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# ANGLO AMERICAN SOUTH AFRICA LIMITED

## SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

## ON

## THE PROMOTION AND PROTECTION OF INVESTMENT BILL [B18-2015]

**PREAMBLE**

Anglo American South Africa Limited ("Anglo American") welcomes the opportunity to make its submissions in relation to The Promotion and Protection of Investment Bill [B18-2015] (which will in these submissions be referred to as the Bill). We hope that these submissions will contribute positively to the process of enacting legislation which will enhance the attractiveness of the Republic of South Africa as an investment destination.

Anglo American is a diversified global mining company, which was established in South Africa in 1917. While Anglo American plc operates in numerous geographies in the world, the operations in South Africa still represent a material portion of Anglo American. Strategic assets owned by Anglo American in South Africa, represented by percentage owned, are the following:

| ASSET | % OWNED IN 2015 |
|---|---|
| Anglo American Platinum | 79.9% |
| Kumba Iron Ore | 69.7% |
| Coal South Africa | 100% |
| De Beers Consolidated Mines | 62.9% |
| Samancor Manganese | 40% |
| Exxaro | 9.7% |

Anglo American, for purposes of these submissions, includes the following businesses in South Africa:

- Anglo American Platinum Limited;
- Anglo American's Coal South Africa Division;
- Kumba Iron Ore Limited; and
- De Beers in South Africa (DBCM – 62.9%; DBGS – 85%) Note: De Beers Group Services is a company housing Group Services, RSA Exploration, De Beers Marine,

## 1. Introduction

1.1 On 22 July 2015, the Promotion and Protection of Investment Bill, 2015 ("**the Bill**") was introduced to Parliament by the Minister of Trade and Industry. On 5 August 2015, the National Assembly's Portfolio Committee on Trade and Industry ("**the Committee**") invited public comments on the Bill by 25 August 2015. The Committee is accordingly requested to consider these written submissions and to grant an opportunity to present oral submissions on the Bill at the public hearings on the Bill on 9 September 2015.

1.2 These submissions seek to ensure that the Bill is compatible with South Africa's international law obligations, as well as the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"). Beginning with a brief outline of the relevant background to the Bill, the submissions indicate that South Africa's legislative framework for investment is antiquated and inadequate. While the Bill was introduced to modernise and clarify this framework, it does not in fact achieve these objectives.

1.3 These submissions demonstrate that the Bill, in its current form, is incompatible with modern international law and is inconsistent with South Africa's obligations as a member of the Southern African Development Community ("**SADC**"). Changes to the Bill are proposed in order to modernise it and into harmony with South Africa's international law commitments.

## 2. Background

2.1 Historically, in customary international law, a foreign investor who was wronged by the state in whose territory such investor had invested (the host state) could seek redress only in the domestic law and courts of that host state. If that resulted in a "*denial of justice*", the state from which the investor derived their nationality (the home state) had the sovereign prerogative to exercise diplomatic protection over the investor, by exerting bilateral pressure on the host state, through inter-state arbitration

or more traditional diplomatic, economic or even military countermeasures.[1] The injured investor, however, had no international recourse against the host state, as diplomatic protection fell exclusively within the prerogative of the home state and was exercised to vindicate only its own sovereignty.[2]

2.2 Against a history of injustice and inconsistency in the exercise of diplomatic protection, international investment law developed the facility for foreign investors to seek redress directly from the host state, *without* the direct involvement of the home state. This had the effect of "*internationalising*" the legal relationship between host states and foreign investors,[3] which relieved participating states from three competing political pressures:[4]

(a) the *horizontal* tension between the home state and the host state;

(b) the vertical tension between the *home state* and *its* nationals, whose requests for diplomatic protection may contradict or complicate its foreign policy; and

(c) the vertical tension between the *host state* and *its* nationals, whose democratic demands may be frustrated by diplomatic concessions extracted by an influential home state.

