



UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW:

DEPARTMENT OF MERCANTILE AND LABOUR LAW

SOLUTIONS TO INVESTOR-STATE DISPUTE SETTLEMENT:

REPUBLIC OF SOUTH AFRICA VIS-À-VIS AUSTRALIA

**Research Paper Submitted in Partial Fulfilment of the Requirements for the
LLM Degree (Mode I)**

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DECLARATION

I, **Dumisani G Mlauzi**, declare that '**Solutions to Investor-State Dispute Settlement: Republic of South Africa vis-à-vis Australia**' is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.



Signed: _____

Dumisani G Mlauzi

Date: 12 January 2017



Signed: _____

Prof. Riekie Wandrag

Date: 12 January 2017



DEDICATION

To my son Yewo Thulani Mlauzi, who was born in my absence as I was pursuing this LLM programme abroad.



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This research would not have been possible if not for the unwavering support of my family. My family allowed me to leave Malawi and pursue this LLM programme despite my fiancée being pregnant. My son was born in my absence and my family took great care of him for the next seven months that I was still away pursuing this LLM programme. For this, I would like to extend a special 'thank you' to my fiancée Anna, my father, my mother, my two brothers, my sister Tumusime, my brother-in-law Kondwani, my sister-in-law Faith, my cousins, all family members and friends who visited my new-born son in my absence, everyone else who supported and helped me during this period, and most of all the almighty God for giving me the strength to endure being away from home during such a critical period.

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ABSTRACT

The main objective of this paper is to critically analyse the solutions that countries are currently implementing in response to the much-debated issue that the conventional investor-state dispute settlement (ISDS) regime limits a host-state's space to make regulations under public policy. Consequently, the paper makes recommendations on viable solutions that countries can implement as solutions to the ISDS problems.

In order to conduct the study, this paper uses the solutions to ISDS problems that have been implemented by the Republic of South Africa (RSA) and Australia respectively. The paper also compares the solutions implemented by RSA and Australia with some internationally recognised solutions.

Chapters two and three of the paper discuss the backgrounds and also analyse the solutions to ISDS that have been implemented by RSA and Australia respectively. Chapter four contains the main findings and arguments of the paper. It analyses the strengths and weaknesses of the ISDS solutions that have been implemented by RSA and Australia respectively. One of the main findings of the paper is that retaining the conventional ISDS regime is less beneficial to developing and least developed countries and more beneficial to developed countries, largely due to the differing levels of outward investments that are present in these categories of countries.

The paper recommends, *inter alia*, that, unlike developed countries, developing countries and least-developed countries should abrogate the conventional ISDS regime and only retain it in particular circumstances as explained in chapter five. The paper recommends that ISDS should only be utilised where state-state arbitration would unnecessarily politicise an investment dispute. The paper also finds the use of domestic court as undesirable to investment disputes. The paper recommends mediation as a more balanced avenue for resolving investment disputes.

KEY WORDS

Abrogating investor-state dispute settlement

Bilateral Investment Treaties

Host-state's public policy

Investment disputes

Investor-state dispute settlement

International Centre for Settlement of Investment Disputes

Protection of Investments Act 2015

Solutions to investor-state dispute settlement

State-state arbitration

Treaty-by-treaty approach



LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
ANC	African National Congress
BEE	Broad-Based Black Economic Empowerment
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement between the European Union and Canada
DTI	Department of Trade and Industry
EPA	Economic Partnership Agreement
EU	European Union
€	Euro
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
HDSAs	historically disadvantaged South Africans
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IPFSD	Investment Policy Framework for Sustainable Development
IRR	South Africa Institute of Race Relations
ISDS	Investor-State Dispute Settlement
MPRD Act	Mineral and Petroleum Resources Development Act
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PI Act	Protection of Investment Act
PMA	<i>Philip Morris Asia Limited</i>
PML	Philip Morris Limited

PPI Bill	Promotion and Protection of Investment Bill
RSA	Republic of South Africa
SACCI	South African Chamber of Commerce and Industry
SADC	Southern African Development Community
SADC FIP	Southern African Development Community Protocol on Finance and Investment
TPPA	Trans-Pacific Partnership Agreement
TPP	tobacco plain packaging
UNCTAD	United Nations Conference on Trade and Development
UNICTRAL	United Nations Commission on International Trade Law
USA	United States of America
US\$	United States Dollar
WTO	World Trade Organisation





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CHAPTER ONE: INTRODUCTION

1.1. RESEARCH BACKGROUND

Investor-state dispute settlement (ISDS) is a form of resolution of disputes between foreign investors and the state that hosts the investment (host-state).¹ ISDS allows foreign investors to initiate dispute settlement proceedings against a host-state, normally by means of arbitration proceedings.² ISDS mechanisms are commonly provided for in trade / investment agreements between two states (bilateral) or more than two states (multilateral).³ They can also be found in domestic legislation or contracts.⁴ Both the foreign investor and the host-state must consent to ISDS before the proceedings may commence. Usually, the consent of the host-state is contained in the trade / investment agreement.⁵ The foreign investor consents to ISDS by submitting its claim to be resolved by ISDS proceedings.⁶

Historically, foreign investment disputes were disputes between the host-state and the foreign investor's home-state (home-state), and were mostly resolved by means of diplomatic protection.⁷ Diplomatic protection is a 'procedure employed by the state of nationality of the injured persons to secure protection of that person and obtain reparation for the internationally wrongful act inflicted.'⁸ The evolution from diplomatic protection to ISDS was largely triggered by the establishment of

¹ International Centre for Settlement of Investment Disputes (ICSID) 'Background Information on the International Centre for Settlement of Investment Disputes (ICSID)' 1 available at <https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf#search=BACKGROUND%20INFORMATION%20ON%20THE%20INTERNATIONAL%20CENTRE%20FOR%20SETTLEMENT%20OF%20INVESTMENT%20DISPUTES%20%28ICSI%20D%29> (accessed 29 December 2016) (hereafter ICSID 'Background Information on ICSID').

² Gauthier A 'Investor-State Dispute Settlement Mechanisms: What is their History and where are they going?' (2015) Publication No. 2015-115-E 1 available at <http://www.lopparl.gc.ca/Content/LOP/ResearchPublications/2015-115-e.pdf> (accessed 29 December 2016) (hereafter Gauthier A (2015)).

³ Gauthier A (2015) 1.

⁴ ICSID 'Background Information on ICSID' 1.

⁵ ICSID 'Background Information on ICSID' 1.

⁶ Singh S & Sharma S 'Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap' (2013) 29 *Merkourios - International and European Law: General Issue* 91 (hereafter Singh S & Sharma S (2013)).

⁷ Singh S & Sharma S (2013) 90.

⁸ Bernasconi-Osterwalder N 'State-State Dispute Settlement in Investment Treaties' (2014) *Best Practices Series* 8 available at <https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> (accessed 10 June 2016) (hereafter Bernasconi-Osterwalder N (2014)).

international forums that resolve direct claims by persons (unlike states), and also the proliferation of treaties, which embody ISDS mechanisms.⁹

Recourse to ISDS as a means for resolving disputes between foreign investors and host-states (investment disputes) was intensified with the coming into force of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1966 (ICSID Convention).¹⁰ The creation of the ICSID Convention was advocated for by developed countries while developing countries had some reservations against it.¹¹ The ICSID Convention established the International Centre for Settlement of Investment Disputes (ICSID), which is an institution that provides for facilities and services for arbitration and conciliation of investment disputes.¹² ICSID has two sets of procedural rules that may govern the initiation and conduct of its proceedings. These are the ICSID Convention, Regulations and Rules; and the ICSID Additional Facility Rules.¹³ The ICSID Convention, Regulations and Rules are available only when a dispute is between an ICSID Convention Contracting State (Contracting State) and a national of another Contracting State.¹⁴ The ICSID Additional Facility Rules are available for settlement of investment disputes where only the home-state or the host-state is a Contracting State.¹⁵ ICSID also administers investment disputes under other rules such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) rules.¹⁶

Currently, the legitimacy of ISDS is becoming increasingly questioned.¹⁷ Various criticisms have been raised against ISDS. These include inconsistent and unintended interpretations of treaty clauses, costly and lengthy procedures, lack of

⁹ Singh S & Sharma S (2013) 90.

¹⁰ Schreuer C 'Course on Dispute Settlement: International Centre for Settlement of Investment Disputes' 2003 9 Available at http://unctad.org/en/docs/edmmisc232overview_en.pdf accessed 30 December 2016 (hereafter Schreuer C (2003)).

¹¹ Singh S & Sharma S (2013) 91.

¹² Article 1 of the ICSID Convention.

¹³ ICSID 'Background Information on ICSID' 3.

¹⁴ Article 25 (1) of the ICSID Convention.

¹⁵ ICSID 'ICSID Additional Facility Rules' 2006 5 available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf (accessed 20 September 2016).

¹⁶ ICSID 'Background Information on ICSID' 3.

¹⁷ Sornarajah M 'Starting Anew in International Investment Law' (2012) 74 *Columbia FDI Perspectives* 1 available at http://ccsi.columbia.edu/files/2014/01/FDI_74.pdf (accessed 12 July 2016) (hereafter Sornarajah M (2012)).

transparency,¹⁸ the efforts of law firms to develop strategies of litigation that states hardly contemplated when negotiating investment treaties,¹⁹ some arbitrators alternating between being an arbitrator and counsel in arbitration proceedings resulting in potential conflict of interest, institutional bias as only investors can bring claims, and allowing three non-democratically-elected individuals to decide matters that implicate a sovereign's right to pursue legitimate public policy objectives.²⁰ This list is not exhaustive. Another major criticism of ISDS, which is the subject of this paper, is that it restricts the capacity of states to implement regulatory actions necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment, cultural diversity or public morals.²¹ This happens as ISDS empowers foreign investors to sue host-states for new regulatory measures that affect their investments, thereby causing what has been referred to as a 'regulatory chill'.²² According to this criticism, the ability of the host-state to implement law and regulatory reforms designed to enhance public welfare is thereby constrained.²³

Notwithstanding the foregoing, some prominent international arbitrators, practitioners, and scholars oppose the ISDS criticisms.²⁴ They argue, *inter alia*, that the claims that ISDS interferes with states' policy space are 'propagandistic screed'.²⁵ They have referred to doubters of ISDS as 'leftist academics [and] anti-globalisation groups'.²⁶ They argue that ISDS benefits all states, including developing states, and is even-handed,²⁷ and that excluding ISDS from investment

¹⁸ United Nations Conference on Trade and Development 'Investment Policy Framework for Sustainable Development' (2015) 84 available at http://unctad.org/fr/PublicationsLibrary/diaepcb2012d5_en.pdf (accessed 7 December 2016) (hereafter UNCTAD IPFSD (2015))

¹⁹ Sornarajah M (2012) 2.

²⁰ Jacobs BL 'A Perplexing Paradox: "De-Statification" of "Investor-State" Dispute Settlement?' (2015) 30 *Emory International Law Review* 25 (hereafter Jacobs BL (2015)).

²¹ Jacobs BL (2015) 22.

²² Perera T & Demeter D 'A Balancing Act: Retaining Investor-State Dispute Settlement Provisions in Investment Agreements and Balancing Stakeholder Interests' (2012) 31 *Australian Year Book of International Law* 86 (hereafter Perera T & Demeter D (2012)).

²³ Perera T & Demeter D (2012) 86.

²⁴ Jacobs BL (2015) 21.

²⁵ Bowler CN & Blanchard S 'What's in a Meme? : The Truth about Investor-State Arbitration: why it need not, and must not, be repossessed by States' (2014) 52 *Columbia journal of transnational law* 691 (hereafter Bowler CN & Blanchard S 'The Truth about ISDS' (2014)).

²⁶ Bowler CN & Blanchard S 'The Truth about ISDS' (2014) 691.

²⁷ Bowler CN & Blanchard S 'From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement' (2014) Vol. 55 *Harvard International Law Journal*

treaties would negatively affect foreign direct investment (FDI) flow for a state.²⁸ An analysis of whether inclusion of ISDS provisions in treaties increases FDI is contained in chapter four of this paper.

The above notwithstanding, the current debate regarding problems with ISDS has moved on from whether or not there are problems with the conventional ISDS regime to how and to what extent to reform the ISDS regime.²⁹ Thus, the problems with ISDS have been widely acknowledged by states. States are currently exploring innovative ways of changing their approaches to ISDS. By the end of 2014, at least 50 states and regions were engaged in reviewing and revising their International Investment Agreement (IIA) models,³⁰ which include ISDS provisions. Several states have decided that the conventional ISDS regime is not consistent with their developmental priorities.³¹ These states have negotiated for trade agreements without ISDS mechanisms, or and have considered withdrawing, while some have actually withdrawn from the ICSID Convention or from IIAs; for instance Bolivia, Ecuador, Venezuela and Nicaragua.³² India and Indonesia also indicated, in 2013 and 2014 respectively, that they would review their IIA regimes.³³

The Republic of South Africa (RSA) is one of the states that have taken bold steps in reforming their ISDS regime. RSA started terminating its investment treaties in 2012 following a three-year review of its investment policies.³⁴ One consideration for this undertaking was RSA's involvement in a high profile ICSID arbitration case, *Foresti vs. Republic of South Africa*.³⁵ This case made it clear to RSA authorities that the

Online 45 (hereafter Bowler CN & Blanchard S 'From "Dealing in Virtue" to "Profiting from Injustice" (2014)).

²⁸ Perera T & Demeter D (2012) 108.

²⁹ United Nations Conference on Trade and Development 'The World Investment Report 2015' xi available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 6 July 2016) (hereafter UNCTAD 'The World Investment Report 2015').

³⁰ UNCTAD 'The World Investment Report 2015' xi.

³¹ Jacobs BL (2015) 26.

³² Jacobs BL (2015) 26.

³³ Kurtz J & Nottage L 'Investment Treaty Arbitration "Down Under": Policy and Politics in Australia' (2015) Vol. 30 Issue 2 *ICSID Review: Foreign Investment Law Journal* 466 (hereafter Kurtz J & Nottage L (2015)).

³⁴ Mossallam M 'Process Matters: South Africa's Experience Exiting its BITs' University of Oxford Global Economic Governance Programme, Working Paper No. 97, 2015 4 available at <http://www.globaleconomicgovernance.org/geg-wp-201597-process-matters-south-africas-experience-exiting-its-bits> (accessed 11 July 2016) (hereafter Mossallam M (2015)).

³⁵ Jacobs BL (2015) 27.

ability of RSA to regulate its domestic public policy objectives was under serious threat from the Bilateral Investment Treaty (BIT) obligations in general and ISDS in particular.³⁶ Following the settlement of the case, RSA initiated a review of its investment policy regime.³⁷ This case is explored in detail later in this paper.

RSA has enacted the Protection of Investment Act (the PI Act).³⁸ The PI Act provides a regulatory framework for foreign investment in RSA.³⁹ Notably, the PI Act has excluded recourse to ISDS, limiting investors who have a dispute with RSA to resort to mediation, RSA domestic courts, independent tribunal or statutory bodies within RSA.⁴⁰ Further, RSA government may consent to state-state arbitration with the home state of the investor subject to exhaustion of domestic remedies.⁴¹ The PI Act was assented into law on 15th December 2015,⁴² but is not yet in force.

Australia is another state that has been preoccupied with changing its ISDS regime following similar ISDS problems discussed above with respect to RSA. In 2011, the Australian government made a landmark announcement that it would no longer include ISDS in its future trade agreements.⁴³ This followed recommendations of the Productivity Commission's 2010 Research Report on Bilateral and Regional Trade Agreements which recommended, *inter alia*, that the government should seek to avoid the inclusion of ISDS provisions in investment agreements on the basis that such provisions posed considerable policy and financial risks.⁴⁴ The Australian government's decision that it would no longer include ISDS provisions in its treaties was also influenced by a case in which Australia defended a high-profile ISDS case,

³⁶ Mossallam M (2015) 10.

³⁷ Mossallam M (2015) 10.

³⁸ Act number 22 of 2015; Joubert N 'New Protection of Investment Act – The Implications for Foreign Investors' (2016) Caveat Legal available at <http://www.caveatlegal.com/new-protection-of-investment-act-the-implications-for-foreign-investors/> (accessed 18 July 2016) (hereafter Joubert N (2016)).

³⁹ Mossallam M (2015) 4.

⁴⁰ Section 13 (4) of the PI Act; see also Lang J 'Bilateral Investment Treaties – Shield or Sword?' 13th December 2013 available at <http://www.internationallawoffice.com/Newsletters/International-Trade/South-Africa/Bowman-Gilfillan/Bilateral-investment-treaties-shield-or-sword> (accessed 11 July 2016).

⁴¹ Section 13 (5) of the PI Act.

⁴² Joubert N (2016)

⁴³ Kurtz J & Nottage L (2015) 469.

⁴⁴ Kurtz J & Nottage L (2015) 469.

the case of *Philip Morris Asia Limited (Hong Kong) (PMA) vs The Commonwealth of Australia*.⁴⁵ This case is explored in more details later in this paper.

However, since the coming in of a new Australian Government in 2013, Australia quietly reverted to a policy of including ISDS provisions in its treaties on a case-by-case assessment (treaty-by-treaty approach).⁴⁶ This means that Australia does not uniformly include ISDS provisions in all in treaties, but rather includes or excludes them depending on the circumstances of each treaty. The criteria used in the treaty-by-treaty approach is discussed later in this paper.

