.wto.org, accessed on 4 March 2014

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ The rules on non-discrimination, MFN and national treatment, were established with the promotion of fair competition in mind. These rules attempt to determine what is fair or unfair, and how governments can respond. An example of this is in charging additional import duties calculated to compensate for damage caused by unfair trade.

¹³⁹ Principles of the Trading System', available at www.wto.org, accessed on 4 March 2014

the Results of the Uruguay Round of Multilateral Trade Negotiations" (the Final Act) signed in Marrakesh in 1994 is regarded to be the cover note to all the WTO Agreements. Everything else is attached to this.¹⁴⁰

The Final Act is followed by the Marrakesh Agreement, which deals with the scope, functions and structure of the WTO. It goes on to define the WTO's relationship with other organisations, the handling of the budget, the duties of the secretariat, interpretation of legal text as well as decision making and the amendment procedure. Furthermore it deals with voting procedures, defines members and explains the accession of new members.¹⁴¹

The multilateral trade agreements (Annexes 1, 2 and 3) are applicable to all members and as such are understood to be a single undertaking. In the Uruguay Round, contrary to previous rounds, a different approach was used known as the single undertaking. This is understood to be multilateral trade agreements that are accepted as a whole to bind all WTO members. The Schedules of Commitments also form part of the single undertaking.¹⁴²

Contrary to the single undertaking approach adopted for most agreements, four plurilateral trade agreements were also negotiated during the Uruguay Round and apply only to members who agreed to be bound by them.¹⁴³ There are several agreements that control the trade in goods, which are binding to all WTO members. These are known as the multilateral agreements on trade in goods. The first of these being the GATT 1994 which sets out the basic goods-related obligations of WTO members; this agreement includes the provisions of the GATT 1947 that have been rectified and amended. It also includes the protocols and certifications dealing with tariff concessions. As well as the protocols of accession and undertaking on the interpretation of GATT provisions.¹⁴⁴

The next agreement is the General Agreement on Trade in Services (GATS). The GATS, which is also binding to all WTO Members, covers four modes of supply - from the perspective of an

¹⁴⁰ 'The Marrakesh Agreement Establishing the WTO (Articles IV:3 & IX:2', available at www.wto.org, accessed on 4 March 2014

¹⁴¹ Ibid

¹⁴² Ibid

¹⁴³ The plurilateral agreements negotiated during the Uruguay Round are; Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; and International Bovine Meat Agreement. The latter two were terminated at the end of 1997.

¹⁴⁴ Ibid

importing country: cross border services; consumption abroad; commercial presence; and movement of natural persons.¹⁴⁵ GATS at the end of the Uruguay Rounds called for further negotiation in respect of four service areas: namely financial services; basic telecommunications; movement of natural persons; and maritime transport.¹⁴⁶ The former two area negotiations were closed in 1997 and movement of natural persons ended in 1995, whilst negotiations on maritime transport were also suspended. In respect of financial services, in March 1999 the Financial Services Agreement (FSA) came into effect.¹⁴⁷ It covers a range of financial services and approximately 95 per cent of global trade in these services.¹⁴⁸ Despite it creating a comprehensive legal structure for market access; cross-border trade and dispute settlement mechanisms¹⁴⁹ numerous countries have failed to exercise its varying reforms.¹⁵⁰

This is followed by the Agreement on Trade – Related Aspects of Intellectual Property (TRIPS). The objective of the TRIPS agreement are understood to be; (i) the reduction of distortions and impediments to international trade; (ii) the promotion of effective and adequate protection of intellectual property rights; (iii) ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to trade.¹⁵¹ The aim of these rights is to contribute to the promotion of technological innovation and transfer of technology. Furthermore the TRIPS agreement is also binding on all WTO Members.

As discussed earlier the WTO acts as a forum for the settling of trade disputes between its members. The rules and procedures of the WTO dispute settlement system are embodied in the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (the DSU), which applies to all WTO Members.¹⁵²

¹⁴⁵ Ibid

¹⁴⁶ S Ostry (2000), *The Uruguay Round North – South Grand Bargain: Implications for Future Negotiations* 1 Ed (2000) 9

¹⁴⁷ S Ostry (Noted 134 above) 9

¹⁴⁸ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹⁴⁹ In respect of dispute settlement mechanisms, the GATS as a part of the WTO provides that a country may be asked to provide compensation where they have failed to adhere to its commitments and have not made the required policy changes.¹⁴⁹ Such request may only be made however where a tribunal finds such mechanism necessary.

¹⁵⁰ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹⁵¹ 'The Marrakesh Agreement Establishing the WTO (Articles IV:3 & IX:2', available at www.wto.org, accessed on 4 March 2014

¹⁵² Ibid

Lastly, there is the Trade Policy Review (TPRM), the purpose of TPRM is to improve and ensure adherence of all members to the rules and obligations that have been committed too under the Multilateral Trading System and the Plural Lateral Trading System. This improves efficiency and promotes transparency across the organisation. The review mechanism facilitates the evaluation of all members' activities within the organisation and at a domestic level. This assessment is conducted in context of the wider economic and developmental needs, policies and objectives of the members concerned.¹⁵³

2.3.2 Developing countries and the WTO

Due to the seismic shift in the geopolitical structure of world power, developing countries find themselves in a position of power that is foreign to all parties involved. This means developing countries now have the ability to negotiate, assert and protect their interests and resources. Developing countries have become a necessity to developed countries and international systems alike who wish to include them in their various negotiations.¹⁵⁴ With this in mind developing countries' needs to assess how best they may balance their domestic needs with their international aspirations. International organisations, like the WTO, in their attempt to have a truly global impact, have realised the need to include developing countries in their negotiations and accommodate traditionally "weaker" members with varied interests.¹⁵⁵ Despite the principles of the WTO, the implementation and practice in terms of developing countries is questionable.

Developing countries, like South Africa, are faced with critical questions that must be addressed; the first being what are its policy objectives in terms of development on a domestic and international level.¹⁵⁶ Secondly, how can economic growth be stimulated and directly contribute to the overall development.¹⁵⁷ In terms of cross-border relations, developing countries need to set out their objectives clearly and establish a mutually beneficial framework via negotiations.¹⁵⁸ This may involve altering trading patterns, reducing of tariffs and altering

¹⁵³ Ibid

¹⁵⁴ Craig Van Grastek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

¹⁵⁵ Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Ibid

their general economic structure. This must be done in a manner that does not compromise their policy framework and on-going trade negotiations.¹⁵⁹

Historically trade negotiations for developing countries have not been fruitful. Their lack of natural and government resources hindered their activity and effectiveness in the WTO. Moreover, the technical nature of negotiations presented certain difficulties¹⁶⁰ and the negotiations have failed to show many developing countries the benefits of trade liberalisation.¹⁶¹ Much to the frustration of many of the developing nations an imbalance of power still exists within and around the WTO. This stems largely from the fact that the WTO has faced difficulty in accommodating trade issues concerning investment.¹⁶²

2.3.3 Post Uruguay Round

The developing countries that were active during the Uruguay Round maintained their momentum and participated in the various committees¹⁶³ established post the Uruguay Round.¹⁶⁴ The countries that had not negotiated started to participate in the implementation aspects. Furthermore, existing alliances were maintained with the emergence of one new grouping of small island countries who wished to assist themselves in terms of costs and implementation issues.¹⁶⁵

2.3.3.1 Seattle Ministerial Conference

The end of the 20th century witnessed the Uruguay commitment to reopen agriculture and services negotiations come to fruition with a new Round being established to deal with these issues. Moreover these preparations allowed for further advancements in formalising procedures which had not taken place in previous Rounds. The lessons learnt from the Tokyo,

¹⁵⁹ Ibid

¹⁶⁰ S Ostry (2000), *The Uruguay Round North – South Grand Bargain: Implications for Future Negotiations* 1 Ed (2000) 9

¹⁶¹ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹⁶² Ibid

¹⁶³ One such example is the committee for the Agreement on Agriculture established during the Uruguay Round.

¹⁶⁴ Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

¹⁶⁵ Patrick Love & Ralph Lattimore, 'Trade Rounds and the World Trade Organization', available at www.oecd-library.org, accessed on 20 August 2014

Uruguay and Singapore Rounds motivated the move to define the agenda.¹⁶⁶ Furthermore the fall out between the EU and the US had stressed negotiations across the table as these former hegemonies failed to reach an agreement regarding intellectual property, agriculture and the extension of the WTO rules.¹⁶⁷ This formed the backdrop that developing countries had to contend with when preparing for a potential new round of negotiations.

Developing countries were extremely willing to be involved for several reasons; the first being that several countries did not want to lose their momentum and economic benefits that came from their active participation.¹⁶⁸ Secondly, these countries had realised the cost of their lack of inactivity during negotiations and did not wish to lose out, again. Lastly, developing countries' governments faced domestic pressure to participate and represent their country's best economic interests.¹⁶⁹

Thus, in the final preparations for the Seattle Round efforts were made for all countries to be included in the consultation concerning the agenda for negotiations. The agenda was orientated around the liberalization in industrial products, as well as the Uruguay Round agenda which includes negotiations in agriculture and services. To avoid discrimination and remain diplomatic the majority of countries' interests were included and those that were excluded could be challenged.¹⁷⁰ The Chair of the Ministerial meeting in Seattle, the US, decided to designate an informal group to establish the agenda. This group was better known as the "Green Room".¹⁷¹

The problem with this group stemmed from the lack of formality when challenging the group's decisions. In light of this, developing countries refused to accept the results and questioned the legitimacy of the procedure. It was issues of this nature, amongst other aspects, that resulted in the stale-mate and failure to reach a consensus at the Seattle Ministerial. Despite its failure the

¹⁶⁶ Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Patrick Love & Ralph Lattimore, 'Trade Rounds and the World Trade Organization', available at www.oecd-library.org, accessed on 20 August 2014

¹⁷¹ Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

resistance from developing countries reflected a shift in the balance of power since the Uruguay Round of negotiations.¹⁷²

Between the Seattle and Doha Rounds many of the developing countries had established regional alliances. Alliances were formed in Africa, the Caribbean and in Latin America.¹⁷³ These alliances provided experience in terms of negotiations and assisted in prioritising which issues to table. The Southern African countries had to approach negotiations taking into consideration the interests of the Southern African Development Community (SADC) and even more the relationship between SADC and the EU as there were many existing bilateral agreements between these parties that were still in place at the time.¹⁷⁴

2.3.3.2 The Doha Round of negotiations

Most countries approached the Doha Round with one issue on their mind, agriculture, in terms of both services and investment. Even though this area is not the primary focus of the research – the actions of developing countries in respect to this particular issue is important as it forms the backbone of trading for many developing countries. Despite the on-going negotiations there was little expectation of success without a greater ministerial initiative. The EU's efforts to protect its rule on subsidies and to obtain recognition that agriculture may be used for social and environmental purposes was defeated by a general alliance of developed and developing countries who opposed the EU's approach.¹⁷⁵ This anti-subsidy lobbying by the developing countries was a significant achievement. Furthermore their presence in the general alliance was clear and it reflected in the concessions they received in areas crucial to their development.¹⁷⁶

The next achievement in agriculture came in terms of special and differential treatment. In a move that many say is a shift back to pre-Uruguay round position, special and differential treatment was acknowledged as crucial to agricultural negotiations and agreements.¹⁷⁷ The Doha round also extended the time afforded to Least Developed Countries (LDCs) to comply

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ Patrick Love & Ralph Lattimore, "Trade Rounds and the World Trade Organization", available at www.oecd-library.org, accessed on 20 August 2014

¹⁷⁵ Ibid

¹⁷⁶ Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

¹⁷⁷ Ostry, S (2000), *The Uruguay Round North – South Grand Bargain: Implications for Future Negotiations*, Yje Political Economy of International Trade Law, University of Minnesota (page 15)

with issues of subsidies and intellectual property.¹⁷⁸ These victories were important to the position of developing countries and could be attributed to the initial discussions and informal negotiations in preparation for the Doha Round.¹⁷⁹

It is worth noting, that in comparison to the Uruguay Round, the Doha Round was far better equipped to take a progressive stance on services during negotiations. Members agreed to continue with the existing foundation and maintain their early deadlines. In terms of labour services many expected progress that would allow these services to be extended across countries' borders.¹⁸⁰ However this was met with resistance due to several considerations, such as security, that halted the progress of labour services.¹⁸¹ The next challenge under services was the issue of implementation which became circular. Developed countries were accused of failing to complete their obligations whilst developing countries required more time to meet theirs.¹⁸² The token section on implementation in the Declaration and the lack of enforcement of contractual commitments counted as a defeat for the developing countries' objectives.¹⁸³ There were subjective victories in terms of intellectual property and on the general rules; however they had no real bearing on the status of developing countries in the WTO.¹⁸⁴ They (developing countries) had also suffered a defeat on the environmental front as the roles they will play in negotiations were left open-ended with their participation unknown.¹⁸⁵

The success of developing countries participation in the Doha Round must be looked at in context of their relative weaker infrastructure when compared to the developed countries. In this context these victories are important. They were successful in several of their declared priorities and subsequently managed to obtain personal achievements that had the potential to

¹⁷⁸ Page, S (2002) , 'Developing Countries in GATT/WTO Negotiations' , Overseas Development Institute, Working Paper (page 33)

¹⁷⁹ On non-agricultural tariffs the agenda's diction represented a cognisance for the interests and position of the developing countries. In terms of tariffs they were implemented with the intention to assist and promote Least Developed Countries participation in the negotiations. Furthermore in terms of technology transfer, there was increased funding for developing countries.

¹⁸⁰ Patrick Love & Ralph Lattimore. 2009, "Trade Rounds and the World Trade Organization" in International Trade: Free, Fair and Open? OECD Publishing.

¹⁸¹ Patrick Love & Ralph Lattimore. 2009, "Trade Rounds and the World Trade Organization" in International Trade: Free, Fair and Open? OECD Publishing.

¹⁸² Patrick Love & Ralph Lattimore. 2009, "Trade Rounds and the World Trade Organization" in International Trade: Free, Fair and Open? OECD Publishing

¹⁸³ Sheila Page 'Developing Countries in GATT/WTO Negotiations', available at www.odi.org, accessed on 10 March 2014

¹⁸⁴ Ibid

¹⁸⁵ Ibid

improve their economic development.¹⁸⁶ Despite the condescending tone of several developed countries who underestimated the fight within the developing countries, their resistance and stubbornness was rewarded. Furthermore the developing countries grew and learnt from each round of negotiations.

In terms of investment, despite the exponential number of bilateral and multilateral treaties relating to foreign investment being established by the time of the Doha Round, no multilateral investment regime existed. This was acknowledged by the Doha Development Agenda who have committed to creating a multilateral framework for transparency and predictability that ensures long term foreign investment.¹⁸⁷ However, this is as far as investment has been dealt with. In December 2013, the Ninth Ministerial Conference of the WTO convened in Bali, Indonesia, with negotiations focused on the lowering of trade barriers. The negotiations produce the Bali Package¹⁸⁸ trade agreement.

2.4 WTO Agreements incorporations of foreign investment

Under the present WTO regime, no extensive multilateral agreement on investment exists. During the Uruguay Round of the GATT negotiations however, investment-centred provisions were introduced in the TRIMS Agreement and the GATS.¹⁸⁹

The former agreement, TRIMs, came into effect on 1 January 1995 and was enacted so as to deal with trade related investment measures.¹⁹⁰ It did not define what trade-related investment measures were involved but was included in the Uruguay Round due to pressure from developed nations much to the dismay of developing nations.¹⁹¹ This opposition was due to the

¹⁸⁶ Ibid

¹⁸⁷ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

¹⁸⁸ The Bali Package consisted of ten separate decisions, covering four areas; trade facilitation, agriculture, cotton and the development of LDCs.