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1 The classic text is by EM Borchard, *The Diplomatic Protection of Citizens Abroad* (1916), while the most authoritative work is a draft codification by the International Law Commission, *Draft Articles on Diplomatic Protection* (2006). For the South African application of the doctrine, see *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) ("***Kaunda***"), paras 26-27; *Van Zyl v Government of Republic of South Africa* 2008 (3) SA 294 (SCA) ("***Van Zyl***"), para 1; *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) ("***Von Abo***"), para 21.

2 See *Case Concerning Barcelona Traction Light and Power Company Limited (Belgium v Spain)* 1970 (46) ILR 178 (ICJ), paras 78-79. *Van Zyl* and *Von Abo* (*ibid*) both concerned South African nationals whose foreign investments (in Lesotho and Zimbabwe respectively) had been expropriated, and who unsuccessfully petitioned the South African government to exercise diplomatic protection on their behalf.

3 UNCTAD, *Series on Issues in International Investment Agreements: Dispute Settlement - Investor-State* (2003) p 13.

4 See: the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 ("**Washington Convention**"), article 27 of which precludes state parties from resorting to diplomatic protection; *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision on Jurisdiction, 17 June 2005, para 29.

2.3 Through a growing global "*network*" of international investment agreements, principally bilateral investment treaties ("**BITs**")[5] and the Washington Convention,[6] states created international standards for the treatment of foreign investors, who could enforce those standards directly ('diagonally') through international arbitration against the host state.[7] Through these developments, the rule of *realpolitik* (in the *ancien régime* of diplomatic protection) was progressively superseded by the rule of law.[8]

2.4 Since 1994, South Africa has signed 45 BITs, 22 of which have entered into force, but has never signed the Washington Convention, despite a strong recommendation by the South African Law Commission (headed by the late Chief Justice Ismail Mahomed) in 1998, that "*South Africa should follow the example of most other African countries and ratify the Washington Convention, as this would create the necessary legal framework to encourage foreign investment and further economic development in the region*".[9] It has recently emerged that the government adopted this recommendation but mistakenly believed that it had to wait for a formal invitation to join the Washington Convention,[10] with the result that South Africa's legislative framework for international investment protection, which was found by the Law Commission to be "*outdated and inadequate*" in 1998,[11] is now only more so, some seventeen years later.

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5 According to the most recent report by the United Nations Conference on Trade and Development ("**UNCTAD**"), *World Investment Report 2015: Reforming International Investment Governance* (24 June 2015), p 106, by the end of 2014, worldwide foreign investment was governed by 3,236 international investment agreements (2,926 BITs and 345 other treaties).

6 To date, the Washington Convention has been signed by 159 states, 151 of which have also ratified it.

7 According to UNCTAD, *IIA Issues Note No. 1: Recent Developments in Investor-State Dispute Settlement*, April 2014, pp 1 and 7, by the end of 2013, 98 states had been respondents in a total of 568 known international investor-state disputes.

8 See Santiago Montt, *State Liability in Investment Treaty Arbitration* (2009), pp 1-3 & 15; Gus van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law", 17(1) *European Journal of International Law* 121 (2006).

9 South African Law Commission, *Report: Project 94 - Arbitration: An International Arbitration Act for South Africa* (July 1998) ("**Mahomed Report**"), p 22.

10 See Deputy Minister of Justice and Correctional Services, John Jeffery MP, *Speech at the Establishment of the China-Africa International Arbitration Centre* (17 August 2015).

11 See Mahomed Report (n 9), p 23 para 1.1.

2.5 South Africa did, however, take significant steps to modernise its investment protection regime by signing and ratifying the SADC Protocol on Finance and Investment, 2006 ("**the SADC Protocol**").[12] With the objective of enhancing and harmonising regional investment laws, the SADC Protocol guarantees similar standards of protection as the Washington Convention,[13] save that foreign investors may only resort to international arbitration after exhausting any available remedies in the courts of the host state.[14]

2.6 Around the same time, the Department of Trade and Industry ("**DTI**") undertook a study of South Africa's policy framework for investment protection, which it completed in 2009,[15] finding that South Africa's "*current BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for development*",[16] and concluding that South Africa "*should review its BIT practices, with a view to developing a model BIT which is in line with its development needs, balancing the need for investor certainty on the one hand, but also ensuring that its own legitimate interests are not compromised*".[17]

2.7 South Africa then engaged actively in the development of a SADC Model BIT Template ("**the SADC Model BIT**"), which was completed in July 2012.[18] The SADC Model BIT is aimed assisting SADC states in negotiating more balanced BITs, while

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12 The SADC Protocol was signed by SADC heads of state (including South Africa's President Mbeki) on 18 August 2006, ratified by the South African Parliament on 19 June 2008 and entered into force on 16 April 2010.