This research paper (paper) has been inspired by the two different solutions to ISDS that have been adopted by RSA and Australia respectively, in light of the problem that ISDS limits host-state's policy space to regulate on matters of public concern. Whilst RSA has decided to abrogate ISDS, Australia has decided to include ISDS on a case-by-case assessment.

1.2. RESEARCH OBJECTIVES

The objective of this research is to evaluate the two solutions to ISDS problems as implemented by RSA and Australia respectively, and use the evaluation to determine a viable solution to the problem that ISDS limits the host-state's policy space.

The research objective can be broken down into the following aims:

1.2.1. To critically analyse the solution of RSA to abrogate ISDS, and also analyse how RSA intends to handle investment disputes under its new ISDS regime.

1.2.2. To critically analyse the solution of Australia to include ISDS provisions on a treaty-by-treaty approach and how Australia implements this approach.

1.2.3. To identify and critically analyse the strengths and weaknesses of each of the two solutions to ISDS problems as adopted by RSA and Australia respectively, and also analyse the internationally recognised solutions to ISDS problems.

1.2.4. To propose recommendations on more viable solutions to addressing the problem that ISDS limits a host state's policy space.

⁴⁵ Perera T & Demeter D (2012) 80.

⁴⁶ Kurtz J & Nottage L (2015) 468; see also Australian Government Department of Foreign Affairs and Trade 'Investor-State Dispute Settlement' available at <http://dfat.gov.au/trade/topics/Pages/isds.aspx> (accessed 8 July 2016) (hereafter Australian Government 'ISDS').

1.3. SIGNIFICANCE OF THE PROBLEM

Effective dispute settlement mechanisms are important for any trade agreement, IIA or commercial arrangement, as they ensure that the rules embodied in the agreement or arrangement are effectively enforced.⁴⁷ It is further argued that effective enforcement of commerce or economic rules is a critical component of the economic success of any state or region.⁴⁸ ISDS is a form of dispute settlement mechanism, specifically designed for investment disputes. As several states are currently exploring various ways of reforming their approaches to ISDS, it is crucial that they should carefully handle this transition period in order to implement viable solutions to the problems. This paper contributes to this discourse by focusing on the solutions that states are currently implementing in response to ISDS problems. Two states that have taken bold steps in this regard are RSA and Australia respectively. By conducting a critical analysis of the solutions adopted by these two states, and also comparing them with some internationally recognised solutions, this paper reveals some of the strengths and weaknesses of the solutions that states are currently implementing. It is hoped that other states facing similar ISDS problems would draw useful from this paper.

1.4. METHODOLOGY

This research is a desktop study. The research is largely based on library research and internet sources. Primary sources will include various pieces of legislation from RSA and Australia, IIAs, BITs and various trade agreements. Secondary sources will include journal articles, internet sources, position papers and other scholarly material.

As the paper focuses on the solutions implemented by RSA and Australia, it uses RSA and Australia as comparators. The research uses these two states as comparators for the following reasons. First, the two states have taken explicit positions on their solutions to ISDS problems. RSA has done this by enacting the PI Act which abrogates ISDS, while Australia has explicitly stated its position to include ISDS provisions on a treaty-by-treaty approach. Secondly, there is abundant literature available on the two states in relation to ISDS, which would contribute to

⁴⁷ McClure R "Can the Leopard Change its Spots?"-A Call for an African Dispute Resolution Mechanism' (2014) 29 *Ohio State Journal on Dispute Resolution* 341 (hereafter McClure (2014)).

⁴⁸ McClure (2014) 364.

the depth of this research. Thirdly, RSA is a developing country while Australia is a developed country. This paper uses the different levels of economic development of the two states to analyse whether the level of economic development of a state has any bearing on its ISDS policy. Finally, the paper uses RSA as the main comparator as it is hoped that other developing countries would draw useful lessons from the experience of RSA.

1.5. CHAPTER OUTLINE

This paper consists of five chapters.

Chapter one

Chapter one is the introduction of the paper. It consists of the background, research objectives, research aims, significance of the problem, the methodology adopted by the paper and an outline of chapters.

Chapter two

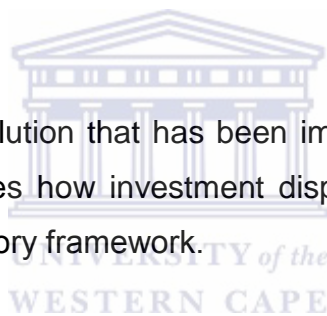
Chapter two discusses the solution that has been implemented by RSA to exclude ISDS. It also critically analyses how investment disputes would be handled under RSA's new investment regulatory framework.

Chapter three

Chapter three discusses the solution that has been implemented by Australia to include ISDS provisions on a treaty-by-treaty approach. This chapter also critically analyses why Australia abandoned its former policy that excluded ISDS, and how Australia conducts the treaty-by-treaty approach.

Chapter four

Chapter four critically analyses the strengths and weaknesses of the two solutions implemented by RSA and Australia respectively. It also discusses the internationally recognised solutions to ISDS problems.



Chapter five

This Chapter concludes the paper by summarising the findings of the paper and also by making recommendations on more viable solutions to ISDS that can be implemented by states. The recommendations are largely drawn from the experiences faced by RSA and Australia respectively.



CHAPTER 2:
ABROGATION OF INVESTOR-STATE DISPUTE SETTLEMENT BY THE
REPUBLIC OF SOUTH AFRICA

2.1. INTRODUCTION

Chapter two analyses the reasoning behind RSA's decision to remove ISDS from its investment regulatory framework. The chapter starts by giving a brief background of how RSA entered into bilateral investment treaties (BITs). It then briefly discusses some of the issues that induced RSA to re-think its investment regulatory framework. These include the Broad-Based Black Economic Empowerment Policy (BEE Policy) and the landmark case of *Pieri Foresti and Ten others v The Republic of South Africa (Foresti case)*.⁴⁹ These issues triggered a review of RSA's bilateral investment treaty policy framework (the review). One of the findings of the review was that the current system of ISDS opens the door for investors, in pursuance of their narrow commercial interests, to subject matters of vital national interest to unpredictable international arbitration through direct challenges to legitimate, constitutional and democratic policy-making.⁵⁰ This chapter further analyses how the review culminated into the decision to terminate RSA's BITs with other states, and also saw the introduction of the PI Act as the new regulatory framework for investment law in RSA. The chapter ends by analysing the bold move implemented by RSA of doing away with ISDS in its entirety.

2.2. BRIEF BACKGROUND OF ISSUES THAT INDUCED THE REPUBLIC OF SOUTH AFRICA TO RE-THINK ITS INVESTMENT REGULATORY FRAMEWORK

2.2.1. Republic of South Africa's Bilateral Investment Treaties Post-1994

As RSA transitioned from Apartheid to democracy, it entered into BIT negotiations with several countries. RSA eventually signed 14 BITs between 1994 and 1997.⁵¹ More BITs were signed, totalling 49 BITs by 1999 (some have not come into force till

⁴⁹ ICSID Case No ARB(AF)/07/1 available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C1651_En&caselId=C90 (accessed 21 September 2016).

⁵⁰ Carim X 'Lessons from South Africa's BIT Review' (2013) *Columbia FDI Perspectives* 1 available at http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf (accessed 21 September 2016) (hereafter Carim X Lessons from RSA's BIT Review (2013)).

⁵¹ Schlemmer EC 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 1 *ICSID Review* 169. (hereafter Schlemmer EC (2016)).

date).⁵² These BITs are often referred to as first generation BITs.⁵³ Although these BITs were entered into in order to enhance trade relations with other states, the main reason behind brokering so many BITs within a short period of time was because the new RSA Government wanted to send a message to the international community that RSA was an investment friendly destination and that any foreign investment in RSA would be afforded full protection.⁵⁴ RSA had received minimal foreign direct investment (FDI) inflows during Apartheid due to a combination of international sanctions⁵⁵ and anti-investment campaign aimed at forcing the then RSA Government to abandon the state-enforced racial repression.⁵⁶

Prior to 1994, RSA had no history and experience of negotiating BITs. As such, the first generation BITs were heavily in favour of foreign investors, without preserving some flexibility in RSA's critical public policy areas.⁵⁷ RSA entered into these BITs blindly and hurriedly without first understanding the real nature and consequences of entering into such binding agreements. RSA was simply convinced that the BITs would create an 'investment friendly' environment.⁵⁸ For instance, the constitutional values and goals for social uplifting contained in RSA Constitution and also the aims sought to be addressed by the BEE policy were not featured in the BITs.⁵⁹

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⁵² Schlemmer EC 2016; for BITs that are not yet in force see UNCTAD 'International Investment Agreements Navigator: South Africa' available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu> (accessed 21 September 2016) (hereafter UNCTAD International Investments Agreements Navigator: South Africa).

⁵³ Davies R 'Speech delivered by the Minister of Trade and Industry Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development at the University of the Witwatersrand' 26 July 2012 2 available at http://unctad.org/meetings/en/Miscellaneous%20Documents/South-Africa-Investment-statement_Rob_Davies.pdf (accessed 21 September 2016) (hereafter Speech by Davies R (2012)).

⁵⁴ Department of Trade and Industry (DTI) 'Bilateral Investment Treaty Policy Framework Review: Government Position Paper' 2009 5 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf> (accessed 21 September 2016) (hereafter BIT Policy Framework Review (2009)).

⁵⁵ Poulsen LNS '*Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries and Bounded Rationality*' (unpublished Ph.D thesis, London School of Economics and Political Science, 2011) 260.

⁵⁶ Burton J 'Sanctions will Exacerbate Apartheid' (1986) 7 *Economic Affairs* 22.

⁵⁷ BIT Policy Framework Review (2009) 5.

⁵⁸ BIT Policy Framework Review (2009) 14.

⁵⁹ Schlemmer EC (2016) 173.

RSA's BITs contain clauses that provide for the resolution of investment disputes through ISDS.⁶⁰ Although RSA is not a Contracting State,⁶¹ the first generation BITs included the availability of ICSID arbitration under the assumption that RSA would eventually become a Contracting State during the subsistence of the BITs.⁶² In the meantime, however, the disputes would be submitted to ICSID arbitration pursuant to the ICSID Additional Facility Rules.⁶³

2.2.2. Broad-based Black Economic Empowerment Policy

RSA introduced the BEE policy in 2003 and enacted the Broad-based Black Economic Empowerment Act (BEE Act).⁶⁴ A BEE (Amendment) Act came into force in 2014.⁶⁵ Along with the BEE (Amendment) Act also came the amended Codes of Good Practice on BEE policy. Section 9 of the BEE Act empowers the Minister of Trade and Industry to issue codes of good practice on black economic empowerment that may include, among other issues, guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector.

The BEE policy is an RSA Government program aimed at redressing the inequalities of Apartheid by giving black people (this includes African, Coloured and Indian South Africans) economic opportunities previously not available to them.⁶⁶ It is also aimed at equitably transferring and conferring ownership, management and control of RSA's financial and economic resources to the majority of the citizens.⁶⁷

⁶⁰ For example see Article 9(2) of the BIT between RSA and Denmark available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3521> (accessed 20 September 2016). (hereafter RSA-Denmark BIT); The RSA-Denmark BIT is one of the BITs which have been terminated.

⁶¹ ICSID 'List of Contracting States and other Signatories of the Convention: as of 12 April 2016' available at <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (accessed 20 September 2016).

⁶² Schlemmer EC (2016) 183.

⁶³ See Article 9(2)(a) of the RSA-Denmark BIT.

⁶⁴ Act No. 53 of 2003.

⁶⁵ Act No. 46 of 2013.

⁶⁶ Mashigo K 'Self-assessment of South Africa's Investment Regime in Relation to the OECD Codes of Liberalisation and the Principle of National Treatment: OECD-South Africa investment policy dialogue' 2014 30 available <https://www.oecd.org/daf/inv/investment-policy/South-Africa-Investment-Regime.pdf> (accessed 21 September 2016) (hereafter Mashigo K (2014)).

⁶⁷ Mashigo K (2014) 30.

Along with the BEE Act came the controversial Mineral and Petroleum Resources Development Act (MPRD Act)⁶⁸ and the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (the Mining Charter).⁶⁹ One of the express objectives of the MPRD Act is to substantially expand opportunities for the historically disadvantaged South Africans (HDSAs) to enter the mineral and petroleum industries and to benefit from the exploitation of RSA's mineral and petroleum resources.⁷⁰ The Mining Charter gets its mandate from section 100(2)(a) of the MPRD Act which requires the Minister of Minerals and Energy to develop a broad-based socio-economic empowerment charter that will set the framework, targets, and time-table for effecting the entry of the HDSAs into the mining industry, and allow them to benefit from the exploitation of the mining and mineral resources. The BEE legislation and policies were challenged by investors through ISDS based on the first generation BITs in the landmark *Foresti* case.

2.2.3. Pieri Foresti and Ten Others Versus Republic of South Africa

The claimants in the *Foresti* case were made up of several Italians and a Luxembourg-based company. Together they controlled much of RSA's Granite industry.⁷¹ The claimants filed a request for arbitration proceedings against RSA under the ICSID Additional Facility Arbitration Rules on 1st November 2006,⁷² alleging expropriation pursuant to Article 5 of the BIT between RSA and Italy, and also the BIT between RSA and the Belgo-Luxembourg Economic Union respectively.⁷³ There were several grounds for the claim. Generally, they claimed that expropriation took place by coming into force of the MPRD Act, combined with the Mining Charter, which extinguished certain old order mineral rights held by the

⁶⁸ Act No. 22 of 2002.

⁶⁹ Available at <https://www.westerncape.gov.za/Text/2004/5/theminingcharter.pdf> (accessed 21 September 2016) (hereafter the Mining Charter).

⁷⁰ Section 2(d) of the MPRD Act.

⁷¹ South Africa Institute of Race Relations (IRR) 'Submission to the DTI regarding the Promotion and Protection of Investment Bill of 2013' 31 January 2014 available at <http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/submission-to-the-dti-regarding-the-promotion-and-protection-of-investment-bill-of-2013-2013-31-january-2015> (accessed 21 September 2016) (hereafter IRR (2014)).

⁷² *Foresti* case 3.

⁷³ *Foresti* case 14; the BIT between RSA and the Belgo-Luxembourg Economic Union has been terminated, whilst the BIT between RSA and Italy is still in force, see International Investments Agreements Navigator: South Africa.

claimants, and also by introducing compulsory equity divestiture requirements with respect to the claimants' shares in their companies.⁷⁴ The Mining Charter, *inter alia*, required mining companies to achieve 26 per cent HDSA ownership of mining assets by 2014, and publish employment equity plans directed towards achieving a baseline 40 per cent HDSA participation in management by 2009.

RSA argued, *inter alia*, that assuming the claimants had a valid claim for expropriation, the alleged expropriation was undertaken for important public purposes, and that the claimants had conceded as much in their arguments. Specifically, RSA explained that the MPRD Act and the Mining Charter were promulgated for the purpose, among other things, of enhancing the marginalisation of HDSAs and other negative social effects caused by Apartheid in general and the Mineral Rights Act⁷⁵ in particular, and protecting the environment and the communities living in the vicinity of mining operations.⁷⁶ RSA also argued that there could be no indirect expropriation because the actions in question were rational and proportional means of pursuing legitimate public regulatory purposes.⁷⁷

It has been reported that the Claimants claimed a total of US\$266 Million from RSA.⁷⁸ The merits of the *Foresti* case were settled by the parties outside arbitration before the substantive hearing took place.⁷⁹ Under this settlement, RSA granted the claimants' companies new order mineral rights without requiring them to sell 26 per cent of their shares to HDSAs. Instead, the companies would be deemed to have complied with the Mining Charter by making a 21 per cent beneficiation offset and providing a 5 per cent employee ownership program for employees of the companies.⁸⁰

Despite the settlement, RSA requested the arbitration tribunal to issue an award on legal costs and fees. RSA's submission of fees totalled €5 765 467.12, and the

⁷⁴ BIT Policy Framework Review (2009) 31; see also *Foresti* case 15.

⁷⁵ Act No. 50 of 1991.

⁷⁶ *Foresti* case 19.

⁷⁷ *Foresti* case 20.

⁷⁸ IRR (2014).

⁷⁹ Mossallam M (2015) 10.