¹⁸⁹ Craig Van Grasstek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

¹⁹⁰ Craig Van Grasstek 'The History and Future of the World Trade Organisation' available at www.wto.org, accessed on 14 March 2014

¹⁹¹ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

agreement providing a list by which to abolish investment measures which adversely affected trade, a move which developing nations viewed as vital to their economic development.¹⁹² In respect of its contents, the TRIMs agreement reaffirmed Articles III (National Treatment) and XI (Prohibition of Quantitative Restrictions) of the GATT. It further went on to introduce standstill and rollback mechanisms in respect on trade balancing; foreign exchange balancing and local content rules.¹⁹³ Due to a number of developed and developing countries using pre-existing investment incentives and performance requirements, the Agreement did not deal with the issue of export performance requirements.¹⁹⁴

To monitor and manage the implementation and execution of the TRIMs agreement, a committee tasked with doing so was established. Member countries were provided with 90 days within which to inform such committee of any existing TRIMs and where thereafter awarded a transition period within which to terminate the declared TRIMs.¹⁹⁵ The length of the awarded transition period was dependant on whether the country at hand was classed as developed or developing – developed countries were awarded 2 years; developing countries, 5 years; and the least developed, seven years.¹⁹⁶ The latter classes were also granted the ability to apply for extensions on the transition periods.¹⁹⁷ However, in terms of applying the TRIMs agreement, all countries are expected to comply with TRIMs upon accession without any transition period being awarded or applied for.¹⁹⁸ Apart from the aforementioned concessions, developing countries are also granted certain exemptions which permit them to deviate temporarily from the agreement due to any balance-of-payment problems.¹⁹⁹ As with all agreements, the TRIMs agreement has also been subject to disputes. Such disputes are governed by the WTO Dispute Settlement Understanding (DSU) and are thereby resolved according to the same settlement mechanism.²⁰⁰

¹⁹² Ibid

¹⁹³ Agreement on Trade Related Investment Measures, 1995

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ Smythe E 'Your Place or Mine?: States, International Organisation and the Negotiation on Investment Rules' (1998) 7.3 Transnational Corporations 85, 115

¹⁹⁷ Note 183 above, 115

¹⁹⁸ Note 183 above, 115

¹⁹⁹ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

²⁰⁰ Smythe E 'Your Place or Mine?: States, International Organisation and the Negotiation on Investment Rules' (1998) 7.3 Transnational Corporations 85, 116

The latter Uruguay Round agreement, GATS, is the first agreement on trade and investment in services which is both multilateral and legally enforceable. It sets out the obligations for trade in services and deals with over 160 different service activities, including energy; education and banking.²⁰¹ The aim of the agreement is to eliminate government measures which inhibit services from trading freely across national borders or which ignore locally established service firms which are foreign owned.²⁰² To implement this aim, GATS has built in the right of establishment, by which service providers may establish a commercial presence in sectors which countries have entered into certain commitments.²⁰³ By introducing this right, the GATS has established itself as an indirect investment agreement and has opened up both commercial services and vital social services to foreign investment.²⁰⁴

GATS further incorporate three principles, namely market access; the MFN principle and national treatment.²⁰⁵ The former refers to a situation whereby a country is obliged to allow international service suppliers to enter their markets, whilst the latter refers to the treating such suppliers under the same terms and conditions as local suppliers.²⁰⁶ MFN in turn provides that a country must treat service providers from all member countries alike. The application of these and other principles differ however, in that some are to be followed automatically whilst others are only applicable once they have been specifically included in a member country's schedule of commitments.²⁰⁷ The former approach is known as negative or top down listing whilst the latter is known as positive or bottom up listing.²⁰⁸ These varying approaches have created the impression that GATS is a flexible agreement. Whilst this may hold true for some, developing nations have not been privy to much of this flexibility given that they are often obliged, due to uneven power relations, to take on greater commitments.²⁰⁹

²⁰¹ The General Agreement on Trade in Services, 1995

²⁰² K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

²⁰³ M Matuatha, TJ Schoenbaum & CP Mavroids, *The World Trade Organisation Law, Practice, and Policy* 1 Ed (2006), 526

²⁰⁴ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

²⁰⁵ The General Agreement on Trade in Services, 1995

²⁰⁶ The General Agreement on Trade in Services, 1995

²⁰⁷ The General Agreement on Trade in Services, 1995

²⁰⁸ M Matuatha, TJ Schoenbaum & CP Mavroids (Noted 190 above) 526

²⁰⁹ M Matuatha, TJ Schoenbaum & CP Mavroids (Noted 190 above) 526

Unlike the TRIMs Agreement, the GATS only came into effect in 2000.²¹⁰ This was due to several member countries' desire to keep it out of the WTO purview.²¹¹ After much negotiation however, it became a part of the WTO, with all member countries being signatories of its framework and with each having made varying commitments to the different service areas.²¹² The US and EU have extended the GATS' scope through such negotiation, whilst developing countries have called for safeguards to be introduced into it, ensuring that their domestic entities are not placed under threat by global service providers.²¹³

Apart from TRIMs and GATS, the WTO has also introduced TRIPS – Trade Related Aspects of Intellectual Property Rights Agreement. It aims to liberalize investment policies by introducing the protection of the intangible asset of intellectual property.²¹⁴ The WTO is currently in the process of examining issues relating to trade and investments by way of a Working Group on Trade and Investment. This Group was formed in 1996 and is tasked with examining the varying aspects of investments. Their mandate is exploratory and analytical however and does not provide for the creation of new rules.²¹⁵

2.5 Conclusion

This chapter consisted of two dominant themes; the first being developing countries and the challenges faced by them in WTO, with the second theme being the extent to which the WTO has given attention to investment. In terms of the former, developing countries have had a consistently difficult time asserting their needs during the rounds of negotiations. In principle the WTO is worthy of the time of all its member countries, especially developing countries who stand to benefit from the MFN and single undertaking principles. However, in practice, the WTO has consistently favoured the developed countries. Due to the nature of the WTO and the manner it was founded, developing countries have always been at disadvantage. The core

²¹⁰ M Matuatha, TJ Schoenbaum & CP Mavroids (Noted 190 above) 526

²¹¹ Van Grastek, C (2013) 'The History and Future of the World Trade Organisation', World Trade Organisation (page 24)

²¹² K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

²¹³ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014

²¹⁴ M Matuatha, TJ Schoenbaum & CP Mavroids (Noted 190 above) 531

²¹⁵ K Singh, 'Multilateral Investment Agreement in the WTO, Issues and Illusions' available at www.wto.org, accessed on 14 March 2014)

principles of the WTO, such as the open market policy, have favoured the more developed nations with the principles being used as a justification to access developing countries' markets and materials.

The second theme of the chapter was the extent and manner in which investment has developed in the multilateral trading system, specifically whether the WTO gave investment the necessary credence. Investment has only come to the fore in the last 20 years due to political and economic reasons that did not allow for investment to grow within the multilateral trading system. Under the WTO, investment has been dealt with via the TRIMS and GATS respectively. However, in light of the growing need for investment and the substantial development that investment can create, especially for developing countries, a new multilateral investment agreement should be considered.

The next chapter will build on this discussion by focusing on the development of FDI on a South African level, and transporting these principles to a discussion on South Africa's new approach to FDI and its international and domestic ramifications.

CHAPTER THREE

3. IN WHAT MANNER HAS SOUTH AFRICA DEALT WITH THE ISSUE OF INVESTMENTS, IN LIGHT OF THE CHANGING GEOPOLITICAL STRUCTURE

3.1 Introduction

As the previous chapters have alluded to, developing countries take varied approaches in achieving economic growth and stability. For many emerging economies Foreign Direct Investment (FDI) is considered a progressive and profitable avenue. More so, because FDI assists the development of new infrastructure, provides capacity for growth and facilitates the exchange of skills and technology, especially in terms of the newer forms of capital inputs that cannot be achieved through trading.²¹⁶ It also promotes competition in the domestic market by allowing essentially the same product of varying quality to be sold simultaneously. In addition, in respect of the labour market, host nations gain employee training in creating and operating new businesses.²¹⁷

The perks of FDI must be looked at in the context of the African continent which is overflowing with investment potential and thus been able to expand the interest of the developed world. This interest has taken the form of a rapid increase in FDI, with countries and unions laying a foundation in Africa to be perfectly poised to capitalise on the continent's potential.²¹⁸ Being the world's second largest continent and possessing a rich variety of resources it is the opportune time for African countries to seize this opportunity by maximising on the abundance of international interest, specifically via foreign investment.²¹⁹

Since African countries, and specifically South Africa, are indeed gaining the interest of the developed world, the objective of this chapter is to specifically analyse the manner in which South Africa has been dealing with issues pertaining to investment, in light of the changing

²¹⁶ Prakash Lougani & Assaf Razin, 'How beneficial is Foreign Direct Investment for Developing Countries?', available at www.imf.org, accessed on 15 July 2014

²¹⁷ Ibid

²¹⁸ Stanley Subramoney, 'Africa has the advantage – it now needs to win the game', available at www.nepad.org, accessed on 15 July 2014

²¹⁹ Ibid

world order. In order to assess the country's progress, this chapter will firstly underline the various reasons relating to the importance of attracting foreign investment to South Africa. Secondly, a critical analysis of FDI in South Africa will be provided, including an historical overview of the country's investment relations, measures and development. Thirdly, with the context and foundation laid out, the Promotion and Protection of Investment Bill will be dissected to ascertain the possible benefits and drawbacks that it contains, as well as its potential to be improved upon.

3.2 The need for South Africa to attract foreign investment

There has been much technological, agricultural and business innovation across the continent. Thus, international businesses attention has taken the form of an increasing number of international companies establishing business premises across the continent, furthermore a number of banks have also taken an interest resulting in stronger stock market performances.²²⁰ All of which has contributed to economic growth across the continent, and importantly in South Africa.²²¹

Thus, it has become apparent that economic growth and stability are important factors that will encourage consistent foreign investment in Africa, and particularly South Africa. The process of encouraging foreign investment must always be to promote and preserve democracy and not jeopardise the democratic process of the host country. This is important as Africa cannot allow itself to be stripped of its riches for a second time.²²² Therefore, in achieving consistent growth, the approach to foreign investment needs to avoid the colonialist theme of Western powers benefitting from the land at the expense of the locals.²²³ In other words, in attracting FDI there needs to be an equitable approach where all parties benefit.

This spotlight on Africa has taken the form of FDI, with emerging powers such as China and India, as well as established super powers like the US increasing their FDI involvement in

²²⁰ Ibid

²²¹ Ibid

²²² The first "time" refers to the colonisation of many African countries under European rule.

²²³ Stephen Gelb S & Anthony Black, 'Foreign Direct Investment in South Africa, Investment Strategies in Emerging Markets' available at <http://r4d.dfid.gov.uk>, accessed on 14 July 2014

Africa.²²⁴ China and India are pursuing strategies that go beyond natural resources, which include: fast growing modernising industries as both economies have burgeoning middle classes that represent growth and purchasing power.²²⁵ It is this hunger that has resulted in these countries buying Africa's light manufactured products, household consumer goods, processed foods, telecommunications and tourism facilities.²²⁶ This places South Africa in an advantageous position as it remains one of Africa's biggest economies and in context of the rest of the continent, it provides a far more stable investment prospect.²²⁷

Despite this, if South Africa wishes to catch up with other developing countries, it needs to make a greater effort in attracting FDI and empowering the economy. There is a strong relationship between economic growth and foreign investment, and a greater level of investment ensures sustainable growth rates which create massive incentives for South Africa in attracting FDI.

Interestingly, the AT Kearney FDI confidence index of the world's leading multinational corporations showed that South Africa moved from 15th place to 13th place.²²⁸ The top 10 countries together all attract half of all global FDI which amounted to \$1.4 Trillion in 2012. The index further indicated that South Africa in 2013 saw their FDI double to \$10 billion, which is more than six times less than fifth placed Brazil.²²⁹ The US was firmly seated in the number one spot, followed by China, with India, Australia and Singapore all in the top 10. Interestingly, Dubai in the United Arab Emirates (UAE) rose to 11th spot as it acts as an investment hub for the Middle East and Africa.²³⁰ The simple lesson from this index is that South Africa should be attracting improved numbers in terms of FDI.

To add to this, experts from AT Kearney attribute successful attraction of FDI to structured programmes that are implemented on a state level. They go on to explain that these programmes introduces diversity to manufacturing, additional skills, improved economic development and

²²⁴ Xanthi Payi, 'Attracting FDI key to South Africa and Africa's growth and development agenda' available at www.stanlib.com, accessed on 14 July 2014

²²⁵ Sanne Van Der Lugt, Victoria Hamblin, Meryl Burgess & Elizabeth Schikering, 'Assessing China's role in Foreign Direct Investment in Southern Africa', available at www.ccs.org, accessed on 24 July 2014

²²⁶ Ibid

²²⁷ Xanthi Payi, 'Attracting FDI key to South Africa and Africa's growth and development agenda' available at www.stanlib.com, accessed on 14 July 2014

²²⁸ www.bdlive.co.za accessed on the 12 September 2014

²²⁹ Ibid

²³⁰ Ibid

increased productivity which results in job creation. They went on to suggest that FDI would be the ideal approach for South Africa to compensate for its low savings rate and to increase employment and incomes.²³¹ South Africa is also the largest producer of platinum - despite not producing consistently at the moment - they also have a large mineral base, accompanied by one of the most sophisticated banking systems on the continent and are viewed as a gateway to Africa.

In light of these opportunities, the Protection and Promotion of Investment Bill in conjunction with South Africa's membership to the Brazil, Russia, India, China and South Africa (BRICS) alliance is evident of South Africa's attempts to improve and encourage FDI. However there are certain aspects of the Bill that have investors apprehensive. It is argued that the Bill has been drafted in light of the grievances felt by the South African government in applying the previous approach to FDI. Therefore, it would seem appropriate to discuss a brief history of South Africa's approach to foreign investment.