13 Annex 1 to the SADC Protocol obliges South Africa: to create favourable conditions to attract investment and a predictable investment climate (article 2(2)); not to modify, arbitrarily or without good reason, undertakings given to investors at the time of investment (article 2(3)); not to nationalise or expropriate an investment, except for a public purpose, under due process of law, on a non-discriminatory basis, and subject to prompt, adequate and effective compensation (article 5); to accord investors and investments fair and equitable treatment, no less favourable than the treatment accorded to investors from any other state (article 6); to promote predictability, trust and integrity through transparent investment policies, practices, regulations and procedures (article 8); and to pursue regional harmonisation of investment regimes, in accordance with best practices.

14 See article 28 of Annex 1 to the SADC Protocol.

15 DTI, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper*, June 2009 ("**DTI Review**").

16 *Ibid*, para 10.1.

17 *Ibid*, para 10.2.2.

18 SADC, *Model Bilateral Investment Treaty Template with Commentary* (July 2012), appended to these submissions and available online: http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf. See also UNCTAD, *SADC moving forward on model bilateral investment treaty template* (5 August 2012).

harmonising their respective investment regimes in accordance with the SADC Protocol.[19] The DTI has also itself engaged prominently in the recent movement, led by UNCTAD, to reform the current international investment law regime into a more transparent, consistent and development-oriented version of itself.[20]

2.8 In November 2013, after giving notice to terminate several BITs with European Union members, including the United Kingdom,[21] the DTI published its first draft of the Bill,[22] describing it as "*a significant milestone in the process to update and modernise South Africa's legal framework to protect investment in South Africa*", as well as stating that it "*clarifies standards of protection for investors - both foreign and domestic - by setting out provisions ordinarily found in BITs in a manner that is consistent with South Africa's Constitution and existing legal framework*".[23]

2.9 It is respectfully submitted, however, that the Bill does not achieve any of its objectives and in fact does quite the opposite. Far from *modernising* South Africa's legal framework for investment protection, it makes it intrinsically incompatible with modern international investment law, including the SADC Protocol. And rather than *clarifying* the standards of protection ordinarily found in BITs, the Bill only obscures and occludes them, and is thus inconsistent with several specific provisions of the SADC Protocol itself, as well as the SADC Model BIT.

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19 SADC Model BIT, p 3.

20 See, e.g., UNCTAD, *Report of the Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead* (17 April 2015); UNCTAD, *Investment Policy Framework for Sustainable Development* (28 July 2015)

21 South Africa has publicly given notice to terminate its BITs with: Belgium-Luxembourg on 7 September 2012; Spain on 23 June 2013; the United Kingdom on 31 August 2013; Germany on 23 October 2013; Switzerland on 30 October 2013; and The Netherlands on 1 November 2013.

22 General Notice 1087, Government Gazette 36995, 1 November 2013.

23 DTI, *Statement on the Promotion and Protection of Investment Bill, 2013*, 4 November 2013.

## 3. Inherent incompatibility with the SADC Protocol

3.1 The SADC Protocol is binding on South Africa internationally and constitutionally.[24] It promises protection to foreign investors from *any state* in the world, not only from other SADC states. Consistent with modern international investment law, the SADC Protocol "*internationalises*" the relationship between the host state and its foreign investors, by creating a set of investor rights that are *fixed* at the international level (and thus cannot be unilaterally changed at the national level by a host state), and are *enforceable* at the international level (if the host state's national courts do not or cannot provide remedies for alleged breaches of such rights). This is overwhelmingly regarded as "*essential to a regime of protection of foreign direct investment*".[25]

3.2 By removing the defining international character of investment protection, the Bill would deprive South Africa of its only international law defence against *diplomatic protection* by the home states of foreign investors who claim to have been wronged - an arena in which disputes are settled purely according to political advantage and leverage, with no precedents or rules of procedure, as well as insight or oversight by the citizenry.

