



SUBMISSION

concerning the

**BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW
GOVERNMENT POSITION PAPER**

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Principal author: Julie Maupin¹

Contributing author: Malcolm Langford²

Comments by: Angela Andrews,³ Jason Brickhill⁴ and Dr. Jackie Dugard⁵

¹ Independent consultant to the Legal Resources Centre, Juris Doctor (law) and MA (economics), Yale.

² Research Fellow, South Africa Programme, and Director of the Socio-Economic Rights Programme, Norwegian Centre for Human Rights.

³ Staff attorney, Legal Resources Centre.

⁴ Staff attorney, Constitutional Litigation Unit, Legal Resources Centre.

⁵ Senior Researcher, Centre for Applied Legal Studies.

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1. Introduction

The Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALS) commend the DTI for its excellent work in collating and reviewing South Africa's past and present policies concerning bilateral investment treaties (BITs). The review upon which these comments are based is thorough, frank, and critical. It displays a concern for and sensitivity to the myriad public interest issues raised by the negotiation, adoption, interpretation, and enforcement of international investment agreements in the 21st century.

We are pleased to provide comments on the DTI's review paper ("the review"). The purpose of these comments is primarily to shed further light on some of the public interest concerns that must be addressed by the Government in its ongoing efforts to review and revise its policies on foreign direct investment (FDI), particularly those that impact upon human rights, sustainable and equitable development, and environmental preservation. Many comments are technical in nature and have therefore necessitated the use of technical language. However, all of the below comments are offered in the hope of improving the compatibility of South Africa's investment treaties and policies with its constitutional values and commitments, in service of all people living in South Africa.

In essence, we recommend that the Government should:

- a) build its own internal capacity and policy coherence on the topic of investment, taking the protection and promotion of human rights and sustainable development as the point of departure for all future policymaking;
- b) carefully consider what type of investment treaties or other investment policies (whether in the form of BITS, trade agreements, or domestic legislation) are most capable of attracting and retaining foreign investment while also respecting South Africa's constitutional objectives, international treaty obligations, and public policy goals; and
- c) cautiously evaluate what type of dispute settlement mechanisms are best suited to accomplishing the above objectives.

2. General Observations on the Need for an Overarching Investment Policy Strategy

We are in agreement with the review's conclusion that a new overarching investment policy strategy is needed to span all of South Africa's investment-related policy efforts. The following paragraphs provide a few general observations in relation to this new policy.

2.1 Areas of focus within the overarching investment policy document

The DTI review mentions several broad areas that should be addressed within an overarching investment strategy document, such as industrial policy, trade policy and foreign relations policy. The review does not however list any areas of focus in detail. An exhaustive list of areas for inclusion should be developed by the Government, in consultation with business and civil society. This will help to ensure that all key investment-related areas are included in the new overarching investment policy and that no areas which may be affected by the new policy will be inadvertently overlooked.

Areas we would particularly like to see included within the new policy are:

- a) The protection and promotion (within the context of investment policy) of human rights, including economic, social and cultural rights as well as civil and political rights;
- b) Strict adherence to all of the provisions and values of the Constitution, with a focus on the strategic utilisation of investment in pursuit of the foundational values of equality, human dignity, and freedom;
- c) A comprehensive strategy for sustainable and equitable development geared towards poverty alleviation, socio-economic transformation, human development, and environmental protection and preservation;
- d) A bilateral, regional, and multilateral integration plan which mandates and facilitates the incorporation of all of the above areas into any further investment-related or other economic integration efforts to be undertaken by the Government in future, both with developed and developing country partners (whether through the conclusion of trade agreements, customs unions, economic partnership

agreements, or treaties relating to taxation, competition, government procurement, the protection of intellectual property, or otherwise).

We submit that any new overarching investment policy which fails to incorporate these concerns in a comprehensive, progressive and strategic manner will not only fail to serve the needs of South Africans – both in terms of economic development and human development – but may even run the risk of being constitutionally insufficient.