3.3 The history of South Africa's approach to foreign investment

Foreign investment has a complex and lengthy history in South Africa, dating back to the 17th Century when the first European colonialists settled in the country. Before their establishment, the economy was orientated around agricultural exports, specifically maize and fruit, to Europe with dominance from London based banks.²³² Moreover, the major mineral deposits, firstly with diamonds and later with gold, became the catalyst in the industrial advancements and development.²³³ These key developments in the sector led to the creation of the Johannesburg Stock Exchange, which in turn stimulated domestic growth and re-investment of mining profits.²³⁴

However, the turn of the century witnessed a greater focus on manufacturing development, with investments from the United Kingdom (UK), the United States of America (USA) and Europe promoting growth of new industrial sectors.²³⁵ Despite difficulties felt across the board

²³¹ Ibid

²³² Stephen Gelb S & Anthony Black, 'Foreign Direct Investment in South Africa, Investment Strategies in Emerging Markets' available at <http://r4d.dfid.gov.uk>, accessed on 14 July 2014

²³³ Ibid

²³⁴ Xialoue Sun, 'Foreign Direct Investment and Economic Development, What Do The States Need To Do?' available at www.unpan1.un.org, accessed on 10 September 2013

²³⁵ Ibid

during World War Two, post the war, FDI continued to flow into mining, specifically aspects of manufacturing and services in other services. By the 1970s, approximately 40 per cent of FDI stock was in manufacturing and only 15 per cent in mining.²³⁶

From the 1970s onwards FDI into South Africa decreased. This was mainly due to the pressure put on investors by their home countries in light of the apartheid regime.²³⁷ The growing international campaigns, such as the Anti-Apartheid Movement and the rallies of the African National Congress (ANC), as well as international sanctions imposed on South Africa made it extremely difficult for investors to interact with South Africa on any level.²³⁸ As the campaigns intensified, the political instability of South Africa's resulted in the country's economy to suffer. The political instability led to an exodus of foreign investors in the 1980s with a large number of US and UK firms departing. Despite the large number of firms dissociating themselves with South Africa up to 450 firms still remained.²³⁹

The early 1990s saw the end of the apartheid regime, with bans on key organisations such as the ANC being lifted.²⁴⁰ Constitutional negotiations took precedence with the end result being a date set for South Africa's first democratic election in 1994. These factors did contribute in renewed interest in the country, as an investment opportunity. Thus, South Africa's FDI rebirth was initiated with existing inflows of prior investment dictating the composition of inflows during the 1990s.²⁴¹

The renewed interest in a democratic South Africa was further enhanced by the country's joining of key international organisations and ratifying of strategic international agreements.²⁴² The sense of political and economic stability catapulted the country as a promising investment opportunity. Moreover, the country's implementation of legislation and policies that were pro-

²³⁶ Augustina Asafo, *Foreign Direct Investment And Its Importance To The Economy Of South Africa* (University of South Africa, 2007) 7

²³⁷ *Ibid*, 9

²³⁸ *Ibid*, 7

²³⁹ Stephen Gelb S & Anthony Black, 'Foreign Direct Investment in South Africa, Investment Strategies in Emerging Markets' available at <http://r4d.dfid.gov.uk>, accessed on 14 July 2014

²⁴⁰ *Ibid*

²⁴¹ *Ibid*

²⁴² South Africa has been a member of the African Union since 23 May 1994; a member of the WTO since 1 January 1995 and a member of GATT since 13 June 1948; a charter member of the UN since 1945 and became a non – permanent member of the UN Security Council in 2006 until 2008. They were once again a non – permanent member from 2010 until 2012.

investment also had a significant impact. In support of this South Africa introduced a general liberalisation of the local markets with the intention of encouraging new foreign investment. The importance of FDI was clearly recognised by the South African government²⁴³ and was reinforced by the implementation of the Growth Employment and Redistribution (GEAR) policy being introduced and implemented in 1996. GEAR applied FDI as the dominant form of solving the saving shortages faced by the new government.²⁴⁴

To expand on GEAR briefly, there were two key economic policies of the post-Apartheid government in South Africa. The first being the Reconstruction and Development Programme (RDP) established in 1994 and GEAR which followed two years later.²⁴⁵ The RDP aimed to improve service delivery to the poor and create an environment conducive to social development. GEAR on the other hand, was a neoclassical macroeconomic stabilisation policy. In terms of the GEAR policy measures, there were both fiscal and monetary policies. In terms of fiscal policy, GEAR was intended to establish a quick deficit reduction, a cut back in government expenditure, and to reduce the tax of the Gross Domestic Profit (GDP).²⁴⁶ In terms of Monetary Policy, GEAR intended to tighten monetary policy and create a gradual relaxation of exchange controls.²⁴⁷

Moreover, South Africa needed to prove to the world, despite its turbulent history and neighbouring nation's lack of stability, that it was a stable political country ready to interact with foreign investors on a profitable basis.²⁴⁸ In light of this, bilateral investment treaties (BITs)²⁴⁹ were the best system to safeguard foreign investments and formed a key factor behind

²⁴³ Ibid

²⁴⁴ Ibid

²⁴⁵ www.treasury.gov.za accessed on 12 September 2014

²⁴⁶ Ibid

²⁴⁷ Ibid

²⁴⁸ Azimpheleli Langelanga, 'South Africa's Foreign Investment Regulation: A revisit by Azimpheleli Langelanga', available at <http://blogaila.com>, accessed on 14 July 2014

²⁴⁹ A BIT is a bilateral treaty between two States that generally entails protection granted and received regarding investments made by citizens and companies of the other State. The protection is intended to go beyond that which the investor would expect under the contractual relationship. This may entail protection of the investor against nationalisation or expropriation. Moreover, the treaties usually contain an appropriate dispute resolution mechanism in the event the investor seeks international arbitration to be enacted against the State that is in breach of the BIT.

Although a BIT is a separate treaty between two contracting states and must be interpreted in accordance with the wording of the treaty, essentially there are five key principles:

- "national treatment" i.e. Investors from a contracting state will not be treated less favourably than locals
- "most favoured nation" status i.e. Investors from a contracting state will not be treated less favourably than locals.

South Africa engaging in BITs with several capital exporting nations.²⁵⁰ However, most of these treaties were signed before the final Constitution was ratified. This is important to note as any renegotiations that would occur would have to be executed in light of the Constitution.²⁵¹ Unlike the original BITs that were negotiated under the Organisation for Economic and Co-operative Development (OECD) template²⁵², these BITs were orientated around the protection of the foreign investor, leaving the government with limited space to manoeuvre.²⁵³ In light of this, the South African government has been strategizing a new approach that will offer greater protection for them.

3.4 The Governments Review of Investment Policy

South Africa post 1994 has had an open FDI regime. This means their approach does not control inward investment unless it deals with competition regulation in terms of mergers and acquisitions.²⁵⁴ The Wal-Mart / Massmart takeover²⁵⁵ was a lesson for South Africa as it proved that the BIT framework caused the regulatory stagnation and ultimately became the catalyst for the revision of all BITs (pre-2007) in 2007. The BITs between South Africa and European powers started to exhibit their draw backs by limiting the government's policy space and bypassing the Black Economic Empowerment (BEE) programme.²⁵⁶ Unfortunately, the open regime of investment yielded mediocre outcomes and resulted in a new approach being tabled in dealing with inward FDI.

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- Investments from a contracting state shall be subject to fair and equitable treatment.
 - Investments by investors from a contracting state will not be expropriated or nationalised unless this is in the public interest and compensation equal to the fair market value of the investment is paid.
 - Disputes between an investor from a contracting state and other contracting state will be resolved by international arbitration; for example under the rules of the International Centre for the Settlement of Investment disputes (ICSID).

²⁵⁰ Azimpheleli Langalanga, 'South Africa's Foreign Investment Regulation: A revisit by Azimpheleli Langalanga', available at <http://blogaila.com>, accessed on 14 July 2014

²⁵¹ Ibid

²⁵² www.oecd-library.org, accessed on 12 September 2014

²⁵³ Azimpheleli Langalanga, 'South Africa's Foreign Investment Regulation: A revisit by Azimpheleli Langalanga', available at <http://blogaila.com>, accessed on 14 July 2014

²⁵⁴ Azimpheleli Langalanga, 'South Africa's Foreign Investment Regulation: A revisit by Azimpheleli Langalanga', available at <http://blogaila.com>, accessed on 14 July 2014

²⁵⁵ www.bowman.co.za, accessed on 17 September 2014

²⁵⁶ *Piero Foresti, Laura de Carli & Others v The Republic of South Africa* ICSID Case No ARB (AF)/07/01

Another contentious matter was whether South Africa's Constitution was broad enough to protect private property involved in foreign investments.²⁵⁷ In the event it was, it meant that the issue of expropriation would be compromised - which is problematic as it forms a key feature of the new Investment Bill. This will be explained in context of the Investment Bill later in this chapter. Arguably the most influential factor was the limitation of the government's policies.²⁵⁸ As briefly mentioned earlier, the Black Economic Empowerment programme was included and enforced in all BITs treaties. Foreign investors were not fond of these compliance requirements as they felt that it affected their efficiency and profit margins. Foreign investors felt that such compliance went against the best interests of their investment. They therefore would attempt to avoid having to satisfy the compliance requirements.²⁵⁹ The very requirements investors tried to circumvent, formed the backbone of their macro-economic and social reform that the South African government implemented, it was therefore crucial that these policies were not circumvented or compromised.²⁶⁰

In light of this, South Africa has drawn much attention, both negative and positive, due to their alternate approach to foreign investment. In recent times, they have elected to terminate all first generation BITs with the European Union.²⁶¹ Most of the BITs were with major capital nations such as Germany and the UK. These BITs were to expire soon and thus South Africa chose not to renew them. This decision not to renew these longstanding BITs did cause concern for investors. The investor's apprehension largely stemmed from the alternate approach which was to be taken by the South African government.²⁶²

The government's decision has drawn criticism from various sectors, including the European Union which is South Africa's largest trading partner and source of FDI. South Africa could take some solace from the fact that other countries, including Australia and India, are currently

²⁵⁷ Section 25 of the Constitution of the Republic of South Africa, 1996 (1996 Constitution) enshrines the right to property which is a basic human right.

²⁵⁸ 'Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

²⁵⁹ Azimpheleli Langalanga, 'South Africa's Foreign Investment Regulation: A revisit by Azimpheleli Langalanga', available at <http://blogaila.com>, accessed on 14 July 2014

²⁶⁰ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

²⁶¹ Pieter Steyn 'The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa' available at www.werksmans.com, accessed on 3 March 2014.

²⁶² 'Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

reviewing their investment policies and BITs for similar reasons. Interestingly, South Africa still has 45 BITs, of which only 17 are still in force. Of the remaining 28, 17 are with African countries and others include similar developing nations such as Russia and Canada.²⁶³

3.5 The way forward: An analysis of The Promotion and Protection of Investment Bill

As alluded to above, South Africa's decision not to renew the BITs has been met with concerns by investors of those countries who shared BITs with South Africa. This is understandable as these BITs have formed a large basis of the trading relationship shared between South Africa and the corresponding countries. However, it submitted that these countries' concerns may not be as serious as initially purported and a comprehensive understanding of the Bill may ease investor's worries. The country's new approach to FDI is a twofold process encompassing:

- firstly, the termination of BITs with several countries; and
- secondly, the introduction of the greatly anticipated Protection and Promotion of Investment Bill.²⁶⁴

The FDI Bill is intended to bring with it a new era for Southern African investment, an era that allows South Africa to regulate investment separately from the international arena. The objective of the bill is to establish a balance between the interests of the host nation and the foreign investor.²⁶⁵

To understand the Investment Bill and the implications for all parties involved, and whether it should be enacted in its current form, it is important to understand the relationship between South African law and International law. In respect of the relationship between municipal and international law, South Africa adheres to the dualist approach. This approach emphasises that the municipal law and international law are two distinct systems of law and each has application in its own sphere. However, those proposing this theory conceded that in the event of conflict between the two systems – the municipal law which is a reflection of the sovereignty of the state would prevail. The principle of state sovereignty is based on the idea that a state must

²⁶³ Pieter Steyn 'The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa' available at www.werksmans.com, accessed on 3 March 2014.

²⁶⁴ Azimpheleli Langalanga, 'South Africa's Foreign Investment Regulation: A revisit by Azimpheleli Langalanga', available at <http://blogaila.com>, accessed on 14 July 2014

²⁶⁵ Pieter Steyn 'The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa' available at www.werksmans.com, accessed on 3 March 2014.

implement laws/policies that suits the national needs of the state. It is of interest to note that in particular, the South African government's reason for the withdrawal of the BITs was that it wanted to provide more sustainable protection to its own interest. Further, the South Africa Constitution²⁶⁶ states that when interpreted, courts must consider international law as per section 39(1)(b), the result being that courts refer to international law whenever relevant and necessary.²⁶⁷

Furthermore, the Bill of Rights²⁶⁸, Chapter 2 of the Constitution, protects the rights of all persons in South Africa, and creates an obligation for the state to respect, promote and fulfil the rights in the Bill.²⁶⁹ This is important in terms of FDI, as it provides equal protection to foreign investors and citizens alike. The Bill of Rights further upholds the practice of Affirmative Action measures taken in context of the principle of equality. This is a point of interest as Affirmative Action has been an issue for foreign investors who do not wish to comply with the practice.²⁷⁰ Moreover, investment law by nature is deeply rooted in international law, thus the Investment Bill encompasses both domestic and international law.

In light of the constitutional objectives and nature of FDI, the Investment Bill is South Africa's attempt to afford itself more space to apply its transformation agenda and industrial policies whilst working towards a consistent realisation of socio-economic rights for its citizens.²⁷¹ In many ways the Bill appears to be on the right track, however key provisions relating to expropriation, compensation, national treatment, rights of establishment and dispute settlement still require attention. These provisions require a fragile balance between domestic and international law.²⁷² The analysis which follows therefore encompasses a comparison between the substantive provisions of the Bill in light of international law principles and the Constitution.²⁷³ Due to the important implications that the Bill will have on South Africa's

²⁶⁶ South Africa is a constitutional democracy, which means the Constitution is the supreme law of the land.

Therefore, parliament cannot pass a law which is inconsistent with the Constitution and no person, including the President, can go against it. Furthermore, there is a constitutional obligation on the courts and government to uphold the standards set by the Constitution and not act in a contrary manner.

²⁶⁷ 1996 Constitution

²⁶⁸ Ibid

²⁶⁹ Ibid

²⁷⁰ *Piero Foresti, Laura de Carli & Others v The Republic of South Africa* ICSID Case No ARB (AF)/07/01

²⁷¹ The Protection and Promotion of Investment Bill, 2013

²⁷² Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

²⁷³ 1996 Constitution

foreign investor relations, it is trite for this dissertation to provide an in-depth analysis of the relevant provisions as a means to ascertain the envisaged operation and possible implications of the Bill. It is important to note, that due to the tentative nature of the Bill certain aspects of the following analysis rely on a limited number of resources.

3.5.1 Preamble

The preamble is necessary to ascertain the objective and intention of the legislator in drafting the legislation. More so, it plays an important role as a point of reference and departure for courts and tribunals. In terms of the Investment Bill, the preamble recognises that the Investment Bill is conscious of the Bill of Rights, whilst simultaneously recognising the importance of investment for economic growth. It goes on to affirm the State's commitment to creating a transparent and certain business environment suitable for the promotion and protection of all investments.

As per the wording, the preamble attempts to balance the need for investment and South Africa's constitutional objectives of equal treatment and opportunities.²⁷⁴ This is in keeping with the government's desires of acting in the public's interest to avoid repeating previous mistakes made in implementing BITs.²⁷⁵ In light of this, the need to constitutionalise investment regulation has not come as a great surprise.

A notable feature of the preamble is the principle of "public interest". This term has an extremely wide meaning leading to both profitable and detrimental consequences.²⁷⁶ There is a need for clarity via a statutory definition. Establishing a single definition of the term will ease the worries of the foreign investors who may feel exposed due to the current ambiguity.²⁷⁷

²⁷⁴ The Promotion and Protection of Investment Bill, 2013

²⁷⁵ These mistakes refer to when the government entered into BITs before finalising the Constitution.

²⁷⁶ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

²⁷⁷ Ibid

3.5.2 Definitions

The Bill contains a definition of “investment” that is a good, simple definition that accommodates the lay man’s understanding as well as incorporating contractual rights.²⁷⁸ This progressive definition is a codification of the Salini Test.²⁷⁹ Furthermore, it appears to do away with any form of speculative investments.²⁸⁰

The definition requires the investment to relate to an economic investment that would be regarded as material or significant, therefore underlying a physical presence in South Africa. One way of viewing this, is that the Bill does not deal with speculative investments or that the Bill excludes foreign investment of that nature.²⁸¹ Based on this presumption, local law would have to deal with such investments. This uncertainty may be problematic for already sensitive investors as it will only add to their fears and discourage future investment.