⁸⁰ *Foresti* case 21.

claimants' submission of fees totalled €5 333 146.91.⁸¹ The Tribunal ordered the claimants to make a 'contribution to the costs incurred by [RSA]' in the sum of €400 000.00.⁸² Considering that the case was settled before a full hearing took place, the amounts of legal costs and fees claimed by both parties show that ISDS arbitration is very expensive and costly for host-state, especially if it is a developing or least developed state. High costs involved in ISDS have been identified as one of the shortfalls of the current ISDS regime.⁸³

2.2.4. Swiss Investor Versus Republic of South Africa

It has been reported that between 2001 and 2004 RSA was dragged to ISDS by a Swiss investor under the UNCITRAL Arbitration Rules, but the case was completed without any publicity of the issues involved or its outcome.⁸⁴ The name of the Swiss investor was also not reported.⁸⁵ Limited information is available on this case as its award was not publicised. According to the available information, a Swiss investor invested in property in the Limpopo province, intending to establish and develop a game farm and conference facilities on the property. The Swiss investor alleged that RSA police turned a blind-eye to the series of incursions upon the Swiss investor's property, and that the investment was subjected to an expropriation either by virtue of the cumulative destruction inflicted upon the property or, in the alternative, due to a domestic land claims process under which several local residents were seeking all or parts of the property in question.⁸⁶ The case was brought under the BIT between RSA and Switzerland of 1995.⁸⁷

The arbitration tribunal found that RSA breached its BIT obligation to provide full protection and security due to the failure of police to protect the property of the Swiss investor. The claim for expropriation, however, was dismissed for insufficient evidence on the grounds that the land reform process on which the claim was based was still on-going.⁸⁸ Even though the amount of damages payable was reduced

⁸¹ *Foresti* case 24.

⁸² Jacobs BL (2015) 29; see also *Foresti* case 31.

⁸³ UNCTAD IPFSD (2015) 84.

⁸⁴ Schlemmer EC 2016 186.

⁸⁵ Scherer M 'Inventory of Arbitration Proceedings Based on Swiss Bilateral Investment Treaties (BIT)' (2015) 33 *ASA Bulletin* 78 (hereafter Scherer M 2015).

⁸⁶ Schlemmer EC (2016) 186.

⁸⁷ This BIT has been terminated; see International Investments Agreements Navigator: South Africa.

⁸⁸ Scherer M (2015) 78.

because the Swiss investor was found not have taken enough precautionary measures to secure and protect his property, RSA was ordered to pay R6 600 000.00 plus interest and also to pay two-thirds of the Swiss investor's legal costs.⁸⁹ Although the amounts of interest and two-thirds of the investor's legal costs respectively are not known, from experience with the costs claimed in *Foresti* case, this paper assumes that these amounts were high. The taxpayer is the one that ultimately shoulders the burden of such huge payments from RSA Government.⁹⁰ As it is discussed in the next section, these two ISDS cases against RSA formed part of the main reasons why RSA decided to conduct a review of its BIT policy framework.

2.3. REVIEW OF THE BILATERAL INVESTMENT TREATY POLICY FRAMEWORK

RSA, through the Department of Industry and Trade (DTI), initiated a review of its BIT policy framework in 2005, but the review formally commenced in 2008.⁹¹ The review was initiated as it became apparent that RSA was facing serious challenges from foreign investors from developed nations seeking compensation from RSA for alleged failure to comply with its obligations under the first generation BITs.⁹² The review was partly in response to the arbitral proceedings in the *Foresti* case and the *Swiss Investor* case which necessitated a need to conduct a risk assessment of the BITs.⁹³ The review was aimed at establishing more balanced rights and obligations between parties to BITs and the adherence to standards that would not undermine RSA's national development policies, particularly BEE policies. In the words of Trade and Industry Minister Dr Rob Davies, the review would develop a framework that would aim 'to achieve an appropriate balance between the rights and obligations of investors and the need to provide adequate protection of foreign investors, while ensuring that constitutional obligations are upheld and that the Government retains the policy space to regulate in the public interest.'⁹⁴

⁸⁹ Schlemmer EC (2016) 187.

⁹⁰ Schlemmer EC (2016) 187.

⁹¹ BIT Policy Framework Review (2009) 12.

⁹² BIT Policy Framework Review (2009) 12.

⁹³ BIT Policy Framework Review (2009) 12.

⁹⁴ Klaaren J & Adeleke F 'SA on the Right Path with New Foreign Investment Law' *Business Day Live* 25 September 2015 available at <http://www.bdlive.co.za/opinion/2015/09/25/sa-on-the-right-path-with-new-foreign-investment-law> (accessed 21 September 2016) (hereafter Klaaren J & Adeleke F 2015).

The review process culminated into an RSA Government position paper published in June 2009 entitled Bilateral Investment Treaty Policy Framework Review (BIT review policy paper). One of the key findings of the BIT review policy paper was that ‘all BITs limit the regulatory flexibility within which [BIT] contracting parties can pursue their economic development policies.’⁹⁵ It further noted that the focus of BITs is on investor rights and that mention of investor obligations is rare, thus rendering the investment agreements incomplete.⁹⁶

One of the contentious issues out of the review was the recourse to ISDS by foreign investors against RSA.⁹⁷ The review found no compelling reason why an investor’s claims against RSA cannot be undertaken by local RSA institutions (for instance RSA courts), as long as the institutions are independent of the public authority and they discharge their duties in accordance with basic principles of good governance.⁹⁸ The review further found that the current system opens the door for investors, in pursuance of their narrow commercial interests, to subject matters of vital national interest to unpredictable ISDS through direct challenges to legitimate, constitutional and democratic policy-making.⁹⁹ The *Foresti* case was cited as an example in this regard.¹⁰⁰ It was thus concluded that BITs allow foreign investors to sue states (in this case RSA) in ISDS forums, by-passing domestic courts, which adjudicate matters on narrow financial interests and not broader social and public imperatives.¹⁰¹

In April 2010, RSA Cabinet largely endorsed the recommendations emanating from the review. Cabinet agreed that BITs pose risks and limitations on the ability of RSA Government to pursue its Constitutional-based transformation agenda.¹⁰² As such,

⁹⁵ BIT Policy Framework Review (2009) 47.

⁹⁶ BIT Policy Framework Review (2009) 47.

⁹⁷ Carim X Lessons from RSA’s BIT Review (2013) 4.

⁹⁸ Maupin J & Langford M ‘Submission Concerning the Bilateral Investment Treaty Policy Framework Review Government Position Paper’ 12 August 2009 42 available at <https://www.elaw.org/system/files/Comments%20on%20DTI%20BITS%20review%20FINAL.pdf> (accessed 21 September 2016) (hereafter Maupin J & Langford M (2009)).

⁹⁹ Carim X Lessons from RSA’s BIT Review (2013) 1.

¹⁰⁰ BIT Policy Framework Review 31.

¹⁰¹ Mlumbi-Peter X ‘South Africa’s Promotion and Protection of Investment Bill: Presentation to the Parliamentary Portfolio Committee on Trade and Industry’ 16 September 2015 8 available at https://www.thedti.gov.za/parliament/2015/dti_Response_PPIB.pdf (accessed 21 September 2016) (hereafter Mlumbi-Peter X 16 September (2015)).

¹⁰² Speech by Davies R (2012) 2.

Cabinet concluded that RSA should refrain from entering into BITs in future, except in cases of compelling economic and political circumstances.¹⁰³ It also decided to terminate existing BITs and offer partner countries the possibility to re-negotiate BITs on the basis of a new model to be developed.¹⁰⁴ It further decided to develop a new Act on foreign investment that is aligned with the RSA Constitution and clarifies typical BIT provisions.¹⁰⁵ This new era of investment regulatory framework in RSA is discussed in the next sections.

2.4. TERMINATION OF BILATERAL INVESTMENT TREATIES

The basis of Cabinet's decision to terminate existing BITs was not only that the BIT dispute resolution clauses allow foreign investors to take RSA to ISDS. There were also other aspects (clauses) of the first generation BITs which were assessed to be questionable and not in tandem with RSA's Constitution as read together with RSA's legitimate policies including BEE. Some of the most contentious aspects included obligations specifying the standard of treatment that the BIT contracting parties are required to provide to an investment once it has been established. These standards of treatment include national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, what constitutes expropriation and its attendant amount of compensation.¹⁰⁶ The BIT review policy paper discusses these issues in more detail. However, these issues are not the concern of this paper.

Following RSA Cabinet's decision to terminate first generation BITs, RSA terminated (in some instances sending notices of termination or notification of intention to terminate) BITs with the following countries: the United Kingdom, the Netherlands, Switzerland, Germany, France, Cuba, Denmark, Austria, Italy, Sweden, Argentina, Belgo-Luxembourg Economic Union, Finland, Spain and Greece.¹⁰⁷ However, the following contracting parties to BITs apparently did not receive notices of termination or any intention to terminate the BITs: South Korea, China, Mauritius, Senegal, Russia, Nigeria and Zimbabwe.¹⁰⁸ Thus, these BITs are still in force.¹⁰⁹ This shows that RSA was selective on which BITs to terminate.

¹⁰³ Speech by Davies R (2012) 2.

¹⁰⁴ Speech by Davies R (2012) 2.

¹⁰⁵ Carim X Lessons from RSA's BIT Review (2013) 2.

¹⁰⁶ BIT Policy Framework Review (2009) 8.

¹⁰⁷ Schlemmer EC 2016 189.

¹⁰⁸ This is the status of BITs in RSA as of 19 May 2015; see Schlemmer EC (2016) 189.

2.5. THE PROTECTION OF INVESTMENT ACT

As stated above, aside from the decision to terminate BITs, Cabinet also decided to develop a new Act on foreign investment in RSA. The RSA Government released a draft Promotion and Protection of Investment Bill (PPI Bill) for public comments in November 2013. The PPI Bill was intended to contain the main regulatory framework for foreign investment in RSA.¹¹⁰ It was intended to provide investors with a domestic law that would protect their investments, especially in light of the BITs that RSA was terminating.¹¹¹ The PPI Bill went through rigorous consultation processes with Government and other stakeholders, including an extensive public comment and consultations period.¹¹² During this period, Government, through DTI, received numerous comments from various stakeholders and organisations.

RSA Cabinet eventually endorsed a revised version of the PPI Bill on 24 June 2015 and it was introduced in Parliament in July 2015.¹¹³ The PPI Bill was assented into law by RSA President on 15 December 2015,¹¹⁴ and is now called the Protection of Investment Act (the PI Act).¹¹⁵ The PI Act is yet to come into force.

Section 4 of the PI Act provides that the purpose of the Act is, *inter alia*, to protect investment in accordance with and subject to RSA Constitution, in a manner which balances the public interest and the rights and obligations of investors, and to affirm RSA's sovereign right to regulate investments in the public interest.

[The PI Act] tried to achieve a situation where the Government's decisions on beneficiation and black economic empowerment could not be challenged before foreign or international tribunals as encroaching on investments or expropriating investments of foreign investors, thus striking a balance between protecting the investor's rights and the government's regulatory

¹⁰⁹ UNCTAD International Investments Agreements Navigator: South Africa.

¹¹⁰ Mossallam M (2015) 4.

¹¹¹ Mossallam M (2015) 13.

¹¹² Mlumbi-Peter X 'South Africa's Protection of Investment Bill Presentation to the Select Committee on Trade and International Relations' 24 November 2015 6 available at <https://www.thedti.gov.za/parliament/2015/PIB24112015.pdf> (accessed 21 September 2016) (hereafter Mlumbi-Peter X 24 November 2015).

¹¹³ Mlumbi-Peter X 24 November 2015 6.

¹¹⁴ See Government Gazette No. 39514 of 15 December 2015 available at <https://www.thedti.gov.za/gazettes/39514.pdf> (accessed 21 September 2016).

¹¹⁵ Act No. 22 of 2015.

space to give effect to its constitutional obligations without having to answer to international tribunals and pay damages and/or compensation for actions taken that are seen to be totally legitimate within its internal policies to redress the inequalities of the past, ensure economic development for all its peoples.¹¹⁶

The PI Act contains several issues that will bring new approaches to investment regulatory framework in RSA. One of the notable issues is the absence of ISDS as an avenue for resolving investment disputes.¹¹⁷ The PI Act also introduces other new issues which are not discussed in this paper. These include that an investor's right to property would be dealt with in terms of Section 25 of RSA Constitution,¹¹⁸ and the definition of an investor as any enterprise making an investment in RSA regardless of nationality.¹¹⁹ As already stated in chapter one, this paper is only concerned with the exclusion of ISDS and the alternatives to ISDS that have been provided for under the PI Act. This forms the discussion in the next section of this paper.

2.6. RESOLUTION OF INVESTMENT DISPUTES UNDER THE PROTECTION OF INVESTMENT ACT

In terms of the PI Act, ISDS shall no longer be an avenue for resolving investment disputes against RSA.¹²⁰ Instead, the PI Act provides for several avenues that are available to any investor that has a dispute in respect of any action taken by RSA government. First, an investor may take the dispute to mediation facilitated by the DTI, which shall appoint a mediator.¹²¹ The mediator must be agreed upon by both the investor and RSA government (the parties).¹²² In the event that DTI is a party to the dispute, the parties may jointly request the Judge President of one of the divisions of the High Court to appoint a mediator.¹²³ Section 13(2)(c) of the PI Act provides that mediation would be governed by prescribed rules. The DTI has recently published Draft Regulation on Mediation Rules (Draft Regulations) that will govern mediation of investment disputes, and has invited the public to submit their

¹¹⁶ Schlemmer EC (2016) 190.

¹¹⁷ Section 13 of the PI Act.

¹¹⁸ Section 10 of the PI Act.

¹¹⁹ Section 1 of the PI Act.

¹²⁰ Section 13 of the PI Act.

¹²¹ Section 13(1) of the PI Act.

¹²² Section 13(2)(b) of the PI Act.

¹²³ Section 13(2)(c) of the PI Act.

comments.¹²⁴ The Draft Regulations are, thus, not yet in force. The Draft Regulations are discussed in more detail in chapter four.

Further, an investor may also seek redress from any competent court, independent tribunal or statutory body within RSA.¹²⁵ This provision is vague. More certainty could have been achieved by stating the independent tribunals or statutory bodies within RSA that would be vested with such authority. Further, the PI Act does not state which court in RSA investors should approach. RSA has several courts in its hierarchy of courts.¹²⁶ This paper argues that the PI Act should have included a definition of court in section 1. As it is, it leaves it open to the investor to ascertain the competent court in this regard. This paper argues that the competent court being referred to here is the High Court of South Africa as it has the authority to decide on any matter which has not been assigned to a particular court by an Act of Parliament.¹²⁷

The PI Act also provides for state-state international arbitration, upon exhaustion of the domestic remedies discussed above. This means that such arbitration would be conducted between RSA and the investor's home state.¹²⁸ The strengths and weaknesses of state-state arbitration as an avenue for resolving international investment disputes are discussed in more detail in Chapter four.

The removal of ISDS from RSA's investment regulatory framework is said to be of major concern to foreign investors.¹²⁹ It has been argued that this will decrease FDI inflow in RSA.¹³⁰ This seems to be supported by the negative sentiment that was expressed by the European Union, through De Gucht,¹³¹ who was reported to have said that the unilateral change of the investment regime was not good, and is not

¹²⁴ DTI 'Draft Regulations on Mediation Rules' 30 December 2016 *Government Gazette* No. 40526 of 2016 available at <http://www.gov.za/documents/protection-investment-act-regulations-comments-invited-30-dec-2016-0000> (accessed 11 January 2017).

¹²⁵ Section 13(4) of the PI Act.

¹²⁶ Section 166 of RSA Constitution of 1996 (RSA Constitution).

¹²⁷ Section 169(1)(b) of the RSA Constitution.

¹²⁸ Section 13(5) of the PI Act.

¹²⁹ Webb M 'No More BITs and Pieces' (2013) *Without Prejudice* December 12 (hereafter Webb M (2013)).

¹³⁰ Webb M (2013) 10.

¹³¹ European Commissioner for Trade from February 2010 until 31 October 2014.

good for RSA.¹³² This issue, together with other advantages and disadvantages of RSA's move to exclude ISDS, is fully explored in Chapter four.

Another important aspect to consider in light of RSA's removal of ISDS is how investment disputes would be handled whilst awaiting the PI Act to come into force. Disputes between foreign investors and RSA that may arise as a result of an alleged BIT breach may still be taken to ISDS in terms of the terminated BITs until the sunset period runs out.¹³³ Sunset period is the period of time specifically provided for in BITs, during which all investments made prior to the date of termination of the BIT would still be protected under the BIT provisions despite its termination. For instance, the BIT between RSA and Germany (RSA-Germany BIT) has a sunset period of 20 years¹³⁴ while the BIT between RSA and Denmark has a sunset period of ten years.¹³⁵ However, until the PI Act comes into operation, disputes that arise between RSA and new investors that do not fall under the protection of any of the BITs would be resolved by recourse to RSA courts or local arbitration if consensus on an arbitration agreement can be reached between the parties.¹³⁶

Whilst the PI Act focuses on investment regulatory framework, and is not expansive on other issues incidental to investment, other statutes and policies shall work with the PI Act to complement it on the incidental issues. These include the Expropriation Bill, the International Arbitration Bill, the Property Valuation Act¹³⁷ and the Infrastructure Development Act.¹³⁸

2.10. CONCLUSION

This Chapter has explored why and how RSA removed ISDS as an avenue available to investors to resolve investment disputes. The Chapter shows that the problem started when RSA blindly entered into BITs with other states in the wake of democracy, in order to send a message to the international community that RSA was an investment-friendly destination. The BITs contained dispute resolution clauses

¹³² Webb M (2013) 11.

¹³³ Schlemmer EC (2016) 193.

¹³⁴ Article 13(3) of the RSA-Germany BIT.

¹³⁵ Article 16(1) of the RSA-Denmark BIT.

¹³⁶ Schlemmer EC (2016) 193.

¹³⁷ Act No. 17 of 2014.