3.3 While it aims to establish technical equality between foreign and local investors, the Bill overlooks the fact that domestic law, by its very design, *differentiates* between citizens and foreigners. In this regard, it is a critical feature of all national constitutions that citizens bear certain political, economic and social rights which by definition do not extend to non-citizens.[26] Significantly, citizens are exclusively entitled to representation in legislative bodies, which are ultimately responsible for enacting

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[24] See section 231 of the Constitution; *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), paras 27 and 69.

[25] *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision on Jurisdiction, 17 June 2005, para 29. See also *Eastern Sugar BV v The Czech Republic*, UNCITRAL, Partial Award, 27 March 2007, para 165; *Mafezzini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para 54; *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006, para 57.

[26] Under the Constitution, citizens are exclusively vested with: the right to make political choices and to participate in elections for legislative bodies (section 19); the right to enter, remain in and reside in the Republic (section 21(3)); the right to choose a trade, occupation or profession freely (section 22); and the right to equitable access to land (section 25(5)).

government policy into legislation and overseeing the implementation of government policy by the executive.

3.4 A further crucial differentiation is that foreign investors are not included in the "*public interest*" which the host state is constituted to promote and protect. The state has "*the constitutional power to redefine and readjust the relationship between private interests and the public interest*", and "*the constitutional duty to allocate burdens and benefits across society in its permanent quest for the public good*".[27] This is the essence of the state's right to regulate, but it begs a vital question: "*Which burdens that are justified by the public interest must, nevertheless, not be borne by foreign investors?*"[28]

3.5 This question is particularly acute in South Africa, where (as the Constitutional Court has clarified), "*in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others*".[29] Yet foreign investors are not "*members of the community*" and to cause the constitutional project to "*weigh more heavily*" on them is to accord them all of the burdens of citizenship, but none of the advantages.

3.6 As foreign investors are subject to a regulatory process in which they have no civic say, in pursuit of regulatory goals in which they have no civic stake, it is doctrinally incorrect to treat foreign and local investors in exactly the same way. The stability and special protection accorded to foreigners under international investment law is informed and justified precisely by their exclusion from the civic life of the host state. It is designed to insulate them from, and compensate them for, the increased burdens

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27 Montt (n 8), p 7.

28 *Ibid*, p 26.

29 See *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (CC) ("***Bel Porto***"), para 7. See also section 9(2) of the Constitution; *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) ("***Van Heerden***"), para 44; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) ("***Bato Star***"), para 76; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

and decreased benefits necessarily given to them by the host state in its pursuit of the public interest.

3.7 The Bill itself offers no stability or special protection for foreign investors. It purports to limit their rights and remedies to a domestic statute which can be amended or repealed by the host state at any time, and which is, in any event, "*subject to other applicable legislation*".[30] The Bill does not add any rights or remedies to those already entrenched in the Constitution, and it is therefore at best superfluous - one of its aims is simply "*to confirm the Bill of Rights in the Constitution and the laws that apply to all investors in the Republic*".[31] Ultimately, however, the premise and purpose of the Bill is not merely confirmation of the Constitution but rather the domestication or *de-internationalisation* of investment protection.

3.8 This is fundamentally at odds with the SADC Protocol, which is an international treaty which South Africa has signed and ratified, as well as the SADC Model BIT, which presupposes the existence and enhancement of international treaties regulating investment protection. The Bill is thus squarely at odds with South Africa's obligations under the SADC Protocol, to harmonise its investment law with that of other SADC states, as well as with the objectives of SADC as a whole.[32]

## 4. Specific inconsistencies with the SADC Protocol

As well as being inherently incompatible with the SADC Protocol (and modern international investment law as a whole), the Bill is further inconsistent with several specific provisions of the SADC Protocol and the SADC Model BIT which South Africa played a prominent role in developing. This is so particularly in respect of the Bill's provisions on qualification for protection; regulatory reliability; expropriation, as well as dispute settlement.