Furthermore, section 4(1) states that the Bill applies to investments made “for commercial purposes”.²⁸² This term is undefined. The implication may be that “non-commercial” investments would be to the exclusion of foreigners who wish to purchase property for their personal use.²⁸³ Section 5 adds further requirements that must be met for an investment to qualify for protection under the Bill, stating that the investment must be found to be “in accordance with the applicable legislation” and was “acquired and used in expectation and for

²⁷⁸ The Promotion and Protection of Investment Bill, 2013

²⁷⁹ In the case of *Deutsche Bank AG v Sri Lanka (ICSID Case No ARB/09/02)*, an ICSID tribunal considered whether it had jurisdiction over a dispute concerning a hedging agreement. The case held that; Article 25 of the ICSID Convention provides that ICSID’s jurisdiction extends to any legal dispute “arising directly out of an investment between a contracting state and a national of another contracting state”. The tribunal identified the following five factors that are indicative of the existence of an investment:

- A substantial commitment or contribution
- Duration
- Assumption of risk
- Contribution to economic development
- Regularity of profit and return

In terms of Article 25 of the ICSID Convention, the Salini test is not mandatory, but may be used as a starting point.

²⁸⁰ *Salini Costruttori SpA & Halstrade SpA v Morocco (ICSID Case No.ARB/00/4/Decision on Jurisdiction 23 July 2001)* at paragraph 52.

²⁸¹ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry’, available at www.sajia.org.za, accessed on 25 April 2014

²⁸² Pieter Steyn ‘The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa’ available at www.werksmans.com, accessed on 3 March 2014.

²⁸³ The Promotion and Protection of Investment Bill, 2013

the purpose of the economic activity or other business purposes”.²⁸⁴ Once again there is no clarity as to the application of these requirements creating further uncertainty which in turn discourages investment.

3.5.3 Interpretation Clause

The importance of the clause is reasonably clear in prescribing the manner and understanding of the Bill. As a constitutionally supreme country, the Bill will be interpreted in accordance with firstly the Constitution²⁸⁵ and secondly with international law.²⁸⁶ Therefore any aspect of international law that is found to be inconsistent with the Constitution²⁸⁷ then it cannot be applicable.²⁸⁸

Additionally, the Bill states that it should be interpreted in line with customary international law consistent with the Constitution.²⁸⁹ Furthermore, it is expected that customary international law has been read into the Bill. This may limit customary international law which is problematic.²⁹⁰ There is a likelihood that a large portion of international investment law

²⁸⁴ Pieter Steyn ‘The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa’ available at www.werksmans.com, accessed on 3 March 2014.

²⁸⁵ The Constitution of the Republic of South Africa, 1996

²⁸⁶ The Promotion and Protection of Investment Bill, 2013

²⁸⁷ Section 231 of the Constitution 1996 states:

1. The negotiating and signing of all international agreements is the responsibility of the national executive.
2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
The republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

²⁸⁸ In the case of *Agri South Africa v Minister of Minerals and Energy*, (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), the Constitutional Court dismissed an appeal against the Supreme Court of Appeal (SCA). *Agri South Africa* brought an application against the minister for Minerals and Energy (Minister). The essence of the application was that the Mineral and Petroleum Resources Development Act expropriated the coal rights of *Agri South Africa*. The application was successful in the High Court and was subsequently appealed by the Minister in the SCA. Aggrieved by the SCA upholding the appeal, *Agri South Africa* appealed to the Constitutional Court. The Constitutional Court held that, the deprivation of coal rights by the MPRDA did not amount to expropriation.

²⁸⁹ The Constitution of the Republic of South Africa, 1996

²⁹⁰ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry’, available at www.saiia.org.za, accessed on 25 April 2014

principles will be contrary to the Bill and therefore not be applicable. One such example is the issue of dispute resolution that prior to the Bill would take place before an ICSID tribunal, however under the Bill will take place within the South African legal system. The result of this being South Africa may have a Bill that does not apply substantial international law principles, therefore leaving investors feeling vulnerable.²⁹¹

3.5.4 Protection of sovereign rights

The Bill is largely positioned on protecting the sovereign rights of the South African government to act in the “public interest”.²⁹² Section 3 provides that the intention of the Bill is to promote and protect investment in “a manner consistent with public interest between the rights and obligations of investors” as well as ensuring equal treatment between South Africa and foreign investors by applying “subject to applicable legislation”.²⁹³

Section 5 states that the Bill applies to investments made for commercial purposes as well as to investments made before and after the promulgation of the Bill. It is applicable regardless of whether the source of investment is public or private, or from a local or foreign origin. Furthermore, the Bill will consider any other relevant domestic legislation and will not preclude measures taken by any organ of state in terms of section 10. Furthermore, section 4 does not preclude domestic law and section 5(3) subjects all protection of foreign investment to comply with applicable domestic laws and international agreements.²⁹⁴

Section 10 allows the government to redress “historical, social and economic inequalities” to “promote and preserve cultural heritage and practices and indigenous knowledge” in an attempt to “foster beneficiation”, to “achieve the progressive realisation of socio-economic rights” and protect “essential security interests”. Section 4(3) permits this may be via taxation, government subsidies, grants and government procurements”.²⁹⁵

²⁹¹ Ibid

²⁹² The Protection and Promotion of Investment Bill, 2013

²⁹³ The Protection and Promotion of Investment Bill, 2013

²⁹⁴ The Protection and Promotion of Investment Bill, 2013

²⁹⁵ The Protection and Promotion of Investment Bill, 2013

Essentially section 10's role is to ensure that the Bill, in fostering investment maintains the standards and ambition of the Constitution. The Bill attempts to protect South Africa's sovereign rights by ensuring all aspects of investment are consistent with the Constitution.²⁹⁶ This ensures that the foreign investors will not dictate the terms of agreement in entirety as it may be to the detriment of the country and not in the public interest.

It is clear the government is asserting its interests in social transformation, however many investors fear that these may be an imposition and limit them.²⁹⁷ The subjective nature of these sections creates a wait-and-see approach which discourages investors who wish to know that their investments will not suffer due to government intervention.²⁹⁸

3.5.5 *Screening of Investments*

The principle of sovereignty naturally extends to the regulation of foreign investment. Section 5(2) codifies the principle of sovereignty by denying the right of establishment.²⁹⁹ Therefore, section 5(2) must be read in conjunction with section 6. Section 6(1) introduces the national treatment obligation for the South African government.³⁰⁰ However section 6(4) refers to the obligation as an examination, which appears to be more of a screening process than an examination.³⁰¹

In terms of the screening process, the procedural dimensions of the examination are unknown. It is unclear who would conduct the examination, particularly which state institution would take the lead on this issue.³⁰² Furthermore, the question remains whether all investments will be screened, or whether only selective investments that are of certain potential will be subjected to the "screening" process. If it is the latter, the Bill needs to clarify the basis that such investments will be differentiated on, and whether the Bill would apply retrospectively.³⁰³ With

²⁹⁶ The Constitution of the Republic of South Africa, 1996

²⁹⁷ Pieter Steyn 'The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa' available at www.werksmans.com, accessed on 3 March 2014.

²⁹⁸ Pieter Steyn 'The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa' available at www.werksmans.com, accessed on 3 March 2014.

²⁹⁹ The Protection and Promotion of Investment Bill, 2013

³⁰⁰ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

³⁰¹ *ibid*

³⁰² The Protection and Promotion of Investment Bill, 2013

³⁰³ The Protection and Promotion of Investment Bill, 2013

various areas requiring greater detail and substantial administrative regulation needed, a more elaborate provision would be useful as it will settle apprehensive investors.

These subsections continue to state a very broad criteria against which the investment will be examined. Terms such as “the effect of the foreign investment on the Republic”; “the sector the investment is in”; “the aim of any measure relating to foreign investment”; and “other factors relating to the foreign investor or the foreign investment in relation to the measure concerned”, may afford the South African government greater discretion but are still extremely broad which instead of appeasing fears will encourage them.³⁰⁴

3.5.6 *National Treatment*

The principle of national treatment provides that foreign investments needs to be treated in a similar manner to local investments. This principle is also one of the cornerstone provisions in the World Trade Organisation (WTO) agreements. In light of South Africa’s membership to the WTO, the country must comply with these principles. However, regarding the operation of national treatment as envisaged by the Bill, a question to consider is what will ensue where the host country subjects its investors to a lower standard relative to international standards.³⁰⁵

The OECD defines the international minimum standard as a norm of customary international law which dictates the treatment of foreigners in a country.³⁰⁶ It provides a minimum set of principles which obligates governments, regardless of their domestic and legislative practices, to respect foreign nationals and their property. In comparing it with the principle of national treatment which foresees that foreign nationals can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that governments must grant to foreign nationals, independent of the government’s treatment of their own citizens.³⁰⁷

³⁰⁴ Pieter Steyn ‘The New Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa’ available at www.werksmans.com, accessed on 3 March 2014.

³⁰⁵ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry’, available at www.saiia.org.za, accessed on 25 April 2014

³⁰⁶ <https://asadip.files.wordpress.com/f>, accessed on 14 September 2014

³⁰⁷ Ibid

Some argue that this a risk the investor takes, however in terms of customary international law there is no voluntary assumption of risk.³⁰⁸ However, in terms of international investment law there is the international minimum standard of treatment that is used to limit national treatment. The term “national treatment” in terms of international investment law has been riddled with nuances leading to its manipulation and violation. It is suggested due to this problem and the general lack of understanding section 6(4), it is advisable that the issue be dealt with on a case by case basis.³⁰⁹

By dealing with the problem in this manner, the Bill is able to determine factors which will be used in determining national treatment. This does not mean that the Bill will not be able to apply these standards or apply a different standard. It means the converse applies, as the Bill has empowered itself to apply the principle of national treatment appropriately.

3.5.7 Security of Investment

Security in terms of investment is a method of protection and compensation for the investment. South Africa is required by international law to provide security to investors’ property. This is codified in section 7(1) of the Bill and states that the security will be dependent on “available resources and capacity”.³¹⁰ Section 7(1) suggests that in the event there is a lack of resources the state will not be liable. In light of civil disobedience and South African citizen’s propensity to strike, the government would need to redraft clearer criteria that create a sense of confidence in investors that despite any civil disobedience, their investment will be secure and profitable.

Moreover, Section 7(2) states that “appropriate” compensation will be paid to local and foreign investors for loss or damage due to requisitioning or destruction of property by government “forces or authorities” if such destruction was not caused “in combat action”.³¹¹ These qualifications are largely unclear and once again result in interpretational issues. This could result in them being circumvented and the protections neutralised.

³⁰⁸ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry’, available at www.saiia.org.za, accessed on 25 April 2014

³⁰⁹ The Promotion and Protection of Investment Bill, 2013

³¹⁰ The Promotion and Protection of Investment Bill, 2013

³¹¹ The Promotion and Protection of Investment Bill, 2013

Further, section 7(2) may be understood as a contradiction to the interpretation clause.³¹² Section 7(2) states that compensation will be determined in accordance with domestic, international and international customary law.³¹³ This differs from the interpretation clause which trumps customary international law with the Constitution. Moreover, international investment law does not provide much clarity regarding such compensation. Once again, according to the Bill, compensation is subjective and will be in line with what the state can afford.

3.5.8 *Expropriation Clause*

In terms of investment, expropriation³¹⁴ is of great importance. Coupled with South Africa's current political debacle over contested terrain; the expropriation clause is the most topical and important provision of the Bill. Section 8 provides that expropriation of an investment may only take place in accordance with the Constitution and in terms of the law of general application for "public purposes or in the public interests under due process of law" and against payment of "just and equitable" compensation.³¹⁵ Further, the compensation must "reflect an equitable balance between the public's interest and the interests of those affected". This includes several factors that must be considered such as, the market value, the current use of investment, the history of the acquisition and the purpose of the expropriation.³¹⁶ It is important to note the distinction between the Bill and the protection afforded to foreign investors under past BIT's.

It appears as though, Section 8(1) complies with customary international law as it provides that expropriation will be lawful so long as it is executed in the public's interest.³¹⁷ On the other hand, the Bill deviates from customary international law in terms of the level of

³¹² Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

³¹³ Ibid

³¹⁴ The term "expropriation is defined in a restricted manner with the intention of excluding measures; which has "incidental or indirect adverse impact on the value of an investment", measures aimed at protecting legitimate public welfare objectives, issues of compulsory licences in terms of intellectual property rights if found to be consistent with international agreements on intellectual property.

³¹⁵ The Promotion and Protection of Investment Bill, 2013

³¹⁶ The Promotion and Protection of Investment Bill, 2013

³¹⁷ The Promotion and Protection of Investment Bill, 2013

compensation³¹⁸ stating that compensation must be just and equitable. This deviation is in line with the South Africa Constitution and is consistent with the interpretational clause of the Bill.³¹⁹ Section 25 of the Constitution prohibits the arbitrary deprivation of property as well as the expropriation of property without payment of just and equitable compensation which has either been agreed upon or which has been decided by a court of law.³²⁰ It has been suggested that section 8(1) is simply compensation that the state can afford and is fairly subjective. It becomes apparent that the South African approach is indeed state centric unlike the customary international law's approach which is investor or proprietary centric.³²¹ Such a bias towards the host country will most likely discourage investors who are used to greater empowerment under the previous BITs. In light of this, a more balanced approach to compensation should be tabled for consideration.

Even more, section 8(2) is a non-exhaustive list of conduct which would not be deemed to be considered expropriation. Firstly the subsection allows for concerted action, which has a negative effect on the value of an investment. This is of concern to foreign investors as under customary international law this is known as creeping or indirect expropriation.³²² Secondly, in customary international law, the objective of pursuing public policy is to distinguish between lawful and unlawful expropriation. It is argued that the Bill has made an error, stating that a measure aimed at pursuing public policy is not expropriation.³²³ Thirdly, the issue of intellectual property is hindered in a similar manner. Under the Bill, there is a deprivation of intellectual property rights resulting in a decrease in value of these rights, which ultimately results in expropriation.³²⁴ Lastly, the provision makes state ownership an essential requirement for expropriation.³²⁵

³¹⁸ International Customary Law prefers the approach of full compensation. This obliges the expropriating state to put the foreign company in the position it would have been in, had the contract correctly been carried out. Where full compensation is not possible, compensation must be "prompt, adequate and effective" as referenced from the "Hull Formula".

³¹⁹ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

³²⁰ <http://constitutionallyspeaking.co.za>, accessed on 14 September 2014

³²¹ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

³²² The Promotion and Protection of Investment Bill, 2013

³²³ The Promotion and Protection of Investment Bill, 2013

³²⁴ The Promotion and Protection of Investment Bill, 2013

³²⁵ The Promotion and Protection of Investment Bill, 2013

In analysing this provision, it currently gives the government excess arbitrary power which could discourage foreign investors. The simple solution would be to realign the provision with customary international law and prevailing international investment standards. This would make the Bill far more investor friendly.

3.5.9 Regulatory Space

The South African government's main reason for the drafting of the Bill was to afford the country more power in terms of regulating FDI. Section 10 forms an integral part of the Bill as it attends to the government's agenda of affording themselves greater regulatory space. It addresses crucial aspects of the government's economic and industrial policy and sheds light on the integral involvement of FDI in achieving sustainable development.³²⁶ The linking and implementation of these policies in conjunction with foreign investment will be extremely tedious and challenging. Furthermore, to create performance requirements for foreign investors seems too ambitious as it will most likely deter investors, instead of promoting their investment activity.