¹³⁸ Act No. 23 of 2014; Mlumbi-Peter X 16 September 2015 4.

which allow foreign investors to take RSA to ISDS alleging that RSA has breached provisions of the BITs. The conduct by RSA Government which the foreign investors complain of normally consists of actions taken by RSA in furtherance or promotion of legitimate policies of national interest, particularly the BEE policy.

This Chapter has also explored how the challenges brought forth by the foreign investors against RSA through ISDS prompted RSA to conduct a review of its BIT policy framework. This process culminated into, *inter alia*, a decision to terminate some of the first generation BITs, and a decision to promulgate a new investment Act. The PI Act was enacted in this regard and is yet to come into force. The PI Act has removed ISDS as an avenue for resolving investment disputes with RSA. The PI Act has replaced ISDS with domestic mechanisms including mediation, domestic courts, and independent tribunals, with possible state-state arbitration upon exhaustion of domestic remedies. This development has prompted mixed reactions among various stakeholders.

As stated in chapter one, Australia has also been embroiled in the ISDS conundrum, and has implemented a solution that is different from the one implemented by RSA. The next chapter discusses Australia's ISDS conundrum and critically analyses the solution that it has implemented.

CHAPTER THREE:
TREATY-BY-TREATY APPROACH TO INVESTOR-STATE DISPUTE
SETTLEMENT: THE CASE OF AUSTRALIA

3.1. INTRODUCTION

Chapter three explores why and how Australia adopted its current policy of including ISDS provisions on a treaty-by-treaty approach (also known as case-by-case assessment). The chapter begins by analysing the background issues that were highly debated throughout the period in which Australia made a landmark announcement of its policy to exclude ISDS provisions in its treaties, before reverting to the current policy of including ISDS provisions on a treaty-by-treaty approach. These background issues include the tobacco plain packaging laws (TPP laws), the case of *Phillip Morris Asia Limited v the Commonwealth of Australia*¹³⁹ (*Phillip Morris Case*) and the Productivity Commission Research Report on Bilateral and Regional Trade Agreements (the Productivity Commission Report).

This chapter also discusses the public policy debate that took place among Australia's policy makers, which culminated into the current policy of including ISDS provisions on a treaty-by-treaty approach. Further, this chapter analyses the factors that guide Australia's treaty-by-treaty approach.

3.2. BACKGROUND ISSUES TO AUSTRALIA'S CURRENT INVESTOR-STATE DISPUTE SETTLEMENT POLICY

3.2.1. Australia's Plain Packaging Laws

At the heart of the ISDS debate in Australia were the TPP laws, which were introduced as part of a fight against the smoking problem in Australia. Smoking is one of the main causes of preventable deaths in Australia.¹⁴⁰ According to Australia's Health Department, each year, smoking kills an estimated 15 000 Australians and costs Australia about US\$31.5 Billion in social (including health) and economic

¹³⁹ PCA case No. 2012-12 available at <https://www.pcacases.com/web/view/5> (accessed 2 November 2016).

¹⁴⁰ Australian Government Attorney General's Department 'Tobacco Plain Packaging - Investor-State Arbitration' available at <https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx> (accessed 2 November 2016) (hereafter TPP - Investor-State Arbitration).

costs.¹⁴¹ As such, the Australian Government committed that by 2018, it should reduce the national adult daily smoking rate to 10 per cent and halve the Aboriginal and Torres Strait Islander adult daily smoking rate.¹⁴²

Australia introduced the TPP laws as part of the Australian government policy to fight the smoking problem. The Tobacco Plain Packaging Act (TPP Act) became law in Australia on 1 December 2011.¹⁴³ The TPP Act was introduced together with the Tobacco Plain Packaging Regulations 2011 (TPP Regulations)¹⁴⁴ and the Competition and Consumer (Tobacco) Information Standard 2011 (Consumer Information Standard).¹⁴⁵ According to the Australian Government, the TPP Act is part of a comprehensive range of tobacco control measures to reduce the rate of smoking in Australia and is an investment in the long-term health of Australians. Further, the Australian Government argues that the TPP laws are based on a broad range of peer-reviewed studies and reports, and supported by leading Australian and international public health experts.¹⁴⁶

According to section 3(2) of the TTP Act, it is the intention of the Australian Government to regulate the retail packaging and appearance of tobacco products in order to reduce the appeal of tobacco products to consumers, increase the effectiveness of health warnings on the retail packaging of Tobacco products, and reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking.

The TPP laws prohibit the use of logos, brand imagery, and promotional text on tobacco products and packaging, and includes restrictions on colour, size, format

¹⁴¹ Australian Government Department of Health 'Tobacco Control Key Facts and Figures' 2016 available at <http://health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff> (accessed 2 November 2016) (hereafter Tobacco Control Key Facts and Figures).

¹⁴² Tobacco Control key facts and figures.

¹⁴³ TPP - Investor-State Arbitration.

¹⁴⁴ Australian Government Department of Health 'Plain Packaging of Tobacco Products' 2016 available at <http://www.health.gov.au/tobaccopp> (accessed 2 November 2016) (hereafter Plain Packaging of Tobacco Products.)

¹⁴⁵ Australia Government Department of Health 'Introduction of Tobacco Plain Packaging in Australia' 2016 available at <http://health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain> (accessed 2 November 2016) (hereafter Introduction of TPP in Australia).

¹⁴⁶ TPP - Investor-State Arbitration.

and materials of packaging, as well as the appearance of the brand.¹⁴⁷ The Consumer Information Standard specifies the new health warnings required to appear on all Tobacco retail packaging. For instance, it is a requirement that health warnings must cover at least 75 per cent of the front of most tobacco packaging and 90 per cent of the back of the packaging.¹⁴⁸

TTP laws have been heavily challenged by tobacco companies that operate in Australia. One of the biggest oppositions so far came from a giant tobacco company called Phillip Morris Asia Limited through ISDS. This case is discussed in the next section. The TPP laws were also challenged in Australia's domestic courts in the cases of *JT International SA v Commonwealth of Australia*¹⁴⁹ and *British American Tobacco Australasia Limited and ORS v The Commonwealth of Australia*.¹⁵⁰ In both cases, the claimants were tobacco companies which were registered owners of trademarks, patents and designs in Australia. They claimed that their tobacco products use distinctive words, colours, designs, logos, lettering and markings which distinguish them from other tobacco products.¹⁵¹ The claimants alleged that the provisions of the TPP Act, as far they restricted their use of logos, colours, brand imagery, words and design on tobacco products and packaging, constituted an acquisition of their property otherwise than on just terms.¹⁵² In both cases, however, the High Court of Australia ruled that the TTP Act was valid as it did not acquire any property.¹⁵³ The claimants' cases were thus dismissed and they did not appeal against these decisions. These two cases provide important insight on the ISDS debate as they demonstrate that public policy regulations can also be challenged in the domestic courts.

¹⁴⁷ Plain Packaging of Tobacco Products.

¹⁴⁸ Introduction of TPP in Australia.

¹⁴⁹ Case Number S389/2011.

¹⁵⁰ Case Number S409/2011.

¹⁵¹ Commonwealth of Australia Constitution Act available at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution (accessed 3 November 2016).

¹⁵² High Court of Australia 'British American Tobacco Australasia Limited and ORS v The Commonwealth of Australia' Short Particulars available at <http://www.hcourt.gov.au/assets/cases/s389-2012/S389-2011.pdf> (accessed 3 November 2016) (hereafter High Court of Australia short Particulars).

¹⁵³ High Court of Australia 'JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & ORS v Commonwealth Of Australia' Judgment Summary 5 October 2012 available at <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2012/hca43-2012-10-05.pdf> (accessed 3 November 2016) (hereafter High Court of Australia Judgment Summary).

The TTP laws were also challenged through World Trade Organisation (WTO) dispute settlement process. However, the proceedings were suspended following an agreement by the parties to find a mutually agreed solution.¹⁵⁴

3.2.2. Phillip Morris Asia Limited v the Commonwealth of Australia

The *Phillip Morris* case was heard under the auspices of the Permanent Court of Arbitration (PCA), under the UNCITRAL Arbitration Rules.¹⁵⁵ The claimant, Phillip Morris Asia Limited, described itself as the regional headquarters for the Asia region of the Philip Morris International group of companies (PMI Group). The Claimant owned 100 per cent of the shares in Philip Morris (Australia) Limited (PM Australia), a holding company incorporated in Australia, which in turn owned 100 per cent of the shares in Philip Morris Limited (PML). PML is a trading company incorporated in Australia, which engages in the manufacture, import, marketing and distribution of tobacco products for sale within Australia. PML has rights with respect to certain intellectual property in Australia, including registered and unregistered trademarks, copyright works, registered and unregistered designs, and overall product packaging. The claimant contended that its entire business, and that of PML and PM Australia, rests on its intellectual property, and in particular on the recognition of its brands on the market.¹⁵⁶

The dispute was commenced pursuant to the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (the Hong Kong - Australia BIT).¹⁵⁷ The claimant alleged, *inter alia*, that the TPP laws bar the use of intellectual property on tobacco products and packaging, transforming the claimant's subsidiary in Australia from a manufacturer of branded products to a manufacturer of commoditised products with the consequential effect of substantially diminishing the value of the claimant's investments in Australia.¹⁵⁸

¹⁵⁴ World Trade Organisation (WTO) 'Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging' available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm (accessed 3 January 2017).

¹⁵⁵ *Phillip Morris Case 3*.

¹⁵⁶ *Phillip Morris Case 2*.

¹⁵⁷ *Phillip Morris Case 1*.

¹⁵⁸ Stockholm Chamber of Commerce: ISDS Blog 'Phillip Morris Asia Limited v Australia' 26 May 2016 available at <http://isdsblog.com/2016/05/26/philip-morris-asia-limited-v-australia/> (accessed 4 January 2017).

The claimant also alleged that the TPP laws violated the Hong Kong – Australia BIT by, *inter alia*, treating the claimant’s investment unfairly and inequitably, and failing to provide full protection and security for the investments.¹⁵⁹ The claimant sought an order that Australia should, *inter alia*, take appropriate steps to suspend enforcement of TPP laws and to compensate the claimant for loss suffered through compliance with plain packaging legislation.¹⁶⁰ The amount claimed in the dispute was described in the Notice of Arbitration as an ‘amount to be quantified but of the order of billions of Australian dollars.’¹⁶¹

The claim, however, was dismissed at a preliminary stage. Australia raised a preliminary objection that the arbitration tribunal was barred from considering the claim because the dispute had arisen before the claimant had obtained the protection of the Hong Kong - Australia BIT as a result of restructuring its investment in PML or because the claimant’s restructuring constituted an abuse of right.¹⁶² The arbitration tribunal held that the claimant had failed to show that, prior to restructuring, it had control with a substantial interest over PM Australia and PML investments.¹⁶³ The arbitration tribunal applied the principle that the initiation of treaty-based ISDS constitutes an abuse of procedural rights or an abuse of process when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. A dispute is foreseeable when there is a reasonable prospect that a measure which may give rise to a treaty claim will materialise.¹⁶⁴ The arbitration tribunal concluded that at the time of the restructuring, the dispute had materialised and was foreseeable to the claimant.¹⁶⁵ The arbitration tribunal further concluded that the main and determinative, if not sole, reason for the restructuring was the intention to

2017) (hereafter Stockholm Chamber of Commerce: ISDS Blog (2016)); see also *Phillip Morris Case 2*.

¹⁵⁹ Phillip Morris Asia Limited ‘Notice of Arbitration: Between Phillip Morris Asia Limited and The Commonwealth of Australia’ 21 November 2011 available at <http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf> (accessed 3 January 2016) (hereafter Phillip Morris Asia Limited ‘Notice of Arbitration: Phillip Morris case’ (2011)).

¹⁶⁰ *Phillip Morris Case 2*.

¹⁶¹ Phillip Morris Asia Limited ‘Notice of Arbitration: Phillip Morris case’ (2011); see also *Phillip Morris Case 2*.

¹⁶² *Phillip Morris Case 2*.

¹⁶³ *Phillip Morris Case 158*.

¹⁶⁴ *Phillip Morris Case 170*.

¹⁶⁵ Stockholm Chamber of Commerce: ISDS Blog (2016); see also *Phillip Morris Case 176*.

bring an ISDS claim under the Hong Kong – Australia BIT, using an entity from Hong Kong.¹⁶⁶ The claim was therefore dismissed as it was held that the initiation of the claim constituted an abuse of rights.¹⁶⁷

The *Phillip Morris Case* was one of the driving forces behind the 2011 policy shift in Australia to exclude ISDS provisions from its future treaties. As indicated in the introduction above, the other driving force for this ISDS policy shift was the recommendation of Australia's Productivity Commission. The Productivity Commission Report is discussed in the next section.

3.2.3. The Productivity Commission Research Report on Bilateral and Regional Trade Agreements

The Productivity Commission Report highly influenced the Australian Government to introduce the policy that excluded ISDS provisions from Australia's treaties. The Productivity Commission is an independent government agency in Australia 'whose past work injected admirable rigour and objectivity into the Australian policy-making process.'¹⁶⁸ The Australian Government requested the Productivity Commission in 2010 to undertake a study and provide advice on the impact of bilateral and regional trade agreements on trade and investment and on Australia's trade and economic performance.¹⁶⁹ One of the aspects of that research focused on the relevance of including ISDS provisions in Australia's treaties.

Among other things, the Productivity Commission Report concluded that there does not appear to be an underlying economic problem that necessitated the inclusion of ISDS provisions in treaties, and that available evidence did not suggest that ISDS provisions have a significant impact on investment flows in Australia. It also made a finding similar to the finding made in RSA's BIT review policy paper (discussed in chapter two) that ISDS provisions can restrict a government's ability to undertake

¹⁶⁶ *Phillip Morris Case* 184.

¹⁶⁷ *Phillip Morris Case* 184.

¹⁶⁸ Kurtz J & Nottage L (2015) 467.

¹⁶⁹ Australia Government Productivity Commission 'Productivity Commission Research Report: Bilateral and Regional Trade Agreements' (2010) available at <http://www.pc.gov.au/inquiries/completed/trade-agreements/report> (accessed 3 November 2016) (hereafter Productivity Commission Report).

welfare-enhancing reforms, popularly known as 'regulatory chill'.¹⁷⁰ The Productivity Commission Report reiterated that this problem is not only present in developing countries seeking to improve their standards of regulation, but also in developed countries like Australia.¹⁷¹ It further highlighted the potential for large claims for compensation which would be paid out by host countries sued under ISDS.¹⁷² For these reasons, the Productivity Commission Report advised that Australia should seek to avoid accepting ISDS provisions in its treaties, which confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system.¹⁷³ This advice was followed by the Australian Government when it announced in 2011 that it would exclude ISDS provisions in its future treaties.

The Productivity Commission Report has, however, been heavily criticised for its alleged shallow analysis of ISDS discipline. First, the criticism is that the Productivity Commission failed to appreciate the complexity of the issue regarding whether there are indeed any positive investment benefits that flow from entering into BITs. That instead of fully engaging with the complex literature on that issue, the Productivity Commission only considered one study in coming to the conclusion that committing to ISDS does not influence foreign investment flows into a country.¹⁷⁴ The second criticism was that when discussing the factors that influence foreign investment inflows into a country, the Productivity Commission Report largely focused on the quantitative liberalisation of border restrictions such as screening processes and tariffs.¹⁷⁵ However, unlike trade in goods, the critical barriers to foreign investment do not mainly take the form of simple border measures, rather, what is more important are 'behind-the-border regulatory interventions', which, if discriminatory or arbitrary, can lessen or even extinguish the profitability of foreign investment in the receiving country.¹⁷⁶ The third criticism was that the Productivity Commission Report ignored

¹⁷⁰ Productivity Commission Report 271.

¹⁷¹ Productivity Commission Report 271.

¹⁷² Productivity Commission Report 272.

¹⁷³ Productivity Commission Report 276.

¹⁷⁴ Kurtz & Nottage 2015 471.

¹⁷⁵ Perera T & Demeter D (2012) 85.

¹⁷⁶ Kurtz & Nottage (2015) 471.

the relevance of ISDS in relation to Australia's outbound investments and only focused on inbound investments, leaving the former at risk.¹⁷⁷

As is discussed in the next sections, these criticisms are relevant as they played a big role in order for Australia to later abandon the policy of excluding ISDS provisions and turn to the policy of including ISDS provisions on a treaty-by-treaty basis. These criticisms are part of the ISDS debate that took place among Australia's policy makers and continues to take place till date. The next section analyses the political context of the ISDS debate in Australia, which eventually culminated into the current policy of including ISDS on treaty-by-treaty approach.

3.3. INVESTOR-STATE DISPUTE SETTLEMENT POLICY DEBATE IN AUSTRALIA

Australia's policy shifts regarding ISDS cannot be separated from its political context. The policy shifts have largely followed the change of political party that is in government. This can be traced back to 2004 when the Liberal Party (the political party that was in government at that time) was about to sign the Australia – United States of America Free Trade Agreement (Australia-USA FTA). The Australia-USA FTA was intended to include ISDS provisions until the Labour Party (the main opposition party at that time) indicated that they would block the implementing legislation for the Australia-USA FTA in Parliament.¹⁷⁸ This sparked one of the biggest public debates over a trade agreement in Australia.¹⁷⁹ The community, lobby groups and non-governmental organisations campaigned, *inter alia*, against the inclusion of ISDS provisions in the Australia-USA FTA. The reasons for the campaign were largely influenced by the observed experiences of the countries that were party to the North American Free Trade Agreement (NAFTA), who had by then been exposed to several ISDS claims by USA investors.¹⁸⁰ As such, the Australian public was concerned that ISDS provisions would negatively impact public policy in Australia as they believed it had under NAFTA.¹⁸¹ Consequently, the ISDS provisions were dropped from the Australia-USA FTA and the agreement was

¹⁷⁷ Kurtz & Nottage (2015) 471; See also Perera & Demeter (2012) 85.