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30 See clause 10, as well as clauses 5, 6(2), 7(1), 11(1) and 12(4) of the Bill.

31 See clause 4(d) of the Bill

32 See article 3 of the SADC Protocol.

4.1 **qualification for protection**

4.1.1 The Bill defines "*investor*" as "*an enterprise making an investment in the Republic regardless of nationality*", and in turn defines "*enterprise*" as "*any natural person or juristic person, whether incorporated or unincorporated*".[33] But the threshold to qualify for the Bill's protection is contained in the definition of "*investment*":[34]

> (a) *any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit;*
>
> (b) *the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or*
>
> (c) *the holding, acquisition, or merger with another enterprise outside the republic, only in so far as such holding, acquisition or merger with another enterprise outside the Republic has an effect on an investment in the Republic.*

4.1.2 The Bill does not define "*lawful*", "*resources of economic value*" or "*a reasonable period of time*", and thus it is impossible to determine which investors may qualify for the Bill's protection. The Bill also warns that investments must be established "*in compliance with the laws of the Republic*".[35] The meaning of this is unclear, and thus so is the scope of the Bill's protection.

4.1.3 Significantly, the Bill does not provide any definition of "*foreign*", despite singling out "*foreign investors*" in key provisions.[36] It is unclear, for example, whether a locally registered company would be considered foreign if it is wholly, mostly or even partly owned, controlled or financed by entities registered or resident in a foreign country. It is crucial that this concept is defined, particularly in view of the background to the Bill.

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33 See clause 1 of the Bill.

34 See clause 2 of the Bill.

35 See clause 6(2) of the Bill.

36 See clauses 6, 7, 8, 10 and 12 of the Bill.

4.1.4 It is submitted that the Bill should follow the guidance in the SADC Model BIT in determining meaningful definitions and a clear set of criteria to qualify for foreign investment protection.[37]

4.2 **regulatory reliability**

4.2.1 The Bill does not contain any provision for "*fair and equitable treatment*", which is guaranteed under the SADC Protocol,[38] and essentially requires the maintenance of a transparent and predictable regulatory environment and protects investors from arbitrary or abusive conduct by host states.[39] At South Africa's insistence,[40] the SADC Model BIT expands the SADC Protocol's terse description as follows:[41]

> *5.1. The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice] [due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].*
>
> *5.2. Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.*
>
> *5.3. Administrative decision-making processes shall include the right of [administrative review] [appeal] of decisions, commensurate with the level of development and available resources at the disposal of State Parties.*
>
> *5.4. The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.*

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37 See SADC Model BIT, pp 8-14. The Model sets out the following three options based on international best practice, explaining the advantages and disadvantages of each: an enterprise-based approach, a closed-list asset-based approach, and an open-list asset-based approach. The SADC Protocol itself (article 1(2) of Annex 1) prescribes the latter option.

38 See article 6(1) of Annex 1 to the SADC Protocol.

39 See UNCTAD, *Series on Issues in International Investment Agreements: Fair and Equitable Treatment* (2011).

40 See SADC Model BIT, p 24.

41 SADC Model BIT, p 23.

> *5.5. State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.*

4.2.2 The Bill, however, contains no such guarantees. On the contrary, the Bill grants "*any organ of state*" extraordinarily wide and unguided powers under the "*right to regulate*".[42] The Bill empowers the state to "*take measures*" to achieve an open list of public goods (such as "*financial stability*" and "*essential security*"), without defining, directing or delimiting the power in any way. These provisions of the Bill are at best superfluous and at worst a blank cheque for regulatory intervention, which contravenes the rule of law and is accordingly unconstitutional.[43] They are, with respect, the very antithesis of a guarantee of fair and equitable treatment, which is one of the pillars of international investment law, and a binding obligation under the SADC Protocol.[44]

4.3 **expropriation**

4.3.1 The Bill provides that "*investors have the right to property in terms of section 25 of the Constitution*".[45] While this is unobjectionable, it is important that it cannot be interpreted to exclude the expropriation guarantees under the SADC Protocol:[46]

> *Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.*

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42 See clause 11 of the Bill.