3.5.10 Dispute Resolution

Section 11 deals with the highly contentious dispute resolution provision of the Bill. Unlike BITs which generally permit a foreign investor to refer investment disputes with a government to international arbitration, the current Bill refers investment disputes to local courts.³²⁷ This would raise concerns where local courts are found to be easily influenced. This is fortunately not the case in South Africa as the independence of the judiciary is a cornerstone of the Constitutional democracy.

The court system is a competent and impartial system that has very rarely acted in an untoward manner. Furthermore, it is not in the best interests of South Africa and FDI for the courts to be bias in favour of the government as it will only discourage foreign investment. For the host country, international arbitration is expensive and subjects government policies to a decision

³²⁶ The Promotion and Protection of Investment Bill, 2013

³²⁷ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

made by a neutral third party. Moreover, international arbitrations work on a case by case basis with no judicial precedence.³²⁸ This may lead to inconsistent decisions being made and awarded.³²⁹

Contrary to the international position, under the Bill, section 11³³⁰ the fact that the Arbitration Act is mentioned despite its archaic nature has left many critics of the Bill confused.³³¹ Its inclusion leaves the door open for government to enter into contracts with individual investors instead of BITs.³³² This would benefit the government as the contracts would be regulated by commercial contract law despite them having an arbitration clause.

The Bill could have provided, that in the event an investor has failed to find redress in local courts, they may approach international tribunals.³³³ As it stands, the investor would require the governments consent for international arbitration to be enables investors to approach a competent court, tribunal or statutory body or refer a dispute to arbitration under the 1965 South Africa Arbitration Act enacted. The chances of a government consenting to this is unlikely and becomes a deterring factor for investors. With that said, South African courts and legal system have in the past upheld the rule of law reasonably well and our legal system is largely independent from government, which may provide some solace for investors.

3.6 Conclusion

It appears that the balancing act of the Bill leans more towards protecting the sovereign rights of the government. This should not come as a surprise in the context of the decision to cancel existing BITs and do away with issues, such as international arbitration, that became extremely cumbersome for the South African government. Unfortunately many key areas dealing with investor's rights and obligations are rather ambiguous, resulting in interpretational issues. Despite the uncertainty, no new obligations are imposed on foreign investors.

³²⁸ Stefan Terblanche, 'Promotion and Protection of Investment Bill, Negative reaction to unwarranted' available at www.theintelligencebulletin.co.za, accessed on 5 March 2014

³²⁹ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

³³⁰ Arbitration Act 42 of 1965

³³¹ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

³³² Ibid

For investors who previously shared BITs with South Africa, the new government policy is a significant change. Under BITs, the relationship was far more limited and qualified. Under the Bill there is no right to fair and equitable treatment, as noted above no right to refer disputes to international arbitration and compensation in terms of expropriation is not guaranteed to equal the market value of the investment. Furthermore, the Bill can be solely amended by the government, unlike BITs which required both governments to agree.

The effect of terminating BITs are not fully known but have clearly created a tense relationship between South Africa and the European Union. Whether this hinders future FDI flow or not, only time will tell. It is important to note that foreign investments are not entirely dependent on BITs, there are several other key factors such as level of return, taxes and business opportunities. However, BITs do provide preferential rights to foreign investors in comparison to local investors and to those foreign investors who do not share BITs with the host country.

South Africa is in need of greater foreign investment and this can only be achieved with a clear and certain framework. Overall the Bill attempts to provide a good opportunity for South Africa to balance its domestic and international obligations. Unfortunately the current draft has not achieved this and amendments are needed in several areas. The government will need to now weigh the utility of an inherently biased Bill against the harm to foreign investors. Having analysed the Bill, the next chapter will look at the Bill in context of South Africa's obligations as a member of BRICS, and the manner in which FDI may benefit or be compromised.

CHAPTER FOUR

4. BRICS AND FOREIGN DIRECT INVESTMENT, WHERE DOES SOUTH AFRICA STAND.

4.1 Introduction

The previous chapter identified the manner by which South Africa has dealt with investment considering the political and economic framework. South Africa's concerns as a developing country in terms of investment are novel as opposed to states such as Germany, the United States (US) and Japan. The US is a prime case as they emerged from World War Two as the most powerful nation in history with unrivalled shares of global Gross Domestic Profit (GDP), manufacturing and production rate, and military might. This allowed them to have an extraordinary influence on the way the world, specifically the multilateral trading system was shaped.³³⁴ The form that the multilateral system took may not have always been the preferred approach but it served the US interests and those who accepted the multilateral system over the imperial system.

The post-World War Two architects', the Allies, vision was hidden behind the curtain of ideologies that was the Cold War.³³⁵ The intentional 'decline' of the US and the rise of its allies were part of a greater plan to assert a new world order that supported and created global economic growth.³³⁶ Today this order is being challenged by the rise of the "rest" or the "different" as Ian Bremmer refers to the new geopolitical landscape that is currently taking shape.³³⁷ Bremmer goes on to explain that the new rising powers are fundamentally different, and it is their differences that creates a real challenge for the US.³³⁸

Bremmer defines the rise of the "different"; firstly these countries are poor and they all have that in common.³³⁹ These countries are categorised as such by taking into consideration their

³³⁴ Ian Bremmer & David Gordon, 'Rise of the Different' available at, www.nytimes.com accessed on 15 September 2014

³³⁵ Benjamin O. Fordham, 'Economic Interests, Party, and Ideology in Early Cold War Era U.S. Foreign Policy', available at www.mtholyoke.edu, accessed on 21 October 2014

³³⁶ Ian Bremmer & David Gordon, 'Rise of the Different' available at, www.nytimes.com accessed on 15 September 2014

³³⁷ Ibid

³³⁸ Ibid

³³⁹ Ibid

total economic size. Of interest is that, today's rising powers, such as Brazil, India, China, Russia and South Africa (hereafter referred to as BRICS), are more similar in respect of their emerging markets than the developed countries that built their wealth post- World War Two.³⁴⁰ For example, China's GDP is one-ninth of the US and India's GDP is a mere one-thirty-fifth.³⁴¹ It is of interest to note that these countries form part of the BRICS nations; a fairly new unit of emerging developing states in respect of global trade. Timothy Shaw et al have expressed that the level of poverty and disparity in such countries haven't driven them to seek development on a fundamental level.³⁴² Thus, this group of countries' objectives is to remain focussed on economic growth rather than becoming international stakeholders, much like the West did at their relevant point of development. This is encapsulated by Shaw et al who affirms that the 'global dynamic is undergoing a cumulative reordering process, where countries such as China, Brazil, India and Russia are occupying increasingly prominent roles in the international system.'³⁴³

Furthermore, today's emerging markets are far more politically different than those of the Cold War. Of interest is that, Germany and Japan both took on the concept of representative governance and capitalism which has evidently worked out well for them.³⁴⁴ In contrast to this, by comparison the BRICS nations such as China is far more authoritarian, Russia is a petro-state, and India is an amalgamation of carefully coordinated market capitalism and democratic liberalism, while Brazil is mirroring the Western model adopted by Germany and Japan.³⁴⁵ Despite their varied differences, these emerging markets support the development of a new world order that dislocates power from the West.

This discontentment has taken the form of the BRICS grouping. BRICS countries have been pushing for amongst others, greater representation in a global scale and have continued to challenge the practices of organisations like the United Nations (UN), the World Trade

³⁴⁰ Benjamin O. Fordham, 'Economic Interests, Party, and Ideology in Early Cold War Era U.S. Foreign Policy', available at www.mtholyoke.edu, accessed on 21 October 2014

³⁴¹ Ian Bremmer & David Gordon, 'Rise of the Different' available at, www.nytimes.com accessed on 15 September 2014

³⁴² TM Shaw, AF Cooper 'Global and/or Regional Development at the Start of the 21st Century? China, India and (South) Africa' (2007) 28.7 *Third World Quarterly*.

³⁴³ Ibid

³⁴⁴ Benjamin O. Fordham, 'Economic Interests, Party, and Ideology in Early Cold War Era U.S. Foreign Policy', available at www.mtholyoke.edu, accessed on 21 October 2014

³⁴⁵ Ian Bremmer & David Gordon, 'Rise of the Different' available at, www.nytimes.com accessed on 15 September 2014

Organisation (WTO), and the International Monetary Fund (IMF).³⁴⁶ Having realised their disadvantages in respect of FDI (compared to some of the developed countries referred to above) these countries are amalgamating their resources to enhance especially their foreign direct investment (FDI) objectives.³⁴⁷

In terms of this paper, the former context will be now be used to discuss South Africa's involvement in BRICS. In particular, the chapter will provide a brief history of BRICS and South Africa's admission into the new grouping and will include the build up to South Africa's acceptance and reasons behind their membership. This background is needed for the discussion of FDI within BRICS nations. Therefore, the chapter will hone in on foreign direct investment (FDI) in BRICS, specifically looking at how South Africa stands to benefit in terms of FDI from their membership. Subsequently, the nature of the FDI relationship between each member of BRICS and South Africa will be highlighted to hypothesis the likely pattern of future FDI in South Africa. Lastly, China and India's investment policy will be analysed in light of their commonalities, or lack thereof, with the South African FDI policy.

4.2 South Africa's entry into BRICS

South Africa was granted an invitation to join the Brazil, Russia, India and China grouping at the end of 2010 by the Minister of Foreign Affairs of the People's Republic of China.³⁴⁸ The invitation came after months of lobbying by the South African government, who marketed themselves as the gateway to Africa. South Africa recognised the importance of belonging to such a grouping as membership to the group could greatly assist emerging economies, such as South Africa, who wish to have be involved in achieving a more equitable and balanced political and economic global structure. This was supported by the South African government who stated that their involvement in this bloc will facilitate economic benefits in terms of investment and trade, as well as political benefits in the form of a greater, louder, voice in the international sphere.³⁴⁹

³⁴⁶ Many developing countries, such as India, Brazil and South Africa, are members of UN, WTO and IMF amongst other international organisations.

³⁴⁷ TM Shaw, AF Cooper 'Global and/or Regional Development at the Start of the 21st Century? China, India and (South) Africa' (2007) 28.7 Third World Quarterly.

³⁴⁸ Besada H, Tok E, Winters K, 'South Africa in BRICS Opportunities, Challenges, and Prospects' (2013) 42.4 Africa Insight 1 -15

³⁴⁹ Noted 15 above, 2

Prior to this, Brazil, Russia, India and China were originally grouped as BRICs in 2001, and for the last decade and a half have been recognised as the fastest growing economies with their growth expected to leapfrog many of the developed economies.³⁵⁰ In 2006, the group officially became a diplomatic entity called BRIC.³⁵¹ In 2011 the acronym was adjusted to BRICS with the addition of South Africa as the newest member. With the BRICS grouping finalised, they could focus on their primary objectives which were; to achieve greater levels of trade; improve their respective infrastructural development and empower themselves as a grouping.³⁵² Interestingly, between 2001 and 2011, the BRICS group of countries collective contribution to the world's GDP ranged between South Africa which recorded the lowest average with 3.5 percent, while China was at the other end of the scale boasting the highest GDP at 102 percent.³⁵³

Clearly, South Africa has a significantly smaller economy than the other BRICS countries, with a GDP around one quarter to one third of the Indian and Russian economies.³⁵⁴ Furthermore, the country also has the smallest population, the highest unemployment rate and the lowest savings.³⁵⁵ It does however sit in the upper-middle of the GDP per head statistics by both convention and purchasing power parity measures.³⁵⁶ These former points are part of the reason why the inclusion of South Africa has been met with mixed reactions.³⁵⁷ Despite the doubt surrounding South Africa's involvement in the BRICS bloc, the country stands to benefit through the flow of increased trade and FDI.

In light of these opportunities, it is essential to understand the nature of South Africa's economy. At one level, South Africa is a continental powerhouse with a GDP averaging 25 per cent of the entire continent.³⁵⁸ The formal sector has been founded on services, mining and

³⁵⁰ 'South Africa's position in BRICS', available at www.treasury.gpg.gov.za accessed on 05 October 2014

³⁵¹ Ibid

³⁵² Ron Sandrey 'BRICS: The Way Ahead?', available at www.tralac.org accessed on 5 October 2014

³⁵³ 'The Rise of BRICS FDI and Africa', available at www.unctad.org accessed on 5 October 2014

³⁵⁴ Ron Sandrey 'BRICS: The Way Ahead?', available at www.tralac.org accessed on 5 October 2014

³⁵⁵ 'South Africa's position in BRICS', available at www.treasury.gpg.gov.za accessed on 05 October 2014

³⁵⁶ Ibid

³⁵⁷ Some commentators, such as Jim O'Neill, the now-retired Goldman Sachs executive, who first coined the term BRIC, have questioned whether South Africa should be a member of BRICS. They argue that the small size of South Africa's economy, its sluggish growth and its smaller population compared to the other BRICS countries, should disqualify it from membership. Extracted from Katy Watson, 'BRICS Bank to create \$100bn development bank', available at www.bbc.com accessed on 19 November 2014

³⁵⁸ Stephen Gelb, 'Foreign Direct Investment links between South Africa and China' available at www.tips.org.za accessed on 5 October 2014

manufacturing. South Africa has had a robust economy that has enjoyed a surplus of mineral resources and a well-developed legal, energy, financial and communications sectors. This is further supported by an efficient distribution of goods and services to urban centres and a stock exchange that ranks amongst the top 20 in the world.³⁵⁹ Unfortunately, these positives are juxtaposed by a dwindling infrastructure, a government riddled with corruption and citizens who are frustrated by the severe inequalities and suffer from growing poverty and high unemployment rates.³⁶⁰

As has been alluded to, South Africa's economic presence is far below its fellow BRICS members, however the country entered the group as the most powerful and stable economy on a fast growing continent.³⁶¹ Moreover, South Africa's involvement in the past few years has expanded to merely representing the entire continent and acting as a gateway to Africa but the country has played a pivotal role in talks involving the establishment of a new development Bank.³⁶²

4.3 A South African perspective on BRICS and foreign direct investment

Membership in the group is expected to result in; firstly, the country being allowed to promote economic development through improved trade and investment, secondly as the expansion of sectors in which South Africa has a comparative advantage, and lastly to provide foreign investment opportunities for South African industries.³⁶³ For other BRIC members, their focus

³⁵⁹ Ibid

³⁶⁰ *Andile Mngxitama in the Mail and Guardian argues that, "The main problem is the narrow legalistic definition of corruption, which does not take into account justice for the majority. Any crusade against corruption that does not expand the definition to include legalised acts of self-enrichment at the expense of the people and the environment only serves to perpetuate it."* He goes on to further argue that "the dominant anti-corruption morality does not see anything wrong with mining houses and farmers paying starvation wages while at the same time making huge profits. The wealth and privilege enjoyed by white capital and the wider white community were created out of legalised theft, the brutalisation of black people and the destruction of lives – a historical fact that has left a racist socioeconomic reality as its legacy...In 1994, the ANC accepted political power in exchange for maintaining the apartheid economic status quo. This presented the challenge of how black people were going to enter the economy, and so white capital extended to the ANC government its tried-and-tested corruption – its unethical business model that took the shape of black economic empowerment. In short, just like their white counterparts, black people had to steal and exploit to enter the economy", available at www.mg.co.za accessed on 19 September 2014

³⁶¹ Besada H, Tok E, Winters K, 'South Africa in BRICS Opportunities, Challenges, and Prospects' (2013) 42.4 Africa Insight 1 -15

³⁶² Besada H, Tok E, Winters K, 'South Africa in BRICS Opportunities, Challenges, and Prospects' (2013) 42.4 Africa Insight 1 -15

³⁶³ 'South African Institute of International Affairs (2013) BRICS FDI: Preliminary View', available at www.saiia.org.za accessed on 05 October 2014

lies in achieving greater representation among developing nations and making inroads into Africa as it would create new opportunities and development among members.³⁶⁴ It is within this objective that South Africa's role becomes pivotal and the country should utilise the position to strengthen its position within BRICS.