¹⁷⁸ Kurtz & Nottage (2015) 472.

¹⁷⁹ Perera & Demeter (2012) 81.

¹⁸⁰ Perera & Demeter (2012) 81.

¹⁸¹ Perera & Demeter (2012) 81.

ratified.¹⁸² Disputes under the Australia-USA FTA would be settled by consultations between the parties.¹⁸³

The Labour Party came into power in 2007. In 2010 it declared it continued to have reservations about ISDS provisions.¹⁸⁴ This was followed by the landmark announcement that Australia would no longer include ISDS provisions in its future treaties.¹⁸⁵ Accordingly, in 2012 Australia entered into an FTA with Malaysia that did not include ISDS provisions.¹⁸⁶ Instead, the Australia-Malaysia FTA provides for conciliation, mediation, arbitral panels and FTA Joint Commissions as avenues for resolving disputes that arise out of the Australia-Malaysia FTA.¹⁸⁷

Since the Liberal Party-led coalition came back into power in 2013, it quietly shifted to a policy of including ISDS provisions on a treaty-by-treaty approach.¹⁸⁸ This remains Australia's policy till date.¹⁸⁹ Accordingly, ISDS provisions were included in the FTA with Korea and China, but not with Japan.¹⁹⁰ Both the Australia-China FTA and the Australia-Korea FTA require the parties to attempt to resolve the dispute by consultations and negotiation before resorting to ISDS.¹⁹¹ The Australia-Japan FTA allows foreign investors access to domestic courts of the host-state.¹⁹² Further, the Australia-Japan FTA provides for consultation, conciliation, mediation and arbitral proceedings set up under the FTA itself as other available methods for resolving disputes under it.¹⁹³ The Liberal-led coalition party won Australia's recent Federal

¹⁸² Kurtz & Nottage (2015) 472.

¹⁸³ Articles 21.3 to 21.15 of the Australia-USA FTA.

¹⁸⁴ Kurtz & Nottage (2015) 472.

¹⁸⁵ Kurtz & Nottage (2015) 467.

¹⁸⁶ Kurtz & Nottage (2015) 472.

¹⁸⁷ Article 20 of the Australia-Malaysia FTA available at <http://dfat.gov.au/trade/agreements/mafta/Pages/malaysia-australia-free-trade-agreement.aspx> (accessed 4 January 2016).

¹⁸⁸ Kurtz & Nottage (2015) 468.

¹⁸⁹ Australian Government 'ISDS'.

¹⁹⁰ Kurtz & Nottage (2015) 468.

¹⁹¹ Article 19.11 of the Australia-China FTA available at <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx> (accessed 3 January 2017); See also Article 11.5 of the Australia – Korea FTA available at <http://dfat.gov.au/trade/agreements/kafta/official-documents/Pages/default.aspx> (accessed 3 January 2017).

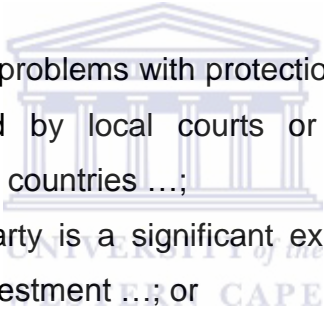
¹⁹² Article 14.6 of the Australia-Japan Economic Partnership Agreement (EPA) available at <http://dfat.gov.au/trade/agreements/jaepa/official-documents/Pages/official-documents.aspx> (accessed 3 January 2016) (hereafter Australia-Japan FTA).

¹⁹³ Article 19 of the Australia-Japan EPA.

Elections of 2016,¹⁹⁴ hence the policy of including ISDS provisions on treaty-by-treaty approach continues till date.

3.4. TREATY-BY-TREATY APPROACH TO INVESTOR-STATE DISPUTE SETTLEMENT

This section analyses how Australia implements the treaty-by-treaty approach in order to ascertain which treaty to include ISDS provisions and which one not to. The Australian Government's policy to include ISDS provisions on a treaty-by-treaty approach is published on its official webpage.¹⁹⁵ However, the Australian Government has not clarified how the treaty-by-treaty assessment is done. Elaboration on how the treaty-by-treaty assessment would be conducted is found in writings of eminent experts on ISDS in Australia such as Professor Luke Nottage.¹⁹⁶ The factors (criteria) that are taken into account in the treaty-by-treaty assessment appear to be whether:

- 
- [1] there are perceived problems with protections available to investors under national laws enforced by local courts or tribunals, especially in less economically developed countries ...;
 - [2] the treaty counterparty is a significant existing or future destination for Australia's outbound investment ...; or
 - [3] the counterparty presses strongly for [ISDS] due to its own general policy ... and/or concerns about risks for its investors in Australia¹⁹⁷

The first factor, which is arguably the major factor, entails taking into account the protection that would be available to Australia's investments in the country that Australia intends to sign a treaty with (counterparty). This basically entails considering the national legal system of the counterparty in order to assess whether

¹⁹⁴ Nottage L 'Investor-State Arbitration Policy and Practice in Australia' 2016 Investor-State Arbitration Series Paper No. 6 22 available at https://www.cigionline.org/sites/default/files/isa_paper_series_no.6oct6web.pdf (accessed 3 November 2016) (hereafter Nottage L (2016)).

¹⁹⁵ Australian Government Department of Foreign Affairs and Trade 'Trade and Investment Topics: Investor-State Dispute Settlement' available at <http://dfat.gov.au/trade/topics/pages/isds.aspx> (accessed 2 November 2016).

¹⁹⁶ Luke Nottage is a professor of Comparative and Transnational Business Law at the University of Sydney. He is also associate director of the Centre for Asian and Pacific Law at the University of Sydney. He leads the Investor State Arbitration Project in Australia; See Nottage L (2016) iv.

¹⁹⁷ Nottage L (2016) 22.

or not it falls below international best standards and would, thus, not protect Australia's investments (investors).¹⁹⁸ A principal consideration in this assessment is the level of economic development of the counterparty.¹⁹⁹ There is seemingly an assumption that developing countries do not have robust legal systems that would offer the necessary protection to Australia's investments, and that the opposite holds true for developed countries. As such, Australia takes into account whether the counterparty is a developed or developing country when conducting the treaty-by-treaty assessment. This issue is explored in more detail in chapter four.

The second factor that Australia takes into account in conducting the treaty-by-treaty assessment is whether the counterparty is a significant (existing or future) destination for Australia's outbound investments.²⁰⁰ Thus, the Australian Government negotiates for inclusion of ISDS provisions in treaties where Australia is a net FDI exporter and advocates not to include them in investment treaties where Australia is a net FDI importer.²⁰¹ This means that Australia, in a way, acknowledges the negative repercussions that ISDS provisions would have in Australia and therefore refrains from including them where the counterparty has comparatively more investments in Australia, as this raises the probability of investors from the counterparty initiating ISDS claims against Australia. On the other hand, Australia does not mind subjecting the counterparty to ISDS claims initiated by its outbound investors as it negotiates for inclusion of ISDS provisions where there are comparatively more Australian investments in the counterparty. This factor is, therefore, one sided in favour of Australia as its sole purpose is to protect Australia against the potential consequences of ISDS provisions while exposing its counterparty to the same.

The third factor that Australia takes into account in conducting the treaty-by-treaty assessment is how much the counterparty presses strongly for inclusion of ISDS provisions due to the counterparty's own general policy and/or concerns about risks for its investors in Australia.²⁰² For instance, Australia's Parliamentary records indicate that a major reason for including ISDS provisions in the FTA with Korea

¹⁹⁸ Nottage L (2016) 22. See also Perera & Demeter (2012) 83.

¹⁹⁹ Nottage L (2016) 22; see also Kurtz & Nottage (2015) 476.

²⁰⁰ Nottage L (2016) 22.

²⁰¹ Perera & Demeter (2012) 83.

²⁰² Nottage L (2016) 22.

(despite being a developed country) was the insistence by the Korean government.²⁰³ The pressure from the counterparty is balanced with lobbying by Australia's business sector involved in outbound investment in the counterparty's country.²⁰⁴

Since the introduction of the treaty-by-treaty approach in Australia, Australia has entered into treaties with Korea, China and Japan.²⁰⁵ As stated above, ISDS provisions have been included in treaties with Korea and China, but not with Japan.²⁰⁶ Accordingly, ISDS provisions have not been included in the treaty with Japan as it is a developed country with a robust domestic legal system.²⁰⁷ China has been regarded as a less developed country in this regard and therefore required the inclusion of ISDS provisions.²⁰⁸ As stated above, Korea insisted on the inclusion of ISDS provisions despite being a developed country.²⁰⁹ Australia is also a party to the Trans-pacific Partnership Agreement (TPPA), a multilateral FTA involving 12 countries (some of which are developing countries), which was signed on 4 February 2016 and currently awaits ratification.²¹⁰ The TPPA also includes ISDS provisions, and Australia reportedly resisted signing the TPPA on the basis of protecting its policy space.²¹¹ These treaties demonstrate the treaty-by-treaty approach in practice. Some of the advantages and disadvantages of this approach are discussed in chapter four.

3.5. CONCLUSION

Chapter three has analysed how Australia adopted its current policy of including ISDS provisions in its treaties on a treaty-by-treaty assessment, and also how Australia conducts the treaty-by-treaty assessment in practice. The chapter starts by giving a brief background of some of the main issues that exacerbated the ISDS debate in Australia and the subsequent government policy shifts on ISDS policy.

²⁰³ Nottage L (2016) 5.

²⁰⁴ Kurtz & Nottage (2015) 479.

²⁰⁵ Kurtz & Nottage (2015) 468.

²⁰⁶ Kurtz & Nottage (2015) 468.

²⁰⁷ Nottage L (2016) 4.

²⁰⁸ Nottage L (2016) 22.

²⁰⁹ Nottage L (2016) 5.

²¹⁰ Perera & Demeter (2012) 82.

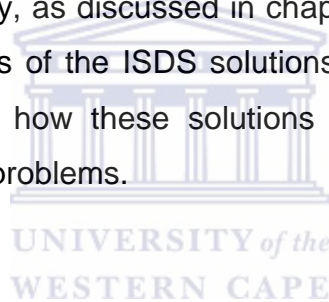
²¹¹ Perera & Demeter (2012) 82.

These issues include the coming into force of the TPP laws, the *Phillip Morris* case and the Productivity Commission Report.

This chapter has further discussed how the ISDS policy shifts in Australia have largely depended on the political party that is in government. While the Labour party advocates for abrogation of ISDS, the Liberal Party opts to include ISDS provisions on a treaty-by-treaty approach.

The chapter has also analysed the factors that guide the treaty-by-treaty approach. These are the capability of the counterparty's domestic legal system to protect Australian investments, the level of Australia's outbound investments in the counterparty, and the counterparty's own ISDS policy.

The next chapter is built upon the ISDS solutions that have been implemented by RSA and Australia respectively, as discussed in chapters two and three. It analyses the strengths and weaknesses of the ISDS solutions as implemented by RSA and Australia, and also analyses how these solutions relate to some internationally recognised solutions to ISDS problems.



CHAPTER FOUR:
STRENGTHS AND WEAKNESSES OF SOLUTIONS IMPLEMENTED BY THE
REPUBLIC OF SOUTH AFRICA AND AUSTRALIA RESPECTIVELY

4.1. INTRODUCTION

Chapter four critically analyses the strengths and weaknesses of the two solutions to ISDS as implemented by RSA and Australia respectively. First, the chapter critically analyses the solution implemented by RSA. In particular, it critically analyses the strengths and weaknesses of the avenues for resolving investment disputes that have been put in place by the PI Act. Secondly, the chapter critically analyses the solution implemented by Australia to include ISDS in its treaties on a treaty-by-treaty approach. This includes a critique of the criteria that Australia uses to implement the treaty-by-treaty approach. This critique is linked with, among other issues, a discussion of the effects of the solutions implemented by RSA and Australia respectively on both FDI and outward investments for a country, the relevance of level of economic development of a country when considering solutions to ISDS, and an inquiry as to whether including ISDS provisions in treaties increases FDI for a country. Finally, the chapter examines the solutions to ISDS that are internationally recognised and have been suggested as solutions to the ISDS conundrum by international bodies such as the United Nations Conference on Trade and Development (UNCTAD).

4.2. DISPUTE SETTLEMENT AVENUES UNDER THE PROTECTION OF INVESTMENT ACT

The PI Act allows investors to resort to mediation, competent courts, independent tribunals, statutory bodies within RSA, and state-state arbitration upon exhaustion of domestic remedies.²¹² The term investor under the PI Act is not limited to foreign investors.²¹³ This presupposes that even RSA investors are entitled to utilise these dispute settlement mechanisms. The following section critically analyses each of the dispute settlement avenues under the PI Act.

²¹² Section 13 of the PI Act.

²¹³ Section 1 of the PI Act.

4.3. USE OF DOMESTIC COURTS

An investor who has a dispute with RSA government concerning an investment may approach any competent court in RSA.²¹⁴ The issue whether domestic courts are appropriate forums for resolving investment disputes has been a matter of debate.²¹⁵ Generally, host-states have a preference to resolve investment disputes using their domestic courts, rather than resorting to ISDS.²¹⁶ Various reasons support this preference. Some of the reasons include protecting national sovereignty unlike subjecting themselves to supranational authorities through ISDS,²¹⁷ promotion of capacity of the domestic courts through experience the courts gain from handling the investment cases,²¹⁸ and, more importantly, to avoid unpredictable international challenges to legitimate, constitutional and democratic policy-making.²¹⁹

On the other hand, investors prefer to have their investment disputes resolved through ISDS.²²⁰ The concern that investors have regarding domestic courts is the possibility of facing a deficient domestic court system that may be prejudiced or systematically favour the host-state government.²²¹ It is further argued that courts cannot encroach on the powers of the executive and legislative arms of government unless the latter have acted irrationally, or have unreasonably or unjustifiably limited constitutional rights.²²² This paper agrees that these concerns by foreign investors about domestic courts favouring a host government vis-à-vis a foreign investor have merit. Even though independence of the judiciary from other branches of government and any other external pressures is a basic feature of any domestic court system in a

²¹⁴ Section 13(4) of the PI Act.

²¹⁵ Ngwenya M *The Promotion and Protection of Foreign Investment in South Africa: A Critical Review of Promotion and Protection of Investment Bill 2013* (unpublished Doctor of Laws thesis, University of South Africa (2015) 117 (hereafter Ngwenya M (2015)).

²¹⁶ Cremades BM & Cairns DJA 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes' in Horn N (ed) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 345 (hereafter Cremades BM & Cairns DJA (2004)).

²¹⁷ Cremades BM & Cairns DJA (2004) 345.

²¹⁸ Franck SD 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 *McGeorge Global Business and Development Law Journal* 367 (hereafter Franck SD (2007)).

²¹⁹ Carim X Lessons from RSA's BIT Review (2013) 1.

²²⁰ Norton JJ 'An Environmental Approach to FDI and Effective Dispute Resolution: The Exhortation of the Monterrey Consensus' in Horn N (ed) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 103 (hereafter Norton JJ (2004)).

²²¹ Norton JJ (2004) 103.

²²² Anglo American SA Limited submission in 'Summary of Submissions for the Promotion and Protection of Investment Bill (PPIB) [B18-2015]' 59 available at https://www.thedti.gov.za/parliament/2015/Summar_Matrix.pdf (accessed 1 December 2016) (hereafter Anglo American SA Limited's submission on PPIB).

democratic society,²²³ the judiciary remains an organ of the host-state. It has an inherent duty to serve and protect the interests of the state. Where there are competing interests between a foreign investor and national public policy, it is reasonable that a foreign investor would be concerned with whether the domestic court system would be impartial.

Another concern by investors regarding the use of domestic court systems is that some national legal systems, particularly in developing countries, lack the requisite capacity to handle investment disputes.²²⁴ For instance, it is argued that the delay in conclusion of litigation cases in most Southern African Development Community (SADC) countries has been a cause for concern.²²⁵ The American Department of State has stated that domestic courts of some SADC Member States face various challenges which may affect their efficiency and attractiveness to investors.²²⁶ The World Bank Doing Business Rankings of 2016 (the Rankings) show that, generally, most developing countries rank low on enforcement of contracts.²²⁷ Nevertheless, the Rankings also show that some countries with lower levels of income rank better than some countries with higher levels of income in terms of enforcement of contracts.²²⁸ This means that it is not conclusive that all lower income countries fare badly when it comes to enforcement of contracts as compared to higher income countries. This argument can be extended to the capacity of domestic courts in developing countries to handle investment disputes. Thus, it would be an inaccurate generalisation to conclude that domestic courts in all developing countries lack the requisite capacity and efficiency to handle investment disputes. Rather each country's capacity should be considered on its own merit.