43 *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), paras 42-58. See *Janse van Rensburg and Another v Minister of Trade and Industry and Another* 2001 (1) SA 29 (CC), para 29: "*it is inappropriate that the Minister [of Trade and Industry] should be able to exercise an unfettered and unguided discretion in situations so fraught with potentially irreversible and prejudicial consequences to business people and others who may be affected*".

44 See article 6(1) of Annex 1 to the SADC Protocol.

45 See clause 9 of the Bill.

46 See article 5 of Annex 1 to the SADC Protocol.

4.3.2 There are two important differences between the standards of property protection under the SADC Protocol and section 25 of the Constitution. First, expropriation under international law is not limited to direct acquisition of property by the state, but extends to *indirect or constructive* expropriation (measures that neutralise the economic value of an investment through measures other than direct state acquisition).[47] Such expansive scope is not expressed in the Constitution and in fact has been explicitly *rejected* by the Constitutional Court.[48] Accordingly, any measures *short of direct acquisition by the state would not require compensation* at all, although they may be set aside as unconstitutional if they are arbitrary (i.e. irrational or grossly disproportional).[49]

4.3.3 Secondly, the SADC Protocol, employing the so-called "*Hull formula*" of "*prompt, adequate and effective compensation*",[50] requires compensation to amount to the market value of the expropriated investment, and to be paid at or prior to the date of expropriation.[51] The Constitution, however, requires only that the amount, time and manner of compensation be "*just and equitable*", which makes market value only one factor in the balance between the investor's interest and the public interest. The amount of compensation may thus be less than market value,[52] and it may be quantified and paid after the expropriation has already occurred.[53]

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47 See article 5(1) of the SA-UK BIT.

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

49 See section 25(1) of the Constitution.

50 See article 5 of Annex 1 to the SADC Protocol.

51 See generally UNCTAD, *Series on Issues in International Investment Agreements II: Expropriation* (2012); as well as *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 8.2.10; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, para 353.

52 See, e.g., AJ van der Walt, "Reconciling the State's Duties to Promote Land Reform and to Pay 'Just and Equitable' compensation for expropriation ", 123 *SALJ* 23 (2006)

53 See *Haffejee NO and Others v eThekwini Municipality and Others* 2011 (6) SA 134 (CC).

4.3.4 It is submitted that, as the Bill must be interpreted "*in a manner that is consistent with*" the SADC Protocol,[54] and that any court interpreting section 25 of the Bill of Rights "*must consider international law*",[55] the amount of "*just and equitable*" will necessarily be market value where a foreign investor endures expropriation. This should, however, be made much clearer in clause 9 of the Bill itself.

4.4 **dispute settlement**

4.4.1 The Bill's definition of "*dispute*" limits it to a claim by an investor that the state has allegedly breached "*the protection provided for in this Act*".[56] Inexplicably, this is limited further by the proviso that "*a dispute will only arise once the parties agree, or as prescribed by the law*", which does not make legal sense. It is not apparent why any specific definition is required (there is no definition of "*dispute*" in either the SADC Protocol or the SADC Model BIT), and thus it may safely be omitted.

4.4.2 The Bill provides that "*the government may consent to international arbitration… with the home state of the applicable investor*".[57] This is, at best, superfluous, as *state-state* arbitration has always been available in customary international law, as an incident of diplomatic protection. By excluding *investor-state* international arbitration, the Bill defeats the defining feature of international investment law, for the reasons set out in detail above.

4.4.3 Under the SADC Protocol, a foreign investor may refer any investment dispute against South Africa to international arbitration under the rules of ICSID or the United Nations Commission on International Trade Law ("**UNCITRAL**"),[58] if all

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54 See clause 3(c).