South Africa's membership will most likely provide new opportunities in terms of trade and investment opportunities for themselves, as well as the rest of the continent. The other four members of BRICS have increased capacity to bring expertise and technology to South Africa which can aid infrastructural development.³⁶⁵ Brazil, Russia, India and China account for 50 percent of overall emerging market spending which suggests that there are many opportunities for the transfer of skills, knowledge and technology.³⁶⁶ Thus, placing South Africa in a prime position to enjoy higher levels of technological innovation, joint manufacturing, marketing and research projects and exchange programmes for skills and training.³⁶⁷

In light of this, it is important that South Africa ensures that they can generate large portions of investment. According to the South African government, the country's trade and investment will expand via its membership to BRICS.³⁶⁸ Despite these positive views, the country should be cautious of being too reliant on its BRICS membership and must maintain their existing relationships with its other trading partners outside of BRICS.³⁶⁹ The best way for South Africa to achieve this balance, will be by leveraging its membership to seek opportunities for joint ventures, mergers and cooperation with other BRIC countries currently investing in the continent and South Africa.³⁷⁰

It is of interest that, in the build up to these relationships, several joint ventures have been established. Particularly between Chinese and South African firms. For example, the largest bank in South Africa, Standard Bank sold 20 per cent of the bank to the International

³⁶⁴ Ibid

³⁶⁵ Ibid

³⁶⁶ Ibid

³⁶⁷ 'The Rise of BRICS FDI and Africa', available at www.unctad.org accessed on 5 October 2014

³⁶⁸ Besada H, Tok E, Winters K, 'South Africa in BRICS Opportunities, Challenges, and Prospects' (2013) 42.4 Africa Insight 1 -15

³⁶⁹ This applies to South Africa's relationship with the European Union that has been placed under pressure of late due to the cancellation of bilateral investment treaties with European countries. For more information, refer to 3.4 on page 48

³⁷⁰ Besada H, Tok E, Winters K, 'South Africa in BRICS Opportunities, Challenges, and Prospects' (2013) 42.4 Africa Insight 1 -15

Commercial Bank of China (ICBC) and in a joint statement the ICBC expressed its interest in South Africa as they regarded it a lucrative market for investment.³⁷¹ From South Africa's and Standard Bank's perspective it appears to be extremely beneficial as it allows superior access to the world's fastest growing economy, and facilitates trade and investment from Asia to Africa.³⁷²

In light of these ventures, it suggests that these relationships are long term with the hope of tangible benefits for South Africa and the other BRICS members. There has also been considerable new interest in establishing innovative foreign investments as South Africa's membership provides a strategic partnership for investors from other members. However there are fears that the influx of investors may allow BRIC investors to exploit the region.³⁷³

In analysing the BRICS countries and their impact on South Africa, the numbers suggest that China has made the biggest impact on the country.³⁷⁴ The relationship between these two nations has followed a steady path of growth over the last decade and bilateral trade between the countries have been on the increase.³⁷⁵ There are many major Chinese companies investing in South Africa, establishing regional and local headquarters.³⁷⁶ Furthermore, in 2010 the two countries committed to a strategic partnership as a form of recognition of the current and future growth.³⁷⁷ The agreement focussed on issues of trade, mineral exploration, agriculture, investment as well as fostering national and political dialogues.³⁷⁸

³⁷¹ 'South African Institute of International Affairs (2013) BRICS FDI: Preliminary View', available at www.saiia.org.za accessed on 05 October 2014

³⁷² Ibid

³⁷³ An example of this exploitation is in Mozambique where South Africa extracts 415 mega watts of electricity from Mozambique through the Cahora Bassa Dam. A consequence of this exploitation is that the flow of the Zambezi River has been altered resulting in severe flooding on a frequent basis. Here we see South Africa's footprint on the African continent and why it is seen as a gateway to Africa, as well as the drawbacks for its fellow African countries.

³⁷⁴ Ibid

³⁷⁵ Stephen Gelb, 'Foreign Direct Investment links between South Africa and China' available at www.tips.org.za accessed on 5 October 2014

³⁷⁶ In November 2012, Zendai a Chinese property company purchased 1,600 hectares of land in Johannesburg, with plans to develop a "mixed-use" project comprising of residential, industrial and commercial components. Furthermore, the Chinese health care and personal care products manufacturer Perfect purchased a 25 hectare wine estate. This became the first Chinese investment in South Africa's wine industry. Moreover, Hisense, a Hong Kong based white goods manufacturer has opened a 350 million rand factory in South Africa.

³⁷⁷ 'South African Institute of International Affairs (2013) BRICS FDI: Preliminary View', available at www.saiia.org.za accessed on 05 October 2014

³⁷⁸ The South African Department of Trade and Industry (DTI) expressed this relationship as follows; "with regard to the People's Republic of China (PRC), the Department leads an engagement to implement the Partnership for Growth and Development (PGD) that aims to promote value added South African exports to China and

Despite the positives of this relationship, there are fears that South Africa will lose out to increased market competition from countries like China. The concern stems from South Africa being the political nexus between its fellow BRIC members and the African continent. There are fears this may result in South Africa discouraging its own markets in Africa as the markets will become increasingly competitive.³⁷⁹ This is a legitimate concern as Africa is the only region where South Africa has a trade surplus in manufacturing.³⁸⁰

The next member's relationship to be discussed is India. South Africa is currently India's second largest trading partner in Africa with trade between the two countries expected to increase to US\$ 15 billion by the end of this year (2014).³⁸¹ India's relationship with South Africa is not as strong as the China – South Africa relationship as India has focussed on expanding its role on the continent, the effect of which was the creation of competition for South African companies.³⁸² Despite their different approach, many Indian multinational corporations have made inroads into South Africa. The local market has seen the entry and investment by companies such as TATA, Reliance and Mahindra.³⁸³ The past few years has seen Indian investors show their willingness to invest in coal, iron ore and manganese mines in the country.³⁸⁴ An example of this being the JSW Energy acquisition of a majority stake in the South African Coal Mining Holdings in April 2010.³⁸⁵ Furthermore, on the nuclear front, India are keen on procuring uranium and nuclear technologies from South African companies.³⁸⁶ With inroads made by India, a free trade agreement (FTA) between the Southern African Customs Union (SACU) and India is currently being negotiated.³⁸⁷

increase inward investment in projects for beneficiation. Our objective is to ensure the sustainability and mutual benefit of the relationship with this important trading partner" available at www.dti.gov.za accessed on 19 November 2014

³⁷⁹ Stephen Gelb, 'Foreign Direct Investment links between South Africa and China' available at www.tips.org.za accessed on 5 October 2014

³⁸⁰ Ibid Institute

³⁸¹ Ron Sandrey 'BRICS: The Way Ahead?', available at www.tralac.org accessed on 5 October 2014

³⁸² 'South African Institute of International Affairs (2013) BRICS FDI: Preliminary View', available at www.saiia.org.za accessed on 05 October 2014

³⁸³ Ibid

³⁸⁴ Ibid

³⁸⁵ Ibid

³⁸⁶ Besada H, Tok E, Winters K, 'South Africa in BRICS Opportunities, Challenges, and Prospects' (2013) 42.4 Africa Insight 1 -15

³⁸⁷ This is expected to be the first of three agreements that would encompass the exemption of visas for diplomatic and official passport holders, science and technology co-operation, and co-operation and mutual assistance on customs matters. It is clear that both governments wish to advance the skills programmes provided by India. Available at www.sacu.int accessed on 19 November 2014

As for the other two BRICS members; Brazil's and Russia's FDI in South Africa is far less than that of China and India. Interestingly, South Africa is Brazil's fourth largest trading partner, behind Nigeria, Angola and Algeria.³⁸⁸ This is largely due to the colonial and historical ties between these nations and Brazil, with Angola and Mozambique attracting the most interest from Brazilian multinationals.³⁸⁹ Much like Brazil, trade between the Russia and South Africa is limited as their focus lies in Africa with Russian investment into the continent expected to increase. Russia as a country is rich in resources but lacks the ability to invest in the same manner as a country like China.³⁹⁰ However Russia do share the same goals as China, India and Brazil in terms of economic expansion in South Africa. In 2009, the Russian President visited South Africa to assess and establish investment opportunities.³⁹¹ These ventures were focussed around energy and nuclear power.³⁹²

A point of interest is the Memorandum of Understanding (MOU) on Cooperation entered into by credit insurance agencies of the BRICS countries.³⁹³ The goal of the MOU is to promote a non – exclusive framework that will encourage trade and investment via cooperative efforts between BRICS countries. Furthermore, to create joint projects envisaging the supply of goods and services from their respective countries to third countries therefore promoting BRICS products and services.³⁹⁴ Moreover, the MOU wishes to exchange experience in the form of guidelines and regulations on export credit and investment insurance.³⁹⁵

³⁸⁸ 'South African Institute of International Affairs (2013) BRICS FDI: Preliminary View', available at www.saiia.org.za accessed on 05 October 2014

³⁸⁹ Ibid

³⁹⁰ Natalya Volkova & Maria Ryabtsava, 'Russia – South Africa Relations: Collaborations in BRICS and the G20', available at www.saiia.org.za accessed on 05 October 2014

³⁹¹ Ibid

³⁹² Ibid

³⁹³ Brazilian Guarantees Agency (Agência Brasileira Gestora de Fundos Garantidores e Garantias S.A. – "ABGF"), a state-owned company with the purpose of operating in the guarantee, insurance and reinsurance sectors. ; OJSC «Russian Agency for Export Credit and Investment Insurance», Russian Federation ("EXIAR"), fully owned by the State Corporation Bank for Development and Foreign Economic Affairs (Vnesheconombank). ; Export Credit Guarantee Corporation of India Ltd, India ("ECGC"), an export credit insurance organization fully owned by Government of India. ECGC is established to provide insurance for exporters and banks in India, and to encourage, facilitate and develop trade between India and other countries. China Export & Credit Insurance Corporation, P.R. China ("SINOSURE"), an authorized Chinese export credit insurance institution, fully owned by government. ; and Export Credit Insurance Corporation of South Africa Ltd, South Africa ("ECIC"), an authorized South African export credit insurance company.

³⁹⁴ 'South African Institute of International Affairs (2013) BRICS FDI: Preliminary View', available at www.saiia.org.za accessed on 05 October 2014

³⁹⁵ Memorandum of Understanding on Cooperation among BRICS Export Credit Insurance Agencies, 14 July 2014

As noted above, South Africa yields power on a regional and continental level as it exports both mineral and agricultural products and provides services across the continent, as well as to BRICS nations.³⁹⁶ Despite this, South Africa still faces competition from China in terms of manufacturing and India in terms of services. Where South Africa does play a role is assisting BRICS maintain its diplomatic position as South Africa has maintained key relations with many developed countries.³⁹⁷ Furthermore, South Africa is regarded as a leader of the continent as it had lead the way on issues of the Millennium Development Goals and New Partnership for Africa's Development.³⁹⁸ This form of global stature makes them an asset to the BRICS grouping.

4.4 China and India's position on foreign direct investment

4.4.1 China

According to the South African Reserve Bank, China has become South Africa's biggest trading partner and is also the largest destination for South African exports.³⁹⁹ In terms of FDI, China is heavily involved in mining, manufacturing and construction within South Africa.⁴⁰⁰ It is reported that China's FDI presence has grown from approximately R350 Million in 2005 to about R50 Billion in 2012.⁴⁰¹ This is largely due to their involvement in the banking sector, as mentioned earlier with the acquisition of a portion of Standard Bank. In light of this, a comparison between South Africa and China's FDI approaches will be discussed. It is important to note that this is not an analysis of China's policy towards outward and inward FDI but a discussion on their approach in conjunction with South Africa's approach. This is intended to shed some light on what future interactions between the two BRIC members may be like.

³⁹⁶ South African Companies involved in these exports included; Anglo American, De Beers and Capespan.

³⁹⁷ President Thabo Mbeki attended all G8 summits between 2000 and 2008 therefore creating a good relationship with many developed countries, such as the US and Germany.

³⁹⁸ TM Shaw, AF Cooper, GT Chin, 'Emerging Powers and Africa: Implications for/from Global Governance?' (2009) 36 *Politikon: South African Journal of Political Studies*, 27 - 44

³⁹⁹ 'Foreign Direct Investment – The China Story', www.worldbank.org accessed on 28 September 2014

⁴⁰⁰ Toh Han Shih, 'From Winery to factories, Chinese firms investing billions in South Africa', available at www.scmp.com, accessed on 21 October 2014

⁴⁰¹ 'Foreign Direct Investment – The China Story', www.worldbank.org accessed on 28 September 2014

China's success in attracting investment opportunities is largely attributed to its size and growing domestic market. The result of which is China having received approximately 20 percent of all FDI to developing countries over the last decade.⁴⁰² Their inward FDI has played an important role in their economic development and export success with over half of all imports and exports stemming from foreign investment.⁴⁰³ This is a good example of the positive effect of high FDI rates resulting in higher productivity. Importantly, FDI has been the catalyst for China's economic reform.⁴⁰⁴

China's FDI policies have evolved in conjunction with their economic development and strengthened institutional capacity.⁴⁰⁵ During the 1980s, China decided to open up foreign investment in selected coastal cities and particular economic zones.⁴⁰⁶ China also moved away from their fixation on GDP and embraced a more balanced developmental approach. Part of embracing this approach was their commitment to service liberalisation during its accession to the WTO.⁴⁰⁷ The effect of which was a shift to FDI in service industries. By the late 2000s, services had tripled while manufacturing FDI in China increased by 81 percent. This resulted in China becoming a hub for East Asia and thousands of multinationals have invested in China.⁴⁰⁸

China has been open to FDI in manufacturing and service industries, however they have been cautious in their liberalisation to align with the development of institutional capacity. A decision which seems to have benefitted them in light of the most recent financial crisis.⁴⁰⁹ Furthermore, China has a largely decentralised FDI approach which allows for competition for

⁴⁰² Ibid

⁴⁰³ Ken Davies, 'China Investment Policy', available at www.oecd.org, accessed on 28 September 2014

⁴⁰⁴ Stephen Gelb, 'Foreign Direct Investment links between South Africa and China' available at www.tips.org.za accessed on 5 October 2014

⁴⁰⁵ 'South African Institute of International Affairs (2013) BRICS FDI: Preliminary View', available at www.saiia.org.za accessed on 05 October 2014

⁴⁰⁶ Ken Davies, 'China Investment Policy', available at www.oecd.org, accessed on 28 September 2014

⁴⁰⁷ Until the 1970s, China's economy was managed and limited by the communist government of the day. The 1980s was the beginning of their political reform with China starting to open its economy and enter into regional trade agreements. By 1986 they had observer status with the General Agreement on Trade and Tariffs (GATT). China worked towards achieving full membership but were denied the opportunity of being a founding member of the WTO due to the lack of reform in terms of their tariff and open market policies. When China finally joined the WTO on December 11, 2001, it agreed to substantially harsher conditions than other developing nations. Their membership resulted in the liberalisation of their service sector and for the first time foreign investment was allowed. This included banking, financial services, insurance and telecommunications being open to foreign investment.