In the case of RSA, Dr Rob Davies argues that it matters little that the PI Act excludes recourse to ISDS and instead gives jurisdiction over investment disputes to

²²³ The South African Judiciary 'Judicial Authority' available at <http://www.judiciary.org.za/judicial-authority.html> (accessed 30 November 2016) (hereafter The RSA Judiciary).

²²⁴ Nottage L (2016) 22.

²²⁵ Ngobeni L 'The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for Effective Harmonisation' (2015) 19 *Law, Democracy and Development* 180 (hereafter Ngobeni L (2015)).

²²⁶ Ngobeni L (2015) 192.

²²⁷ The World Bank 'Doing Business' (2016) available at <http://www.doingbusiness.org/rankings> (accessed 30 November 2016) (hereafter The World Bank Doing Business Rankings (2016)).

²²⁸ The World Bank Doing Business Rankings (2016).

RSA domestic courts.²²⁹ He further argues that RSA's domestic courts 'fare very well in terms of their capacity to enforce contracts' and that RSA is 'a specialised commercial jurisdiction with efficient and well-capacitated legal professionals and an independent judiciary.'²³⁰ The RSA government argues that its domestic legal processes are robust, that the RSA Constitution is one of the most progressive in the world, and that the domestic courts are independent.²³¹ As such, the position of RSA government is that an investor whose rights have been infringed would have requisite local legal remedies available. It is argued that RSA courts generally function well in commercial matters and still have a significant degree of institutional independence.²³² The United States Investment Climate Statement of 2016 has indicated that United States investors find RSA domestic courts generally fair and consistent and that infrastructure is well-developed.²³³

On the other hand, it has been argued that the Bench in RSA domestic courts has been weakened by a number of poor appointments since 1994.²³⁴ These appointments have eroded business confidence in the capacity of the courts to decide complex commercial cases, and that there has always been limited commercial experience within the Constitutional Court.²³⁵ The South African Institute of Race Relations (IRR) has further argued that the African National Congress (ANC), which has been the national ruling party since 1994, has expressed an intention to bring the Judiciary under the control of its party.²³⁶ The alleged political interference with the Judiciary, if successful, would undermine its autonomy and independence.²³⁷ The IRR further argues that some of the rulings of the Constitutional Court on contentious political or transformation issues important to the

²²⁹ Jeffery A 'The Investment Bill and FDI' *Without Prejudice* (2014) 19 (hereafter Jeffery A (2014)).

²³⁰ Jeffery A (2014) 19.

²³¹ Ngwenya M (2015) 117.

²³² Jeffery A (2014) 19.

²³³ U.S Department of State 'Investment Climate Statements for 2016: South Africa' available at <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm#wrapper> (accessed 30 November 2016).

²³⁴ Jeffery A (2014) 19.

²³⁵ South African Institute of Race Relations 'The IRR's Full Submission on Promotion and Protection of Investment Bill of 2015' (2015) available at <http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/full-submission-promotion-and-protection-of-investment-bill-of-2015-2013-25-august-2015-1> (accessed 30 November 2016) (hereafter IRR (2015)).

²³⁶ IRR (2015).

²³⁷ IRR (2015).

ANC have clearly been executive-minded.²³⁸ One of the case examples that have been cited in this regard is the Constitutional Court's ruling in the case of *Agri South Africa v Minister for Minerals and Energy* (the *Agri SA case*).²³⁹ This case is briefly discussed later in this paper.

Even though the allegations of inadequacy and partiality of RSA's domestic court system have been echoed elsewhere,²⁴⁰ the source of the allegations seems to be IRR itself.²⁴¹ Further, the allegations by IRR do not explain how the case examples it has cited have been partial. Conversely, this paper argues that these allegations are not supported by sufficient evidence. Further, this paper subscribes to the position advanced by Maupin and Langford that 'in view of the current level of commercial litigation routinely taking place within [RSA] courts,' RSA domestic courts 'can now offer fair and prompt protection of the economic rights of foreign investors.'²⁴²

4.4. CHALLENGING PUBLIC POLICY IN DOMESTIC COURTS

This section of the paper argues that abrogating ISDS and restricting investment disputes to domestic courts would not necessarily stop investors from challenging public policy regulations which affect their investments, because investors can still lodge their claims in the domestic courts. This is clear, for example, in the cases of *International SA v Commonwealth of Australia* and *British American Tobacco Australasia Limited and ORS v The Commonwealth of Australia* discussed in chapter three. A similar example in RSA is the *Agri SA case*, in which the claimant claimed that its mineral rights had been expropriated by the MPRD Act.²⁴³ The case was commenced at the North Gauteng High Court and went all the way to the Constitutional Court of RSA. The claim was dismissed by the Constitutional Court as it found that no expropriation had taken place.²⁴⁴ This claim is similar to the claim made in the *Foresti case*, discussed in chapter two.²⁴⁵

²³⁸ IRR (2015).

²³⁹ [2013] ZACC 9.

²⁴⁰ For instance by Jeffery A (2014) 19.

²⁴¹ The exact wording is used by both authors.

²⁴² Maupin J & Langford M (2009) 42.

²⁴³ *Agri SA case* 16.

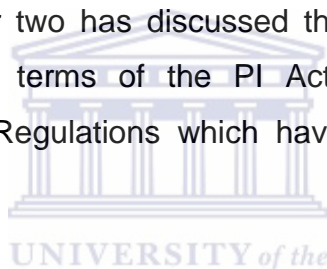
²⁴⁴ *Agri SA case* 36.

²⁴⁵ *Foresti case* 15.

The point here is that laws or regulations enacted as part of public policy that are challenged through ISDS can also be challenged in domestic courts. One can, therefore, argue that abrogating ISDS and redirecting investment disputes to domestic courts does not necessarily stop investors from challenging laws that are implemented as part of public policy. Nevertheless, it is interesting to note that in all the case examples cited in this paper, the domestic courts dismissed the expropriation claims. This shows that domestic courts are more vigilant in protecting the nation's public policy regulations. This also buttresses an argument made in the previous section of this paper that the judiciary is an organ of the host state, which has an inherent duty to serve and protect the interests of the nation.

4.5. MEDIATING INVESTMENT DISPUTES

Aside from pursuing an investment claim in RSA's domestic courts as discussed in the preceding sections, investors in RSA also have an option of pursuing their claims through mediation.²⁴⁶ Chapter two has discussed the procedure to be followed in conducting the mediation in terms of the PI Act.²⁴⁷ This procedure shall be complemented by the Draft Regulations which have recently been published for public comment.²⁴⁸



The mediation process as provided for in the PPI Bill was heavily criticised for, inter alia, the criteria for appointment of a mediator as it was left entirely within the prerogative of the Minister of Trade and Industry.²⁴⁹ However, it is evident that the PI Act has rectified the shortfalls as these no longer appear in the current version of the PI Act. One aspect that has not been sufficiently rectified by the PI Act despite criticism is the lack of time limits within which each step in the mediation process ought to be completed.²⁵⁰ The only time limit provided is the requirement that the investor must request for mediation within six months from becoming aware of the dispute.²⁵¹ The PI Act does not go further to provide for time limits for the other steps

²⁴⁶ Section 13(1) of the PI Act.

²⁴⁷ Sections 13(1), 13(2) and 13(3) of the PI Act.

²⁴⁸ See chapter two section 2.6.

²⁴⁹ Vodacom Submission in 'Summary of Submission for the Promotion and Protection of Investment Bill (PPI Bill) [B18-2015]' 72 available at https://www.thedti.gov.za/parliament/2015/Summar_Matrix.pdf (accessed 1 December 2016) (hereafter Vodacom Submission on PPI Bill).

²⁵⁰ Vodacom Submission on PPIB 74.

²⁵¹ Section 13(1) of the PI Act.

in the mediation process. Time limits are necessary in mediation in order to avoid delays in resolution of disputes. However, this shortfall shall, seemingly, be rectified should the Draft Regulations come into force. The Draft Regulations contain several time limits that cover various steps within the mediation process. For instance, a mediator ought to be appointed within ten days of receipt of a respondent's response,²⁵² and that the mediator should appoint a date and venue for the mediation hearing within ten days of accepting the role of mediator.²⁵³ The various time limits contained in the Draft Regulations should go a long way in improving efficiency of the mediation process.

The Draft Regulations acknowledge that in some instances mediation may fail to resolve some investment disputes, in which case the mediation process would be terminated or closed.²⁵⁴ However, the Draft Regulations fail to indicate what should happen to the investment dispute in that case. Thus, it is not clear whether or not this qualifies as exhaustion of domestic remedies. This issue is particularly important because the PI Act has not indicated whether or not the various domestic avenues for resolving investment disputes are in a hierarchy, or whether or not recourse to one or more of the domestic avenues is sufficient to qualify as exhaustion of domestic remedies, which then qualifies an investor to request for state-state arbitration. It is hoped that the DTI shall clarify this issue when reviewing the Draft Regulations.

The above notwithstanding, for over a decade, stakeholders and commentators have lauded mediation as a potential alternative process for resolving international investment disputes.²⁵⁵ Several advantages of mediation have been identified in this regard. First, it is argued that mediators set a tone and atmosphere that is conducive to cooperation and information sharing, asking questions to discover the parties' underlying interests and expose unsupported assumptions, and introducing effective procedures for generating and evaluating options for settlement.²⁵⁶ Thus, mediation offers the opportunity for parties to discuss not only their legal but also extra-legal

²⁵² Section 7 (1) of the Draft Regulations on Mediation Rules.

²⁵³ Section 7 (8) of the Draft Regulations on Mediation Rules.

²⁵⁴ Sections 14 & 15 of the Draft Regulations on Mediation Rules.

²⁵⁵ United Nations Commission on International Trade Law 'Mediation of Investor-State Conflicts' (2014) 127 *Havard Law Review* 2559 (hereafter *Mediation of Investor-State Conflicts* (2014)).

²⁵⁶ *Mediation of Investor-State Conflicts* (2014) 2543.

issues and interests. These may include 'domestic political realities, regional concerns, and protection of important community norms or characteristics.'²⁵⁷ This paper argues that these features are appropriately suited to the investment disputes as the host-state's public policy concerns can more readily be articulated and understood through this approach.

Another advantage of mediation, which incidentally flows from the amicable environment created at mediation, is the likelihood to preserve or even strengthen the relationship between the investor and the host-state. This is beneficial to both parties. Investors who have illiquid capital in the host-state that are virtually permanent, and on the other hand, host-states that rely on FDI for economic development may especially be interested in maintaining this cordial relationship.²⁵⁸

Some criticisms have also been levelled upon using mediation to resolve investment disputes. One of the criticisms that this paper finds more valid derives from the fact that most states operate through large and inefficient bureaucracies. As such, the internal negotiations among state officials, agencies, and even local units of government to reach consensus on settlement authority may be significantly difficult and time-consuming.²⁵⁹ This may not only cause massive delays but also render mediation of investment disputes impracticable and undesirable.²⁶⁰

It is argued that mediation and other consensual processes are already being used regularly to resolve domestic public policy and major regulatory disputes that involve extraordinarily difficult public and private issues and state actors.²⁶¹ Further, domestic and international experience shows that many investors and states are already familiar with mediation as a process for resolving legal disputes.²⁶² The recourse to mediation for resolving investment disputes, therefore, does not come as a far-fetched alternative to ISDS. It is an Alternative Dispute Resolution (ADR)

²⁵⁷ Welsh NA & Schneider AK 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 *Harvard Negotiation Law Review* 108 (hereafter Welsh NA & Schneider AK (2013)).

²⁵⁸ *Mediation of Investor-State Conflicts* (2014) 2555.

²⁵⁹ Welsh NA & Schneider AK (2013) 87.

²⁶⁰ *Mediation of Investor-State Conflicts* (2014) 2557.

²⁶¹ Welsh NA & Schneider AK (2013) 88.

²⁶² Welsh NA & Schneider AK (2013) 90.

technique that has been tried and tested. It is submitted that the provision for mediation in the PI Act will go long way as a good alternative to ISDS.

4.6. RESOLVING INVESTMENT DISPUTES BY STATE-STATE ARBITRATION

As stated above, the PI Act also allows investors to pursue the possibility of state-state arbitration upon exhaustion of the domestic remedies.²⁶³ State-state arbitration is where a dispute is settled by arbitration between the host-state and the home-state of an investor.²⁶⁴ State-state arbitration exercised by an investor's home-state on behalf of the investor forms part of diplomatic protection under international law.²⁶⁵ State-state arbitration is not new to investment disputes settlement. For instance, the Australia-USA FTA discussed in chapter three uses state-state arbitration as one of the mechanisms for resolving investment disputes.²⁶⁶ Several RSA treaties also contain state-state arbitration mechanisms.²⁶⁷ It is argued that one of the solutions to the ISDS conundrum could be to solely rely on state-state arbitration.²⁶⁸

The PI Act has imposed several conditions that ought to be satisfied in order for an investor to resort to state-state arbitration. First, an investor has to exhaust the domestic remedies available under the PI Act.²⁶⁹ This means that an investor must first pursue its claim either at the domestic courts, mediation or independent tribunal or statutory body before pursuing state-state arbitration. The PI Act does not, however, provide how long the dispute must have subsisted in the domestic avenues before it can be taken for state-state arbitration. This exposes investors to potential delays that may happen in the course of pursuing the domestic avenues. It is argued that time-limits need to be imposed within which a dispute must be resolved using domestic courts failing which the investor could initiate the state-state arbitration process.²⁷⁰ Further, as stated above, the PI Act needs to clarify whether or not the

²⁶³ Section 13(5) of the PI Act.

²⁶⁴ Bernasconi-Osterwalder N (2014) 3.

²⁶⁵ Bernasconi-Osterwalder N (2014) 8.

²⁶⁶ Bernasconi-Osterwalder N 'Rethinking Investment-Related Dispute Settlement' (2015) *Investment Treaty News* 4 available at <http://www.iisd.org/itn/2015/05/21/rethinking-investment-related-dispute-settlement/> (accessed 2 December 2016) (hereafter Bernasconi-Osterwalder N (2015)).

²⁶⁷ For instance the RSA-Denmark and RSA-Germany BITs discussed in chapter two.

²⁶⁸ UNCTAD IPFSD (2015) 105.

²⁶⁹ Section 13(5) of the PI Act.

²⁷⁰ Vodacom Submission on PPIB 74.

domestic remedies are in a hierarchy or whether one or more domestic remedies ought to be resorted to before the requirement of exhaustion of domestic remedies can be said to be satisfied.

The condition for exhaustion of domestic remedies is accompanied by another requirement that an investor may pursue state-state arbitration only if RSA government consents to it.²⁷¹ It is argued that access to state-state arbitration should not be subject to the consent of the government because it gives the government a prerogative to deny consent,²⁷² for reasons including diplomatic relations between RSA government and the home-state. If the government withholds its consent, that would mean the end of the claim for the investor. This requirement, therefore, leaves this avenue for resolving investment disputes solely in the discretion of RSA government, which may not be fair for the investors.

The investors' right to state-state arbitration seems to be protected by the administrative processes as set out in section 6 of the PI Act.²⁷³ These administrative processes include the right to be given written reasons and administrative review of the decision by the government, consistent with section 33 of RSA Constitution.²⁷⁴ This paper argues that this grants an investor a right to challenge the government through judicial review of the decision to withhold its consent to conduct state-state arbitration. As such, even though the government retains the discretion to consent to state-state arbitration, its exercise of this discretion must be lawful, reasonable and procedurally fair,²⁷⁵ otherwise, it may be challenged.

Another problem that has been cited with state-state arbitration is that it leaves the investor at the mercy of its government (the home-state) to agree to take up the claim on the investor's behalf. The investor has to lobby its government to institute a claim. It is not guaranteed that the home-state government would agree to pursue

²⁷¹ Section 13(5) of the PI Act.

²⁷² Agri SA Submission in 'Summary of Submission for the Promotion and Protection of Investment Bill (PPI Bill) [B18-2015]' 57.

²⁷³ Section 13(5) of the PI Act.

²⁷⁴ Section 6(3) of the PI Act

²⁷⁵ Section 33(1) of RSA Constitution.

the arbitration proceedings.²⁷⁶ A home state may not always be willing to take up state-state arbitration against another government for reasons related to diplomatic relations.²⁷⁷

As stated earlier in this section, state–state arbitration forms part of diplomatic protection under international law.²⁷⁸ It is, thus, argued that state-state arbitration is already available to all investors subject to the rules of customary international law,²⁷⁹ notwithstanding the PI Act. Under customary international law, the requirements of exhaustion of domestic remedies and consent by the home-state also exist.²⁸⁰ It is the requirement for RSA government to consent to state-state arbitration that is seemingly different from ordinary diplomatic protection procedure. This paper argues that the consent requirement may serve an important purpose for RSA in that it retains the option of submitting to state-state arbitration only where the government deems it appropriate. However, as stated above, this discretion ought to be exercised in a lawful, reasonable and procedurally fair manner.

It is unclear what mechanisms and procedures will govern state-state arbitration of investment disputes in RSA, what body will conduct the arbitration and what rules will apply.²⁸¹ Perhaps this information would be contained in the PI Regulations that would be promulgated under section 14 of the PI Act. It is important that RSA government clarifies these issues.