55 See section 39 of the Constitution.

56 See clause 1 (*sv* "dispute") of the Bill.

57 See clause 12 of the Bill.

58 Under the SADC Protocol, disputes may also be resolved at the SADC Tribunal. However the Tribunal's activities were suspended in 2011 after delivering an adverse judgment against the Government of the Republic of Zimbabwe in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADC 2 (28 November 2008).

available domestic remedies have first been exhausted.[59] South Africa is thus *obliged* to submit to investor-state international arbitration in such circumstances. This is contradicted by the Bill's provision that South Africa "*may consent*" to state-state arbitration only.

4.4.4 In this respect, the Bill's premise - that foreign investment disputes are *capable* of being confined to domestic legal and judicial systems - is not only inconsistent with international investment law but indeed incompatible with South Africa's own constitutional architecture. In South Africa, as in most, if not all, other domestic jurisdictions, public control of regulatory authority is primarily *political* (exerted by citizenry over the legislature and, in turn, by the legislature over the executive), rather than judicial. The role of the courts in restraining or rectifying the errant exercise of regulatory power by executive and legislative authorities is delimited by the doctrine of the separation of powers.[60]

4.4.5 The courts cannot trench 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. Courts are particularly reluctant to assume authority over the "*policy-laden and polycentric*" decisions that fall within the expertise and experience of executive and legislative functionaries.[61]

4.4.6 Typically, this description would apply to major executive and legislative decisions about the economic direction of the country and related regulatory interventions in industry. Thus the Constitutional Court has held that "*the power to formulate and implement domestic and international trade policy resides in*

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[59] See article 28(1) of Annex 1 to the SADC Protocol: "*Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.*"

[60] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ("***ITAC***"), para 91; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC), para 38; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), para 90; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 48.

[61] See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), para 68; *ITAC*, para 95.

*the heartland of national executive authority*"; that "*courts are not well suited to judge international trade policy and related polycentric decisions properly suited to specialist bodies*"; and that they "*may not without justification trench upon the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the constitution for the national executive*".[62]

4.4.7 Accordingly, the Bill's assumption that investor-state disputes could, let alone should, be dealt with by domestic courts is misconceived. The doctrine of the separation of powers precludes the courts from second-guessing the substance of regulatory decisions, which would exclude many, if not most, investor-state disputes from substantive judicial protection.[63]

4.4.8 The Bill's proposed scheme of limiting foreign investors to the domestic judicature would thus place South Africa's courts in the invidious (and constitutionally inappropriate) position of entering the realm of economic and foreign policy.[64] It is submitted that this clause in the Bill would impose an intolerable strain on the separation of powers, and is thus incompatible with our constitutional scheme, as well as inconsistent with the SADC Protocol.

## 5. CONCLUSION

5.1 In order to ensure that the Bill achieves the DTI's articulated policy goals of bringing modernity and clarity to South Africa's legislative framework for international investment protection, it is essential that it is brought into harmony with the SADC Protocol, and is accompanied by a schedule incorporating the SADC Model BIT, together with guidance for its use in negotiations.

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62 *ITAC*, paras 44 and 99-104; see also *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC), para 33, where the Court remarked that the judiciary should not "*second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination*".

63 More often than not, foreign investors would be compelled to seek diplomatic protection from their home states, at which point the focal point of inquiry, under the "*denial of justice*" criterion for diplomatic protection, would be the competence and independence of the South African courts, rather than the regulatory measures under challenge. See Montt (n 8), pp 17-19.

64 See *Kaunda* (n 1), paras 77 and 172, regarding the courts' reluctance to tread into foreign policy.

5.2 It is submitted that the Bill can only meet its objectives by manifesting a recommitment to the SADC process of investment promotion and protection, through providing for the improvement of South Africa's BITs by renegotiation, where necessary, in accordance with the SADC Model BIT.

5.3 The Committee is requested to grant an opportunity to present oral submissions on the Bill at the public hearings on 9 September 2015, in order to amplify and answer any questions arising from these written submissions.