⁴⁰⁸ Ken Davies, 'China Investment Policy', available at www.oecd.org, accessed on 28 September 2014

⁴⁰⁹ 'Foreign Direct Investment – The China Story', www.worldbank.org accessed on 28 September 2014

FDI among local authorities.⁴¹⁰ However this approach has the potential to produce excessive red tape and corruption, which are deterrents to investors.⁴¹¹ Such an approach requires transparency of regulations and communication between government and businesses alike. A possible solution to this is for local governments to seek administrative and operational efficiency of the approval process.

Based on the above information, it appears as though China has done well to position itself, however its new challenge is to attract the appropriate form of FDI. In response to this, the Chinese government in an attempt to balance its economy, has been more selective in its approach to attract energy efficient and technologically advanced industries.

Chinese and South African investors seem to both appreciate a long-term approach orientated around establishing good relationships with their relevant FDI host countries. South African firms are in favour of this approach as they deem it profitable and useful as they operate within their own region and can therefore capitalise on the markets closest to them.⁴¹² This is important to the South African government as they intend on growing in conjunction with the continent. This however is a utopian approach that is far easier in principle than in practice.⁴¹³ Apart from this, South Africa needs to address the errors of the Promotion and Protection of Investment Bill to be more investor friendly.⁴¹⁴

Furthermore, South Africa needs to work on their own negative image that is a combination of the legacy of Apartheid and contemporary issues, such as those of striking and high unemployment rates. The Chinese approach towards long term business relations is largely founded on norms and values within Chinese business culture.⁴¹⁵ A key difference is that South African investors seem to connect far more with the local community. Unlike Chinese investors who typically focus on their relations with the host government.⁴¹⁶

⁴¹⁰ Ken Davies, 'China Investment Policy', available at www.oecd.org, accessed on 28 September 2014

⁴¹¹ 'Foreign Direct Investment – The China Story', www.worldbank.org accessed on 28 September 2014

⁴¹² Ibid

⁴¹³ South Africa has domestic concerns, such as corruption and poverty that will hinder their production rates and overall growth. Only once these issues are addressed will the country enjoy the benefits of free-flowing FDI. Furthermore, for South Africa to grow concurrently with the rest of Africa, South Africa will have to ensure that its fellow BRICS members investment in the continent does not result in greater competition for South African goods and services.

⁴¹⁴ The errors spoke of have been discussed extensively in Chapter 3.

⁴¹⁵ Ken Davies, 'China Investment Policy', available at www.oecd.org, accessed on 28 – 09 - 14

⁴¹⁶ Ibid

4.4.2 India's review of their FDI Policy

It is of interest that India, South Africa's fellow BRICS member, has also decided to review their FDI policy. In light of this paper, one may deem a brief discussion of India's reasoning and its approach to be relevant as such a discussion can shed light on whether there is common ground between South Africa and India in reviewing their BITs. Moreover, this discussion will provide an examination into future interactions between these two BRICS members may be similar.

The departing of Congress and the swearing of the new Prime Minister Narendra Modi, has brought about some immediate alterations with international ramifications.⁴¹⁷ One such immediate alteration to the *status quo* was the Prime Minister's announcement that India would be reviewing their FDI policy.⁴¹⁸ BITs have been largely perceived by the Indian public to be protecting and promoting foreign investors.⁴¹⁹ The main issue with BITs involving India as the host nation is the empowering of foreign investors to directly bring claims against the host country at an international arbitration forum.⁴²⁰ Since BITs control the exercise of public power, the BIT arbitrations have the ability to adjudicate on public functions like monetary policy and taxation measures.⁴²¹

India, since 1994, has 80 BITs with 72 still being enforced.⁴²² Most of these BITs are foreigner investor friendly with legal interpretations favouring investment and investor protection of the regulatory powers by the Indian government.⁴²³ Interestingly the past three years has witnessed two key developments that urged India to embark on their revision of BITs.⁴²⁴ The first issue being the BIT tribunal in the case of *White Industries V India*⁴²⁵; where for the first time India

⁴¹⁷ Viren Mascarenhas, 'The Lure of India: Foreign Investment and Treaty Arbitration', available at www.metrocorpocounsel.com accessed on 1 October 2014

⁴¹⁸ Ibid

⁴¹⁹ S Bhushan & and Puneeth Nagaraj, 'Need to align bilateral investment treaty regime with global reality', available at www.thehindu.com, accessed on 20 November 2014

⁴²⁰ Ibid

⁴²¹ S Bhushan & and Puneeth Nagaraj, 'Need to align bilateral investment treaty regime with global reality', available at www.thehindu.com, accessed on 20 November 2014

⁴²² Ibid

⁴²³ Ibid

⁴²⁴ Viren Mascarenhas, 'The Lure of India: Foreign Investment and Treaty Arbitration', available at www.metrocorpocounsel.com accessed on 1 October 2014

⁴²⁵ *White Industries Australia Limited v The Republic of India*, UNCITRAL (Final Award), 30 November 2011 available at www.iisd.org, accessed on 25 November 2014.

was found to violate its BIT obligations with Australia.⁴²⁶ The second involved India being taken to arbitration by large foreign investors, like Vodafone and Telenor, as they wished to challenge several regulatory measures, such as the imposition of retrospective taxation.⁴²⁷ These are just the tip of the iceberg in terms of claims against India by foreign investors. The most recent issue was by a French shipping service and maritime company after they pulled out of an agreement between them and the Indian government two years ago.⁴²⁸

These issues acted as a trigger for India to start the review process, however before the *White Industries case*, there had been lobbying for a review process in light of India's vulnerability to such BITs claim.⁴²⁹ In light of this, it is presumed that the decision to review existing BITs has been largely welcomed. Despite this, information regarding the process and way forward is limited with only a few media articles and scholar's interpretations of the way forward being available. Therefore the way forward remains somewhat unknown.

This is in contrast to the South African approach who has reviewed their BITs and are in the process of adopting a new Investment Bill. The South African government, from the start of the review process, were open about why they chose to cancel their existing BITs and once the Bill was drafted, it was open to the public to comment and criticise. However, the reasons behind India and South Africa reviewing and cancelling their BITs were largely the same, as both governments felt the international arbitration aspect of the BITs agreements worked consistently in favour of the foreign investor. It is submitted that this common ground between the two nations will facilitate future FDI that protects both the investor and the government equally. Their close relationship may cogently act as a form of checks and balances in establishing successful FDI links. Furthermore, if one were to apply the possibility of the Promotion and Protection of Investment Bill's clause on domestic arbitration, South African courts will ensure that Indian investors are not subjected to an unfair trial.

In this case, an arbitral tribunal found that the delay by the Indian courts in enforcing a commercial arbitration award received by an Australian mining company against Coal India, an Indian government-owned entity, breached the Australia-India BIT. The arbitral tribunal found that the protracted delays in the Indian courts had led to a situation where the Australian mining company had been denied "effective means" of asserting claims and protecting its rights in the Indian courts.

⁴²⁶ *White Industries Australia Limited v The Republic of India*, UNCITRAL (Final Award) , 30 November 2011

⁴²⁷ Prabhash Ranjan, 'Make BIT reviews more transparent', available www.financialexpress.com, accessed on 1 October 2014

⁴²⁸ Ibid

⁴²⁹ Ibid

4.5 *The next step: BRICS development bank*

BRICS have made clear inroads into Africa and have taken steps to decentralise the traditionally western nature of the multilateral trading system. Arguably the biggest step taken so far by the young grouping is their intention to establish a development bank and emergency reserved fund.⁴³⁰ Furthermore, leaders of the five BRICS countries have signed a deal to create this new international financial institution. Which appears to be more than a political gesture but a state of intention and a bargaining tool.⁴³¹

A monetary institution of this nature should not be taken for granted as it is important to developing countries. The Bank itself will not rival the World Bank and IMF in size, however it does not need too as they do not intend to take on the multilateral trading system's responsibilities.⁴³² Despite the IMF promising reform⁴³³, developing countries are not convinced and believe the West will still possess considerable power in terms of the allocation of funds.⁴³⁴

The Bank will start off with \$50 Billion in initial capital.⁴³⁵ The emergency reserve fund will have a further \$100 Billion and is intended to assist developing countries avoid "short – term liquidity pressures, promote further BRICS cooperation, strengthen the global financial safety net and complement existing international arrangements".⁴³⁶ The establishment of the BRICS bank is

⁴³⁰ Leonid Bershidsky, 'BRICS bank and its threat to end World Bank', available at www.moneyweb.co.za accessed on the 19 November 2014

⁴³¹ "The World Bank has a subscribed capital of \$223.2 billion, paid in or payable by 188 countries. The US is the biggest shareholder with 16%. China is the third biggest, with 5.76%, which makes its share of the World Bank's capital \$12.86 billion. So the \$10 billion it agreed to put into the BRICS Development Bank will not be much smaller. Russia, India, Brazil and South Africa, all contributing equally, will pay in more money to the BRICS bank than they do to the World Bank. Moreover, the contributions that nations make to the International Monetary Fund (IMF)—which has \$315 billion in immediately available resources and more than \$1 trillion it can get under certain conditions—are also determined by the relative sizes of their economies. The US, again, is the biggest contributor. Russia's IMF quota is \$9.19 billion—roughly half the \$18 billion it will provide to the BRICS nations' last-resort pool, the \$100 billion contingent reserve arrangement. China is contributing \$41 billion to the reserve, almost three times its IMF quota" - extracted from Leonid Bershidsky, 'BRICS bank and its threat to end World Bank', available at www.moneyweb.co.za accessed on the 19 November 2014

⁴³² Leonid Bershidsky, 'BRICS bank and its threat to end World Bank', available at www.moneyweb.co.za accessed on the 19 November 2014

⁴³³ The IMF is promising to reform itself, giving more power to the large developing nations: By January, China should have the third biggest quota, and Brazil, India and Russia should all be in the top 10. Putin, however, thinks changes to the system are being "unreasonably delayed." The US Congress is in no rush to approve the changes, and the year-end deadline might be moved again

⁴³⁴ Katy Watson, 'BRICS Bank to create \$100bn development bank', available at www.bbc.com accessed on 19 November 2014

⁴³⁵ Ibid

⁴³⁶ Ibid

anticipated to be in direct competition with the World Bank as well as other regional monetary funds. Even more, BRICS nations have criticised the World Bank and the IMF for failing to give developing countries substantial voting rights.⁴³⁷ Therefore one of the goals of the bank is to empower developing countries to have a greater voice in ascertaining loans for infrastructure projects.

BRICS commitment to investing more resources and money into their new institution rather than the existing one suggests that they do wish to afford developing countries more power and alter the multilateral system.⁴³⁸ However, these steps taken are to lay a foundation for what may be a gradual departure from the IMF and World Bank. China, India and Brazil are all still heavily invested in the World Bank which will allow the US to breathe easy, however if greater reform is not introduced and developing countries continue to be marginalised it will be to the detriment of the developed countries.⁴³⁹

4.6. Conclusion

A theme of this chapter is the common ground that is shared between the discussed emerging economies. It is true these developing countries share the same interests and agenda on a global stage, however this is not to say that they are also not competing with each other. Developing countries all prioritise on their own developmental needs and securing greater concessions from developed countries in trade negotiations.⁴⁴⁰ BRICS member countries are no different as their ambition is not only shared but overlaps. Almost all five members of the BRICS members can be considered regional hubs that yield a strong influence over their neighbours.⁴⁴¹ India and China find themselves in direct competition for the prime spot of East Asia, whilst South Africa is deemed the sole regional point of authority in Southern Africa.⁴⁴² This is coupled with the competition for international status and recognition as developing nations call for greater reform of the UN Security Council, as well as other international institutions.⁴⁴³ The

⁴³⁷ Raymond Colitt, Unni Krishnan & Arnaldo Galvao, 'BRICS agree on \$50 Billion Bank with Something for Everyone', available at www.bloomberg.com accessed on 19 November 2014

⁴³⁸ Ibid

⁴³⁹ Ibid

⁴⁴⁰ TM Shaw, AF Cooper 'Global and/or Regional Development at the Start of the 21st Century? China, India and (South) Africa' (2007) 28.7 *Third World Quarterly*.

⁴⁴¹ Noted 106 above

⁴⁴² Noted 106 above

⁴⁴³ Both India and Brazil call for expanding the UN Security Council to include their representatives. Moreover, there is a joint call for the reforms of the Bretton Woods Institutions that many regard as bias towards developed nations and risking irrelevance in light of the emerging markets. Extracted from TM Shaw, AF

competition between BRICS members further increases as the countries' economies grow. China has in recent times controlled the market in terms of manufacturing and trade, furthermore they are the second biggest exporter to the USA after Canada.⁴⁴⁴ This has forced its fellow BRICS member, India, to focus on education and services⁴⁴⁵ as they cannot compete with the low wages assembly-lines of the Chinese manufacturing sector.⁴⁴⁶

In light of the competition, a question worth asking is what exactly South Africa contributes to BRICS, apart from being a gateway to Africa. South Africa's membership to the BRICS grouping was largely based on economic logic and not on its global profile.⁴⁴⁷ South Africa's participation in BRICS is significant as it provides important opportunities to build their manufacturing sector, establish a consistent flow of technology and ideas, improve value-added exports and provide a platform for South Africa businesses to develop and expand. The country's general stability has allowed it to become synonymous with Africa opportunities investment.

In terms of the Protection and Promotion of Investment Bill, it should not impact BRICS as a grouping and South Africa's interactions with its fellow BRICS members. If the ambiguities and points of revision of the Bill are comprehensively addressed, South Africa will find itself in a position of power when negotiating their foreign investment relationships with its fellow BRICS members. In turn the foreign investors from the BRICS nations should respect and work within the limits of the Bill. It is submitted that the Bill was drafted as part of South Africa's geopolitical realignment and should work in favour of the BRICS investors.

As for South Africa's obligations under the WTO, the South African representatives will have greater negotiating power working in tandem with its fellow BRICS members. This is key, as BRICS offers its members a much welcomed "group effort" allowing these countries, such as South Africa, the ability to meet their WTO obligations while standing their ground and avoid being bullied by the more developed countries. It is a truly fascinating time as the five members

Cooper 'Global and/or Regional Development at the Start of the 21st Century? China, India and (South) Africa' (2007) 28.7 Third World Quarterly.

⁴⁴⁴ TM Shaw, AF Cooper 'Global and/or Regional Development at the Start of the 21st Century? China, India and (South) Africa' (2007) 28.7 Third World Quarterly.

⁴⁴⁵ India is currently the leader in IT services, however China and Russia have also started to grow their IT services as they benefitted from globalization and Western outsourcing.

⁴⁴⁶ TM Shaw, AF Cooper 'Global and/or Regional Development at the Start of the 21st Century? China, India and (South) Africa' (2007) 28.7 Third World Quarterly.

⁴⁴⁷ Ibid

of BRICS have their differences. However, despite the differences between South Africa and its BRICS counterparts, there are opportunities for all members. Importantly, it is their differences that make them a strong grouping that has the potential to alter the global economic status of emerging markets. They find common ground in their hunger to develop and empower themselves.

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATIONS

5.1 *Introduction*

This paper was based on South Africa's change in approach to foreign investment in context of its obligations as a developing nation and in light of these changes, how the country's plans will affect its position in the Multilateral Trading system. It has been argued that due to the changing geopolitical structure and strengthening of emerging markets that there is a gradual decentralisation of the multilateral trading system. Therefore the manner in which foreign investment is conducted between the developed and developing nations has changed as developing countries, such as South Africa are embracing a new approach that empowers and protects them.