4.7. CONFLICT WITH THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY PROTOCOL ON FINANCE AND INVESTMENT

RSA's move to abrogate ISDS may be in conflict with the Southern African Development Community Protocol on Finance and Investment (SADC FIP Protocol). In terms of the SADC FIP Protocol either an investor or a host-state may refer any

²⁷⁶ EU Chamber of Commerce and Industry in South Africa 'PPIP Comments' (2015) available at https://www.thedti.gov.za/parliament/2015/EU_Chamber_15Sept2015.pdf (accessed 3 December 2016).

²⁷⁷ South African Chamber of Commerce and Industry (SACCI) submission in 'Summary of Submission for the Promotion and Protection of Investment Bill (PPI Bill) [B18-2015]' 70 & 73.

²⁷⁸ Bernasconi-Osterwalder N (2014) 8.

²⁷⁹ Anglo American SA Limited's submission on PPI Bill 58.

²⁸⁰ Bernasconi-Osterwalder N (2014) 8.

²⁸¹ Western Cape Government (WCG) submission in 'Summary of Submission for the Promotion and Protection of Investment Bill (PPI Bill) [B18-2015]' 75.

investment dispute to ISDS.²⁸² This right is subject to exhaustion of domestic remedies and also after the expiration of at least 6 months from written notification of the claim.²⁸³ RSA is a member of SADC and also a signatory of the SADC FIP Protocol.²⁸⁴ The provisions of the SADC FIP Protocol, including the requirement to submit to ISDS, are therefore binding on RSA. It is, therefore, argued that abrogating ISDS is inconsistent with the SADC FIP Protocol.²⁸⁵ It is also argued that this means that an investor is still entitled to invoke the SADC FIP Protocol and commence ISDS proceedings against RSA.²⁸⁶

DTI's response on this issue has been brief. It has stated that comments relating to the SADC FIP Protocol are confidential as it is pending Summit approval.²⁸⁷ The DTI has further stated that 'certain provisions of the dispute settlement process [in the SADC FIP Protocol] have been amended' and that reference to international arbitration has now been excluded and that member states must give investors the right of access to courts and tribunals in line with relevant host-states' domestic laws in their respective jurisdictions.²⁸⁸ It is, however, unclear whether the said amendment of the SADC FIP Protocol will indeed align with the PI Act.²⁸⁹ That notwithstanding, in the current state of the SADC FIP Protocol, the PI Act does not comply with the SADC FIP Protocol.

4.8. PROS AND CONS OF THE TREATY-BY-TREATY APPROACH

Chapter three briefly discussed the criteria utilised by Australia when implementing the treaty-by-treaty approach. This section builds on that discussion. As observed in chapter three, the first criterion proceeds on a sweeping assumption that national legal systems of developing countries fall below international best standards and that

²⁸² Article 28 of Annex 1 of the SADC FIP Protocol.

²⁸³ Article 28 of Annex 1 of the SADC FIP Protocol.

²⁸⁴ SADC 'Member States' available <http://www.sadc.int/member-states/> (accessed 5 December 2016).

²⁸⁵ Anglo American SA Limited's submission on PPI Bill 58.

²⁸⁶ National Union of Metalworkers of South Africa (NUMSA) submission in 'Summary of Submission for the Promotion and Protection of Investment Bill (PPI Bill) [B18-2015]' 69.

²⁸⁷ The DTI 'Summary of Submission for the Promotion and Protection of Investment Bill (PPI Bill) [B18-2015]' 1.

²⁸⁸ Anglo American SA Limited's submission on PPI Bill 59.

²⁸⁹ Bosman K 'South Africa: Trading international investment for policy space' (2016) *Stellenbosch Economic Working Papers* 25 available at <http://www.ekon.sun.ac.za/wpapers/2016/wp042016/wp-04-2016.pdf> (accessed 8 December 2016).

the opposite holds true for developed countries.²⁹⁰ This argument has already been explored further earlier in this chapter,²⁹¹ the ultimate argument being that each country's national legal system has to be analysed individually rather than proceeding on a sweeping assumption that national legal systems in developing countries lack the capacity to handle investment disputes.

Another weakness with this criterion is that it denies an opportunity to states with weaker legal systems to improve their capacity.²⁹² This happens because when a developed country opines that there are perceived problems with the domestic legal system of the counterparty, it insists on including ISDS provisions in the treaty.²⁹³ It is argued that the focus should rather be on how the developed country can assist the developing country to reform and improve its national legal system.²⁹⁴ The Productivity Commission commented on this issue as follows:

'if perceptions of problems with a foreign country's legal system are sufficient to discourage investment in that country, a bilateral arrangement with Australia to provide a "preferential legal system" (ISDS) for Australian investors is unlikely to generate the same benefits for that country than if its legal system was developed on a domestic non-preferential basis. To the extent that secure legal systems facilitate investment in a similar way that customs and port procedures facilitate goods trade, there may be a role for developed nations to assist through legal capacity building to develop stable and transparent legal and judicial frameworks. While not an immediate solution, over time such capacity building goes towards addressing the underlying problem, and provides benefits not only for foreign investors (including Australian investors), but all participants in the domestic economy.'²⁹⁵

²⁹⁰ See chapter three section 3.4.

²⁹¹ See section 4.3 above.

²⁹² Franck SD (2007) 367.

²⁹³ For instance Australia uses this approach see Nottage L (2016) 22.

²⁹⁴ Norton JJ (2004) 105.

²⁹⁵ Productivity Commission Report 277.

4.9. ROLE OF OUTWARD INVESTMENTS IN THE TREATY-BY-TREATY APPROACH

As discussed in chapter three, the second criterion on which Australia bases the treaty-by-treaty approach is whether the treaty counterparty is a significant existing or future destination for Australia's outward investments.²⁹⁶ The essence of this criterion is that the Australian Government negotiates for inclusion of ISDS provisions in treaties where Australia is a net FDI exporter and advocates for not including them in investment treaties where Australia is a net FDI importer.²⁹⁷ If treaties with counterparties where Australia is a net FDI exporter include ISDS provisions, that enables Australian investors that have invested in the counterparty countries to pursue ISDS claims against the counterparties. That way the investors feel more protected. Conversely, if treaties with counterparties where Australia is a net FDI importer do not include ISDS provisions, that reduces the chances of Australia facing ISDS claims. This paper argues that this criterion is clearly biased as it essentially aims at protecting Australia from ISDS claims while exposing other countries (Australia's counterparties) to ISDS claims by Australian investors.

Generally, it is argued that much discussion of ISDS policy seemingly overlooks protection of outward investments as the arguments focus on protecting public policy from inbound investors' claim.²⁹⁸ When national policies focus their investment policies on ensuring that inbound investors do not bring ISDS claims against their governments, they normally neglect the importance of ISDS in protecting outward investors. This leaves the outward investors at risk.²⁹⁹ This argument is applicable to RSA and the PI Act. The PI Act aims at protecting the interests of inward investors in RSA. RSA's outward investors are not being protected by the PI Act as it is a domestic legislation.

4.10. INFLUENCE OF OUTWARD INVESTMENTS ON A COUNTRY'S INVESTOR-STATE ARBITRATION POLICY

This paper argues that outward investments in a country have a bigger role to play in determining a country's ISDS policy than it is often stated. This paper further argues

²⁹⁶ Nottage L (2016) 22.

²⁹⁷ Perera & Demeter (2012) 83.

²⁹⁸ Kurtz & Nottage (2015) 471; See also Perera & Demeter (2012) 85.

²⁹⁹ Kurtz & Nottage 2015 471.

that countries that have high outward investment stand to benefit more from including ISDS provisions in a treaty as it increases protection for their outbound investors. Conversely, countries that have low outward investment have little benefit from ISDS because chances are high that their investors would never utilise ISDS. Australia's investment pattern in recent years has recorded a major shift resulting from an increase in outward investment. Currently, outward investment is considered an important characteristic of Australia's international economic profile.³⁰⁰ In 2013, Australia's stock of outward investment totalled US\$ 1,600,000,000,000,000.00 (US\$1.6 Trillion) and was ranked world's 18th largest source of direct investment.³⁰¹ It is, therefore, expected that Australia would be inclined towards a policy that retains ISDS provisions in its treaties rather than abrogating it, so as to protect its outward investments.

On the other hand, RSA's level of outward investment as of 2014 stood at US\$ 6,900,000,000,000.00 (US\$6.9 Billion).³⁰² Despite being the highest in Africa,³⁰³ RSA's level of outward investment comes nowhere near that of Australia. Similarly, the level of outward investments for developing countries and least developed countries is much lower than most developed countries.³⁰⁴ This paper argues that such developing countries and least developed countries are less likely to benefit from ISDS provisions as they do not have much outward investments to protect.

Despite having little outward investment to protect, developing countries are major FDI recipients. In 2014, developing countries accounted for 55% of FDI inflows.³⁰⁵ This exposes them to a higher risk ISDS claims than developed countries. Statistics actually show that developing countries have comparatively been defendants in more ISDS claims than developed countries.³⁰⁶ Further, historical trends show that

³⁰⁰ Perera and Demeter (2012) 109.

³⁰¹ Hallenic Australian Business Council 'Foreign Direct Investment in Australia' available at http://www.habc.gr/australia_fdi.asp (accessed 6 December 2016).

³⁰² UNCTAD 'The World Investment Report 2015' 32.

³⁰³ UNCTAD World Investment Report 2015 32.

³⁰⁴ UNCTAD 'The World Investment Report 2015' 32, p71 for developed countries and p78 for least developed countries.

³⁰⁵ UNCTAD 'The World Investment Report 2015' 30.

³⁰⁶ UNCTAD 'Investor-State Dispute Settlement: Review of Developments in 2015' (2016) 2 *IIA Issues Note* 3 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf (accessed 6 December 2016) (hereafter UNCTAD ISDS Review of Developments in 2015); see also UNCTAD IPFSD (2015) 79.

investors from developed countries have been the main users of ISDS, accounting for 80 per cent of all known IDS claims.³⁰⁷ This leaves developing countries in a position where they are not benefiting much from ISDS and at the same time they are being negatively affected more by ISDS. Hence, a country's policy decision on whether or not to include ISDS should take into account its level of outward investment, which would normally be synonymous to its level of economic development.

4.11. INFLUENCE OF INVESTOR-STATE DISPUTE SETTLEMENT ON FOREIGN DIRECT INVESTMENT

The preceding section has explored a perspective that argues that developing countries benefit less from including ISDS provisions in treaties when compared with developed countries. This section explores a counterargument that having ISDS provisions in treaties boosts FDI inflows for a country,³⁰⁸ and as such developing countries would benefit more from FDI if they have ISDS in place for foreign investors.³⁰⁹ A debate has ensued as to whether there is a direct correlation between including ISDS provisions in a treaty and the level of FDI for a country.³¹⁰ There is seemingly an absence of empirical evidence analysing this relationship.³¹¹ However, there is a rich body of research on the relationship between FDI and BITs, many of which include ISDS provisions as a key component.³¹² It is argued that looking at the relationship between BITs and FDI can give insights into the likely effects of ISDS on FDI.³¹³ According to UNCTAD, empirical studies on the relationship between BITs and FDI show mixed results.³¹⁴ UNCTAD recognises that while a majority of the studies conclude that BITs have a positive impact on FDI, some empirical studies

³⁰⁷ UNCTAD ISDS Review of Developments in 2015 3.

³⁰⁸ Perera & Demeter (2012) 103.

³⁰⁹ Johnson ER 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 935.

³¹⁰ Franck SD 354.

³¹¹ Franck SD 355.

³¹² Oldenski L 'What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI?' (2015) *Trade and Investment Policy Watch* available at <https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state> (accessed 6 December 2016) (hereafter Oldenski L (2015)).

³¹³ Oldenski L (2015).

³¹⁴ UNCTAD 'The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014' (2014) *IIA Issues Note – Working Draft 1* available at <http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf> (accessed 6 December 2016) (hereafter UNCTAD 'The Impact of IIAs on FDI' (2014)).

show no effect of BITs on FDI.³¹⁵ The main argument that UNCTAD advances in this regard is that BITs are simply one of the several determinants of FDI, and that they cannot substitute the importance of host-state conditions, which include sound domestic policies, regulatory and institutional frameworks, quality of institutions, the level of political risk, or the development of the financial sector.³¹⁶

The foregoing discussion shows that it is not conclusive that having ISDS provisions increases FDI for a country. Similarly, it is not conclusive that not having ISDS decreases FDI in a country. This paper argues that it is not conclusive that abrogating ISDS would negatively affect FDI in a country. Rather, what affects FDI is the totality of prevailing host-state conditions as stated by UNCTAD (in the preceding paragraph). An analysis of the other host-state conditions is, however, beyond the scope of this paper. Nevertheless, abrogating ISDS alone does not spell doom for FDI prospects in RSA. What matters more is that RSA should properly implement the alternative avenues to ISDS, taking into account the shortfalls of the avenues discussed throughout this paper.

4.12. INTERNATIONALLY RECOGNISED ALTERNATIVES TO INVESTOR-STATE DISPUTE SETTLEMENT

As stated in chapter one, various countries are currently preoccupied with reforming their ISDS regimes.³¹⁷ ISDS has also become a subject of debate in many international organisations. One international organisation that has taken a lead on this issue is UNCTAD. UNCTAD is an intergovernmental body that was established by the United Nations General Assembly in 1964.³¹⁸ In 2012, it published the Investment Policy Framework for Sustainable Development (IPFSD).³¹⁹ The current version of the IPFSD, IPFSD 2015, pools global expertise in the investment and development fields from other international organisations, international experts, academics and other investment-development stakeholders.³²⁰ Since the launch of

³¹⁵ UNCTAD 'The Impact of IIAs on FDI' (2014) 1.

³¹⁶ UNCTAD 'The Impact of IIAs on FDI' (2014) 1.

³¹⁷ Jacobs BL (2015) 26.

³¹⁸ UNCTAD 'About UNCTAD' available at <http://unctad.org/en/Pages/aboutus.aspx> (accessed 7 December 2016).

³¹⁹ UNCTAD IPFSD (2015) Acknowledgments.

³²⁰ UNCTAD IPFSD (2015) Acknowledgments.

IPFSD in 2012, a large number of countries and groupings have used it to review and revise their national investment laws and policies.³²¹

One of the salient issues in the IPFSD 2015 is ISDS. The IPFSD 2015 acknowledges that the very nature of the IIA's standards of protection place limits on government's regulatory freedom, and to the extent that the foreign investors perceive that domestic policy changes negatively affect their expectations, they may challenge the policy changes through ISDS.³²² The IPFSD 2015, therefore, proposes several recommendations (solutions) on how countries can safeguard their interests and protect themselves from ISDS problems. The recommendations proposed by IPFSD 2015 show that there is no single acceptable solution to the problem; rather there are various solutions available which different countries can implement according to their respective circumstances.

The first solution that the IPFSD 2015 proposes is for countries to carefully craft the IIAs and clarify the scope and meaning of vague substantive provisions such as fair and equitable treatment standard and expropriation. In this regard, each country should strive to achieve the right balance between protecting foreign investments and maintaining policy space for domestic regulation in accordance with each country's development strategy.³²³ This proposal is important because countries have different development agendas. For instance, RSA's development agenda highly considers uplifting the HDSAs,³²⁴ while Australia is concerned with curbing the smoking problem in the country.³²⁵ It is, therefore, expected that countries may implement different solutions to ISDS which fit their respective developmental strategies.

The solution to carefully craft IIA provisions is also particularly important because, as stated in chapter one, the ISDS problems are not just limited to infringing on host state public policy space (which is the focus of this paper). The ISDS system has also been criticised for other shortfalls.³²⁶ The solution to carefully craft substantive

³²¹ UNCTAD IPFSD (2015) Acknowledgments.

³²² UNCTAD IPFSD (2015) 78.

³²³ UNCTAD IPFSD (2015) 78.

³²⁴ Section 2(d) of the MPRD Act.

³²⁵ See Tobacco Control key facts and figures.

³²⁶ See chapter one section 1.1.

provisions can, therefore, take into account the individual problems that each country is facing and draft its treaty provisions in order to avert the problems in future. New generation treaties, including the TPPA, seem to be adopting this approach.³²⁷ Countries can also implement this approach by defining or circumscribing the range of disputes that can be subject to ISDS under the treaty.³²⁸ For instance, by specifying that only disputes arising out of specifically listed documents like IIAs, contracts or investment authorisations can be brought to ISDS.³²⁹ This can also be achieved by excluding certain sensitive areas from ISDS or listing those issues to which ISDS applies.³³⁰ For instance, RSA would exclude from ISDS all regulations that emanate from BEE policies.

The IPFSD 2015 also suggests reserving a state's consent to arbitration so that it would need to be given separately for each specific dispute.³³¹ The host-states could therefore specifically indicate in the treaty that they reserve the right to consent to ISDS. This way, where a host state genuinely opines that the envisaged ISDS claim would infringe upon its public policy, it would withhold its consent.

The IPFSD 2015 also proposes that countries could choose to omit ISDS provisions altogether.³³² Several treaties have since omitted ISDS provisions, including some Australian treaties.³³³ RSA has also excluded ISDS altogether, although it has done it differently by enacting the PI Act. This shows that the solution adopted by RSA, of excluding ISDS, is also internationally recognised as one of the solutions to ISDS.

Another dimension of the solutions concerns improvements to the institutional nature and implementing alternatives to ISDS system. One of the ways this can be done is by introducing an appeals facility to undertake a substantive review of the ISDS tribunals' decisions.³³⁴ For instance, the Comprehensive Economic and Trade

³²⁷ Office of the United States Trade Representative 'Fact-Sheet: Investor-State Dispute Settlement' available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (accessed 8 December 2016).

³²⁸ UNCTAD IPFSD (2015) 106.

³²⁹ UNCTAD IPFSD (2015) 106.

³³⁰ UNCTAD IPFSD (2015) 106.

³³¹ UNCTAD IPFSD (2015) 106.

³³² UNCTAD IPFSD (2015) 106.

³³³ For instance Australia-Japan Treaty; see also chapter three section 3.3.

³³⁴ UNCTAD IPFSD (2015) 108.

Agreement between the European Union and Canada (CETA) has included provisions on an investment court system and an appellate mechanism under which the legal correctness of arbitral decisions could be challenged.³³⁵ The IPSFD 2015 has also suggested replacing the system of multiple ad hoc arbitral tribunals with a standing international investment court competent to hear all investment disputes, with judges elected or appointed by states on a permanent basis and with an appeals chamber.³³⁶ This suggestion has seemingly received much support. It has been suggested that the investment court can be modelled on the World Trade Organisation (WTO) dispute resolution body.³³⁷ The proposal to establish an investment court for ISDS has also become an important point of discussion within the European Union.³³⁸ Nevertheless, as stated in the introduction, this paper is rather interested in the steps that countries should / can take as immediate solutions to the ISDS conundrum rather than solutions of an institutional nature.

Finally, the IPSFD 2015 has suggested promoting the use of ADR methods including conciliation or mediation,³³⁹ and also resorting to state-state arbitration. It is suggested that state-state arbitration can be provided as the only international means to resolving investment disputes,³⁴⁰ with domestic avenues available to all investors.³⁴¹ The PI Act has largely followed this approach. This buttresses the argument made in this paper that RSA's solution generally conforms to internationally recognised solutions to ISDS.

This is not an exhaustive discussion of all solutions to ISDS that countries can implement. It simply highlights some of the common solutions that countries have implemented. Other solutions, not discussed in this paper, also exist.

4.13. CONCLUSION

This chapter, first, discusses the strengths and weaknesses of the dispute settlement avenues for investment disputes provided the PI Act. These are domestic courts,

³³⁵ Bernasconi-Osterwalder N (2015) 3.

³³⁶ UNCTAD IPFSD (2015) 108.

³³⁷ Jacobs BL (2015) 42.

³³⁸ Bernasconi-Osterwalder N (2015) 4.

³³⁹ UNCTAD IPFSD (2015) 108.

³⁴⁰ UNCTAD IPFSD (2015) 105.

³⁴¹ UNCTAD IPFSD (2015) 106.

mediation and state-state dispute settlement upon exhaustion of domestic avenues. Among other arguments, this chapter argues that foreign investors are inevitably concerned about the potential bias that domestic courts systems may have in favour of policies enacted for public policy. The chapter has also dispelled the sweeping notion that national legal systems of developing countries lack the capacity to handle investment disputes. Rather, each country should be considered according to its own merits. In this regard, it has been argued that RSA's domestic courts possess the requisite capacity to handle investment disputes. A further argument that investors may also challenge public policy space in the domestic courts has also been explored in this chapter.

The chapter also argues that both mediation and state-state arbitration are potential and acceptable alternative avenues to ISDS. However, these avenues as implemented by the PI Act also have their own shortfalls. For instance, the requirement by RSA to consent to state-state arbitration is problematic. Further, this chapter has highlighted that RSA's solution to abrogate ISDS may be in conflict with the SADC FIP Protocol.

The chapter has also analysed the pros and cons of the criteria used by Australia in implementing the treaty-by-treaty approach. The criterion that if a country's national legal system is considered weak then ISDS provisions should be included in the treaty with that country has a consequence of denying that country an opportunity to develop capacity of its legal system. The criterion to consider a country's outward investments used by Australia has brought out one of the main arguments in this paper, which is that including ISDS provisions in treaties is more beneficial to countries with high outward investments (often developed countries), whilst it is more detrimental to countries that have little outward investments (often developing and least developed countries).

This chapter has also analysed whether a direct relationship exists between ISDS and FDI for a country. The ultimate position is that it is not conclusive that having ISDS increases FDI for a country. Rather, the totality of various host-state conditions that affect investors play a bigger role in terms of increasing FDI. Therefore, merely abrogating ISDS should not spell doom for RSA.

Finally, this chapter has demonstrated that there are various internationally recognised solutions to ISDS. Each country is therefore at liberty to implement a solution that suits its own developmental needs. In this regard, this Chapter has also considered how the solutions implemented by RSA and Australia respectively fit into the internationally recognised solutions.

The next chapter is the last chapter of this paper. It concludes the paper, and summarises the main findings of this research paper and also makes recommendations on viable solutions that countries can implement in response to ISDS problems discussed throughout the paper.



CHAPTER FIVE: **CONCLUSIONS AND RECOMMENDATIONS**

5.1. INTRODUCTION

Chapter five is the conclusion for this paper. It is in two parts. The first part contains a summary of findings of this research. This includes a summary of the solutions to ISDS problems as implemented by RSA and Australia respectively, and also as internationally recognised. It also includes a summary of findings on the strengths and weaknesses of the solutions, and a summary of some of the factors that affect a country's ISDS policies. The second part of this chapter contains recommendations on the solution that countries should implement in response to the problem that ISDS encroaches on a host state's policy space. The recommendations especially focus on developing and least developed countries. The recommendations are largely drawn from the arguments made throughout the paper.

5.2. SUMMARY OF FINDINGS

Many countries are currently preoccupied with reforming their ISDS regimes.³⁴² One of the main reasons that triggered this reform is that ISDS limits a host state's public policy space.³⁴³ Two countries that have been embroiled in this reform are RSA and Australia. Notably, these two countries have adopted different policies as solutions to the ISDS conundrum. This research has examined how these two countries arrived at their respective solutions. Further, this research has critically analysed these solutions and discussed their strengths and weaknesses.

RSA has enacted the PI Act, under which ISDS shall no longer be an option for resolving investment disputes with RSA.³⁴⁴ Instead, the PI Act provides that investment disputes can only be resolved through mediation, RSA's domestic courts, independent tribunals within RSA, statutory bodies within RSA, and state-state arbitration upon exhaustion of domestic remedies.³⁴⁵

³⁴² The World Investment Report 2015 xi.

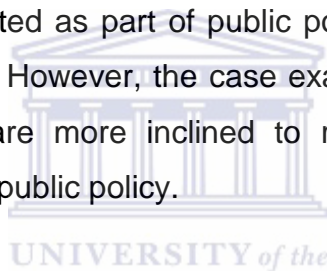
³⁴³ Jacobs BL (2015) 22.

³⁴⁴ Section 13 of the PI Act.

³⁴⁵ Section 13 of the PI Act.

This solution by RSA has received mixed reactions. Investors are generally concerned that domestic courts would be partial in favour of the government or in favour of the public policy laws or regulations.³⁴⁶ This concern is reasonable because notwithstanding that a basic feature of a judicial system in a democratic society is its independence from other branches of government,³⁴⁷ the judiciary remains an organ of the state and has an inherent duty to serve and protect the interests of its nation and its public policies. Another concern by investors, that national legal systems in developing countries lack the requisite capacity to handle investment disputes,³⁴⁸ is an inaccurate generalisation. Instead, each country's national legal system should be considered on its own merits. In the case of RSA, it is argued that its domestic courts have the requisite capacity to handle investment disputes.³⁴⁹

It has also been observed that abrogating ISDS and redirecting investment disputes to domestic courts does not necessarily prevent investors from challenging laws or regulations that are implemented as part of public policy. Investors can still pursue the claims in domestic courts. However, the case examples discussed in this paper show that domestic courts are more inclined to rule in favour of the laws or regulations enacted as part of public policy.



Mediation and state-state arbitration are also plausible avenues for resolving disputes between investors and host states. Mediation is already being utilised to resolve complex public policy issues.³⁵⁰ Similarly, state-state arbitration is not new to investment disputes. It is present in many treaties including those where RSA or Australia are a party.³⁵¹ Some weaknesses have been observed regarding the manner in which RSA has implemented mediation and state-state arbitration as avenues for resolving investment disputes. These weaknesses include lack of time limits within which a dispute must have subsisted in the domestic avenues before it can be taken for state-state arbitration, and whether more than one domestic remedy

³⁴⁶ Norton JJ (2004) 103.

³⁴⁷ The RSA Judiciary.

³⁴⁸ Nottage L (2016) 22.

³⁴⁹ Maupin J & Langford M (2009) 42.

³⁵⁰ Welsh NA & Schneider AK (2013) 88.

³⁵¹ See chapter four section 4.6.

has to be attempted before the requirement of exhausting local remedies can be said to be satisfied.³⁵²

As for Australia, recent trends show that ISDS policies largely depend on the political party that is in power. While the Labour Party opts for abrogating ISDS in its entirety, the Liberal-led Coalition Party, which is the current ruling party, has opted for including ISDS provisions on a treaty-by-treaty approach.³⁵³ Certain criteria are utilised in implementing this treaty-by-treaty approach. The first criterion entails considering the national laws and legal system of the counterparty in order to assess whether or not it falls below international best standards and would, thus, not protect Australia's investments (investors).³⁵⁴ This criterion is problematic for two reasons. First, it proceeds on an inaccurate sweeping assumption that national legal systems of developing countries fall below international best standards and that the opposite holds true for developed countries.³⁵⁵ Secondly, by redirecting investment disputes from countries whose national legal systems are found to lack the capacity to handle investment disputes, the domestic legal systems of those countries are denied an opportunity to improve on their capacity.

The second criterion utilised in the treaty-by-treaty approach is that Australia negotiates for inclusion of ISDS provisions in treaties where Australia is a net FDI exporter and advocates for exclusion of ISDS in treaties where Australia is a net FDI importer.³⁵⁶ This criterion is biased in favour of protecting Australia from ISDS claims while exposing its counterparties to a potential ISDS claims. However, unlike RSA, Australia's approach considers the plight of its outward investors. It is argued that discussions of ISDS policies often focus more on protecting public policy regulation from ISDS claims by inbound investors, and as a result the discussions overlook the importance of ISDS in protecting a country's outward investors.³⁵⁷

One of the central arguments in this paper is that the level of outward investments in a country has a bigger role to play in determining a country's ISDS policy than it is

³⁵² See chapter four for full discussion.

³⁵³ Australian Government 'ISDS'.

³⁵⁴ Nottage L (2016) 22. See also Perera & Demeter (2012) 83.

³⁵⁵ See chapter three section 3.7.

³⁵⁶ Perera & Demeter (2012) 83.

³⁵⁷ Kurtz & Nottage (2015) 471; See also Perera & Demeter (2012) 85.

often stated. In this regard, countries that have high levels of outward investments stand to benefit more from including ISDS provisions in its treaties. Conversely, countries that have low levels (or none) of outward investments would benefit little from ISDS because chances are high that their investors would never utilise ISDS. Since the level of outward investments for developing countries and least developed countries is much lower as compared to most developed countries,³⁵⁸ this paper argues that such developing countries and least developed countries are less likely to benefit from ISDS provisions as compared with developed countries. Meanwhile, developing countries are at higher risk of ISDS claims than developed countries.³⁵⁹ This leaves developing countries and least developed countries in a position where they are not benefiting much from ISDS and at the same time they are more negatively affected when compared with developed countries. Consequently, this paper argues that a country's policy decision on whether or not to include ISDS should take into account its level of outward investment, which would normally be synonymous to its level of economic development.

Inclusion of ISDS provisions in a treaty is often supported by an argument that having ISDS provisions in treaties increases FDI for a country.³⁶⁰ However, research has shown that it is not conclusive that having ISDS provisions increases FDI for a country.³⁶¹ Rather, what is more important is the totality of prevailing host-state conditions, which include sound domestic policies, regulatory and institutional frameworks, quality of institutions, the level of political risk, or the development of the financial sector.³⁶²

UNCTAD acknowledges problems that ISDS causes, particularly by limiting host state's regulatory freedom and challenging the public policy changes through ISDS.³⁶³ As such, it has recommended a range of solutions that countries may implement. The recommendations show that there is no single acceptable solution to the problem; rather countries are at liberty to implement solutions that fit their

³⁵⁸ UNCTAD World Investment Report 2015 32, p71 for developed countries and p78 for least developed countries.

³⁵⁹ See chapter four section 4.10

³⁶⁰ Perera & Demeter (2012) 103.

³⁶¹ See chapter four section 4.11.

³⁶² UNCTAD The Impact of IIAs on FDI (2014) 1.

³⁶³ UNCTAD IPFSD (2015) 78.

respective circumstances and developmental needs. Notably, the alternative avenues for resolving investment disputes contained in the PI Act have also been recommended by UNCTAD. UNCTAD has further recommended other solutions, not implemented by RSA or Australia, but viable and currently being implemented by other countries. Some of the solutions are in the nature of establishing new institutions. For instance, replacing the system of multiple ad hoc arbitral tribunals with a standing international investment court competent to hear all investment disputes, with judges elected or appointed by states on a permanent basis and with an appeals chamber.³⁶⁴ However, as stated in chapter four, this paper is rather interested in the steps that countries should / can take as immediate solutions to the ISDS conundrum rather than solutions of an institutional nature. The next section contains recommendations on solutions that countries can implement.

5.3. RECOMMENDATIONS

Unlike developed countries, developing countries and least developed countries should abrogate ISDS, and only retain it with limited application as explained below. This follows from the finding in this paper that developing countries and least developed countries are in a position where they do not benefit much from ISDS and yet it negatively affects them more when compared with developed countries. As the developing countries or least developed countries abrogate ISDS, they should ensure that the totality of the host-state conditions that affect FDI remain attractive to investors and they should also assure investors that their investments remain protected despite abrogating ISDS for public policy reasons.

ISDS should not, however, be abrogated without providing for viable alternative avenues for resolving investment disputes. Host-state's domestic courts are arguably not a convincing alternative to ISDS as they are likely to be inclined in favour of the laws or regulations implemented under the auspices of a country's public policies. However, domestic courts should always be available to investors for various interim and interlocutory applications and remedies during the subsistence of the investment.

³⁶⁴ UNCTAD IPFSD (2015) 108.

Considering that each avenue for resolving disputes discussed in chapter four has its own weaknesses, mediation presents a comparatively more-balanced avenue for resolving investment disputes. Using mediation means that investors would no longer have the concerns that they normally have regarding domestic courts, and at the same time host-states would no longer have the concerns that they have regarding ISDS. However, the weaknesses of mediation process ought to be addressed in the regulatory framework that would set mediation as the main avenue for resolving investment disputes. A time limit within which each step in the mediation process ought to take place has to be specifically indicated. The time limits would also force the bureaucratic decisions by the host-state to be speeded up. Further, mediation would maintain the cordial relationship between the investors and host-states, especially considering the importance of investments to economies of some developing and least develop countries. However, mediation may suffer from its non-binding nature. Hence, the regulatory framework should indicate what should happen if the dispute is not resolved through the mediation process, or if either party fails to adhere to the set time limits.

If the dispute fails to be resolved through mediation, both ISDS and state-state arbitration should be available options, with the following conditions. If the dispute involves a challenge of public policy laws or regulations, it should be resolved through state-state arbitration. Conversely, if the nature of a dispute is such that it does not involve a challenge of a public policy law or regulation, thus purely investment issues, the dispute should be resolved through ISDS. This would balance the concerns by investors that state-state arbitration would politicise investment disputes and on the other hand avoid submitting to ISDS disputes that have a bearing on a host state's public policy.

A problem with this option would be that parties may not always agree on whether or not a dispute involves a challenge of public policy regulations. In order to resolve this problem, the regulatory framework could include a clause that if there is disagreement on whether or not the dispute involves a challenge of public policy regulations, the mediator for each dispute should have the power to provide a binding determination on this aspect alone.

The dispute settlement clause embodying this solution can be inserted either in BITs or in domestic legislation as is the case with RSA. This solution can be implemented by countries whilst awaiting implementation of institutional solutions like the international investment court discussed in chapter four.

As discussed in chapter four, developed countries seemingly benefit more from ISDS. As such, a problem may arise where the BIT is between a developing (or least developed) country and a developed country because the two states would advocate for exclusion and inclusion of ISDS provisions respectively. In such circumstances, it is recommended that ISDS provisions are excluded because only the developed country is likely to benefit from it. If the BIT involves both developed countries, the two states may agree on whether or not to include ISDS as they are at relatively similar risks of ISDS problems, due to possible similar levels of inward / outward investments.

All in all, other countries should learn some valuable lessons from the solutions to ISDS problems that have been implemented by RSA and Australia respectively. For developing countries and least developed countries, it is advisable to avoid recourse to ISDS unless with limited application. Mediation could be utilised as the main method for resolving investment disputes, with state-state arbitration and ISDS only available upon failure of mediation as explained above.

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