At the outset, this paper aimed to critically analyse the country's foreign investment policy and its effects on particular trade relationships. Specifically this paper has considered the historic foreign investment partners of South Africa, such as the European Union, as well as new partners, such as China and India. The paper analysed The Promotion and Protection of Investment Bill as it represents South Africa's attempt to move away from the previous system of Bilateral Investment Treaties. Furthermore, this paper explored South Africa's accession to the grouping of Brazil, China, Russia, India and South Africa (BRICS) and the relationship shared between South Africa and its fellow member countries. Special focus is paid to their relations in terms of inward foreign investment.

5.2 *Conclusion*

Understanding the multilateral trading system, the General Agreement on Trade and Tariffs (GATT) and the World Trade Organisation (WTO) provided the foundation of this paper. However, there are two important questions to be answered; the first being to what extent has international law evolved to accommodate developing countries in respect of international trade relations, and the second question being the extent to which the WTO has promoted investment in developing countries.

In terms of the first question, it is clear that developing countries have found themselves in a constant uphill battle when dealing with the WTO. Despite the principles of the WTO, such as the Most Favoured Nation and Single Undertaking principles, reports suggest that the WTO has favoured developed countries.⁴⁴⁸ The progress made through the GATT years and the WTO largely stemmed from developing countries asserting themselves and working together to seek benefits. For many developing countries the GATT and the WTO in principle presented many opportunities but in practice it failed. This was largely due to the exclusivity exercised by developed countries who had larger markets and therefore could influence the smaller, more fragile and desperate, developing countries. As for developing countries, their lack of infrastructure restricted their ability to negotiate and grow under the WTO. This thesis has proffered the argument that the multilateral system was implemented and shaped by the developed countries, such as the United States, and has consistently worked in favour of them.⁴⁴⁹ Whether it be in terms of liberalising markets or restricting trade, more often than not, it has favoured the established economic powerhouses. This meant those who could work alongside them benefitted and those who couldn't, battled to benefit.

With the WTO failing to empower developing countries on a tangible or substantial level, the next point of discussion is the manner in which the WTO has promoted the aspect of investment. The GATT years did not prioritise much on investment and apart from the failure of Havana Charter; there had been minimal focus on investment. The birth of the WTO brought with it discussions and negotiations that tabled issues of investment and the establishment of two agreements that deal with investment on varying levels, the Agreement on Trade – Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS). However a framework for investment is still non – existent despite the growing importance of foreign investment in building and sustaining economies.

In light of no international framework for investment existing, countries over the last 20 years have relied bilateral investment treaties (BITs). BITs encourage and strengthens the rule of law where court systems are weak or impartial against foreign investors. However, it appears as though the relationship between BITs and FDI suggest that BITs are not necessary or sufficient to attract FDI. This is supported by the fact that South Africa receives FDI from investors in

⁴⁴⁸ Hoekman, Bernard M. and Kostecki, Michel, (1995), *The Political Economy of the World Trading System: from GATT to WTO*. Oxford: Oxford University Press, (page 195)

⁴⁴⁹ As discussed in Chapter 2, page 17

countries with whom it has no BITs with. One of the biggest issues with BITs is whether the rule of law is adequately upheld in investor – state dispute settlement (ISDS) systems or in the BITs that underpin it.

As noted in this paper, these frustrations with BITs resulted in the South African government reviewing its BITs, as well as the role of foreign investment in South Africa and the levels of protection afforded to investment, and the risks and benefits of BITs. The review of South Africa’s BITs confirmed the frustration experienced by the South African government in terms of international arbitration. The review further confirmed the importance of FDI to the South African economy as foreign investors are present in all sectors of the economy. Furthermore, FDI has grown steadily and has the potential to grow further.⁴⁵⁰

This is largely attributed to South Africa being regarded as one of the more open jurisdictions in international trade and offers investment protection and stability that is of the highest standard. Protection is provided by the Constitution⁴⁵¹ and complementary legislation, among other forms of business securities. Importantly, foreign investors enjoy the same protection as domestic investors and have equal access to administrative justice.⁴⁵² In terms of foreign investor protection, a significant point for is the manner in which the issue of expropriation is viewed by the host nation. In terms of South Africa, expropriation may only occur within the law of general application and for public purposes.⁴⁵³ Expropriation is subject to compensation, which is expected to be justifiable and must reflect a fair balance between the public interest and that of foreign investors.⁴⁵⁴

In light of this, and the frustrations of BITs, the decision was made by the South African government to terminate the majority of their existing BITs and refrain from engaging in new BITs. The government aimed to re - negotiate BITs on the basis of a new model. This new model took the shape of the Promotion and Protection of Investment Bill⁴⁵⁵ and is aligned with the Constitution. Importantly, it maintains that South Africa is open to FDI while maintaining

⁴⁵⁰ Xanthi Payi, ‘Attracting FDI key to South Africa and Africa’s growth and development agenda’ available at www.stanlib.com, accessed on 14 July 2014

⁴⁵¹ Refer to Chapter 3, specifically 3.11

⁴⁵² The Promotion and Protection of Investment Bill, 2013

⁴⁵³ Expropriation Act 63 of 1975

⁴⁵⁴ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry’, available at www.saiia.org.za, accessed on 25 April 2014

⁴⁵⁵ The Promotion and Protection of Investment Bill, 2013

the country's sovereign right⁴⁵⁶ of the government to follow and work towards the necessities of public policy and act in constitutionally consistent manner.

The Bill is the culmination of lessons of the past, with the new legal framework for investment being better equipped to meet the challenges of sustainable development and growth. The constitutional values have been maintained with the Bill encompassing equitable relationships between the government and the foreign investor based on due process, the rule of law, and security of property rights.

Despite the Bill attempting to balance the interests of the host nation and the foreign investor, the Bill leans more towards protecting the sovereign rights of the government.⁴⁵⁷ This should not come as a surprise in context of the decision to cancel existing BITs and do away with issues, such as international arbitration, that became extremely cumbersome for the South African government. Unfortunately many key areas dealing with investor's rights and obligations are rather ambiguous, resulting in interpretational issues. Despite the uncertainty, no new obligations are imposed on foreign investors.

South Africa's alteration of foreign investment policy is evident of the country wishing to assert itself as an emerging market who deserves recognition as a regional, continental and global leader. The opportunity for South Africa to assert itself has become a tangible prospect with the country's recent membership to the BRICS grouping. It has been highlighted that South Africa has faced much criticism and negative press regarding their involvement in the BRICS bloc as many believe they lack the influence and power of China, Brazil, India and Russia⁴⁵⁸. Thus based on the arguments proffered, it appears as though South Africa's seat at BRICS comes down to strategy in terms of trade, location and political relations. There are a new set of super power countries on their way and they are doing things in a slightly unorthodox way when compared to past standards. This is not a surprise, as BRICS, encompassing some of the fastest growing developing countries, has made their objective known: to displace the economic (and possibly political) power that has been traditionally held by the West. In asserting this new world order, South Africa's involvement is good business as it provides a

⁴⁵⁶ Section 5(2) of the Promotion and Protection of Investment Bill, 2013

⁴⁵⁷ Promotion and Protection of Investment Bill Submission to the Department of Trade and Industry', available at www.saiia.org.za, accessed on 25 April 2014

⁴⁵⁸ Besada H, Tok E, Winters K, 'South Africa in BRICS Opportunities, Challenges and Prospects' (2013) 42.4 Africa Insight 1 - 15

stable financial gateway to the rest of Africa for its fellow members. Furthermore, in light of the new BRICS bank being established, it is vital that there is an African presence for infrastructural development.

South Africa's participation in BRICS is significant as it provides important opportunities to build their manufacturing sector, establish a consistent flow of technology and ideas, improve value-added exports and provide a platform for South Africa businesses to develop and expand. The country's general stability has allowed it to become synonymous with African opportunities for investment. Despite the differences between South Africa and its BRICS counterparts, there are opportunities for all members. Importantly, it is their differences that make them a strong grouping that has the potential to alter the global economic status of emerging markets. Thus, they find common ground in their hunger to develop and empower themselves.

It is still early days for the BRICS grouping, however the initial moves and mergers that have taken place show that BRICS mean business and cannot be taken lightly. South Africa is in a prime position to be involved in these changes to the geopolitical structure of the world. At the very least, the grouping is a threat to organisations like the International Monetary Fund (IMF) and the WTO who risk irrelevance if BRICS is able to loosen the dependency these organisations have on many developing countries and least developed countries. The trajectory of BRICS goes well beyond this paper, however it submitted that their progress will be slow, steady and calculated as they manoeuvre themselves through the political and economic sensitivity that is international trade. However, this does not mean that current powerhouses that have the largest influence on financial trends will be impotent or lack influence. This is evident with the demonination for the BRICS bank being the US Dollar.

5.3 Recommendations

5.3.1 Chapter Two

In light of the gradual growth investment has undergone under the multilateral system, it appears that it is an appropriate time for the WTO to establish an international framework for investment. Their inability to have previously done so must be considered in context of the 1990s, when the WTO established itself and the Multilateral Agreement on Investment (MAI)

failed. 20 years later, the world is characterised not by the developed countries who founded the WTO, but by the developing countries. Emerging economies, led by China, India and Brazil are now major investors across the globe which suggests WTO may be the appropriate platform for a single investment regime.⁴⁵⁹

For international trade to keep moving forward, it requires a stable and certain environment that allows for investments to prosper, therefore creating greater wealth and development. This has been shown by the steady increase of FDI since the global financial crisis that caused the decline due to economic fragility and policy uncertainty across many developed and developing economies.⁴⁶⁰ The investment environment is not assisted by the varying international investment coverage afforded by certain agreements, primarily TRIMS and GATS⁴⁶¹ thus the lack of a central authority on investment needs to be addressed as the future of investment cannot be ignored. Expansive discussions, concerning investment, need to be initiated and welcomed. Issues such as dispute settlement, international investment by state – owned enterprises and the public – private partnership can assist greater international investment.⁴⁶²

There are several regional negotiations regarding FDI and a single international investment agreement can be the platform for which to consolidate these agreements and create a stable, predictable environment for international trade.⁴⁶³ However, the creation of such a regime will not be easy and is expected to be a long and tedious process as there will have to be balancing of political and economic situations to create a new global standard. It is suggested that these negotiations are made in conjunction with other long-term discussions on international trade. The joint platforms are opportunities to promote mutual understanding among governments, as well as between governments and its citizens, in the effort to create a single regime for international investment that protects the interests of all parties.⁴⁶⁴

⁴⁵⁹ Gary Hufbauer & Sherry Stepherson, 'The Case for Framework Agreement on Investment' available at www.vcc.columbia.edu accessed on 10 October

⁴⁶⁰ Ibid

⁴⁶¹ Refer to Chapter 2, 2.4

⁴⁶² Gary Hufbauer & Sherry Stepherson, 'The Case for Framework Agreement on Investment' available at www.vcc.columbia.edu accessed on 10 October

⁴⁶³ Ibid

⁴⁶⁴ Ibid

It is suggested that such a framework is created as a plurilateral agreement. The WTO has 159 members and custom territories, therefore only willing nations should be signatories to the agreement.⁴⁶⁵ The initial benefits of being a member to such an agreement would be the benefit of certain rights, such as the most-favoured-nation (MFN) principle.⁴⁶⁶ This will hopefully attract greater numbers to join the new regime. Currently, all rights that were once exclusive to signatories may be extended to all WTO members.

However, it should be noted that the recommended regime would not supersede BITs or free trade agreements (FTAs), instead the goal should be for them to coexist. Therefore in disputes, complainants could choose recourse under the proffered agreement depending on which is deemed most favourable.⁴⁶⁷ Furthermore, a comprehensive regime would be far more advantageous for smaller states to rely on as they would not need to negotiate new BITs with other states. Smaller states are now placed on platform where they are accessible and have access to other economies.

The failure of the MAI discussions in the 1990s has taught us the importance of laying a solid foundation before engaging in negotiations on international investment in a multilateral trading system.⁴⁶⁸ The on-going bilateral and regional negotiations can be used as the first – step towards unscrambling the multitude of agreements and setting long-term investment strategies. A single international investment landscape has the potential to reflect a comprehensive regime that international trade can rely on to generate sustainable growth. Which in turn will assist the WTO maintain relevance within the multilateral trading system.

5.3.2 Chapter Three

In attracting greater FDI, South Africa needs to establish a clear and certain framework that ensures foreign investors feel secure and confident in investing in the country. The Promotion and Protection of Investment Bill provides a great opportunity for South Africa to balance its

⁴⁶⁵ Principles of the Trading System.: www.wto.org, accessed on 04 – 04 -14

⁴⁶⁶ Ibid

⁴⁶⁷ Gary Hufbauer & Sherry Stepherson, 'The Case for Framework Agreement on Investment' available at www.vcc.columbia.edu accessed on 10 October

⁴⁶⁸ Gary Hufbauer & Sherry Stepherson, 'The Case for Framework Agreement on Investment' available at www.vcc.columbia.edu accessed on 10 October

domestic and international obligations, while simultaneously prioritising on which countries and regions it wishes to build investment relations with.

Unfortunately, the current draft of the Bill fails to achieve there are several aspects that require refining. It should be noted that since the amendments have been highlighted and discussed in Chapter three of this paper, the current chapter will therefore focus on the balancing of rights of the South African government and foreign investors.

In light of this, a relevant question that must be put before the South African government which is whether the utility of an inherently biased bill outweighs the harm to foreign investors, and foreign investment in general. It is submitted that the requisite amendments will not devalue the Bill, moreover, instead it has the prospect to allow for a more a balanced approach that empowers South Africa and encourages future foreign investment. However, the government should not allow the legislation to remain bias as it will detract from the original intention of reviewing their BITs and overall approach to FDI. Ultimately it is important that the Bill represents an equitable relationship between all parties, based on the respect of human rights, rule of law and due process.

5.3.3 Chapter Four

Realistically, South Africa's dependency on traditional sources of FDI will remain intact for years to come as BRICS is still in its teething stages. In the promise of future FDI inflows from BRICS increasing, South Africa needs to equip itself immediately and this paper will attempt to proffer some suggestion in this regard.

Firstly, the government needs to finalise their FDI policy approach in terms of inward and outward FDI. As they focus on finalising their FDI policy (the Promotion and Protection of Investment Bill) the government needs to work on reducing deterrents of FDI such as corruption and high unemployment rates, in order to bolster the development of the country. Secondly, South Africa needs to invest in its primary sectors for investment which are namely metals and resources. Most of the BRICS members are in need of such resources and South Africa should capitalise on this by ensuring these materials are off the highest quality and best value. Also, South Africa needs to meet the needs of its fellow BRICS members by creating a

stable economic environment that allows for the members to invest in South Africa. By doing so, the country will maintain a competitive edge over the rest of the African continent.

Thirdly, to translate this potential into material investments for South Africa and its fellow BRICS members, there are a few points worth raising; the first being the need for greater collaboration across research institutions in the BRICS to support the transfer of knowledge. The BRICS members need to engage in a comparative study of each other's investment framework and regulations. This is important, in light of policy alterations and economic advancements that should encourage investment and not hinder the process. This will allow for linkages to be established between investment, trade and industry.

Furthermore, to assist the relationship between South Africa and its fellow BRICS members, there needs to be a deeper understanding of the various factors influencing decisions of BRICS investors. This support can take the form of joint approaches to investment and cooperation based on principles of sustainable FDI. BRICS Members will need to also focus on the value of FDI creation and the benefits for the host country.

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