2.2 Centralised coordination and oversight

We commend the review’s frank accounting of the lack of coordination between various Government departments, which has characterised the Government’s investment policymaking efforts to-date. Given the myriad problems identified in the review in consequence of this lack of coordination, the Government should develop a concrete and well-structured method for streamlining the efforts of the various Government departments. While a start has been made to this task in the course of the preparation of the DTI review document, we submit that the completion of the process will require:

- a) a thorough mapping of all government departments whose mandates or activities touch on investment, including those dealing with industrial, trade and foreign relations policies;
- b) a chronicling of the individual offices involved and their respective roles and responsibilities in relation to investment; and
- c) an understanding of the interrelationships between all of these offices and officials.⁶

Once this mapping is complete, the Government should consider ways of bringing all of the various players identified within a central organising umbrella. This organising structure should be clearly delineated and overseen through a centralised reporting structure or “chain of command”. The history of South Africa’s investment policy efforts

⁶ Ideally such a mapping would include not only written descriptions of the various offices and their functions, but also a flow chart or other such diagram providing an “at a glance” overview of how all of the offices inter-relate.

to-date, as summarised in the review, has shown that loose, ill-defined mutual cooperation mechanisms are not sufficient to ensure coherence between all of the offices' individual efforts and will not be effective in achieving universal compliance with the Government's new overarching investment policy. The Government should therefore consider which department (likely DTI) is best placed to serve this central organising function and how the relevant sub-department might need to be re-organised in order to carry out this task in the most efficient manner.

2.3 Capacity building requirements

Ongoing strategic planning, evaluation, and monitoring efforts are crucial to the success of any overarching investment policy. For this reason, the Government will need to invest in capacity building in order to equip the relevant government departments and the central organising structure to implement the new policy. In this regard, the DTI should consider recruiting and hiring dedicated experts to staff the central organising structure. Such experts could provide the necessary oversight for the new policy while also training the relevant departments in various aspects of the policy and reporting routinely to Parliament and the Cabinet on the success or failure of the policy with respect to its key objectives. The expert team should ideally be comprised of:

- a) qualified (doctoral level) economists specialising in investment issues, preferably a mix of theorists and empiricists, at least one of which should be a development economist; and
- b) qualified experts in international economic law (masters or doctoral level), preferably at least one specialising in international investment law, one in international trade law, and one in the international law on sustainable and equitable development.

In addition, the Government should identify and train one or two human rights experts, perhaps within the South African Human Rights Commission, who can be tasked with providing feedback on the human rights aspects of any new investment policy or treaty to be vetted in future.

3. Specific Observations Concerning the Macro Policy Framework

In addition to the general observations outlined above, particular details contained in Part I (“Macro Policy Framework”) of the review merit special comment. These are highlighted in the following paragraphs.

3.1 The utility of BITs and the need to explore all options

The review notes that “[i]t is uncertain whether a direct correlation exists between FDI and the conclusion of BITs. FDI has many determinants and BITs may account for at least one of them, namely legal certainty.”⁷ In this regard, we draw attention to the results of the 2005 Africa Foreign Investor Survey, carried out by the United Nations Industrial Development Organisation (UNIDO), in which investors cited the following as their top criteria when selecting an investment destination (in order of importance):

1. Economic stability
2. Political stability
3. Physical security
4. Local market
5. Skilled labour
6. Quality of infrastructure
7. Legal framework

It is noteworthy that “legal framework” appears only 7th on the list, and even then, the survey participants may have cited it in reference to the *domestic* legal framework. More striking still is that the existence of trade agreements between the target investment country and other countries ranks only 19th on the list, and the availability of government investment promotion programmes ranks even lower at number 20. These rankings seem to comport with the results of several empirical studies which have produced generally ambivalent and sometimes conflicting conclusions regarding the usefulness of BITs in attracting foreign investment.⁸ The inconclusive empirical data as to the utility of BITs

⁷ DTI Review at section 6.1.

⁸ See eg, Eric Neumayer and Laura Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” (2005) in *World Development* 33, pp 1567-1585; Jason W Yackee,

cautions against adopting an over-emphasis on BITs in any new overarching investment policy. No matter how well crafted, BITs cannot serve as the sole or even central element of a successful national investment strategy.

Even so, dismissing outright the usefulness or at least the perceived importance of BITs would be inadvisable. As the review notes, the entrenchment of BITs in the global economic system is both broad and deep. More than 2600 BITs have come into existence since the 1950's, with most countries maintaining numerous BITs. By some reports, South Africa has itself negotiated more than 40 such treaties.⁹ And while investors do not cite the existence of BITs as a top factor in making their investment location decisions, some studies have suggested that BITs nevertheless serve an important “signalling” function – essentially making investors more comfortable with the investment decisions they would have reached based on other factors.

One legitimate policy option identified by the review is for South Africa to cease to conclude or persist with the use of BITs *at all*. We caution, however, that it is conceivable that a *sudden* and *permanent* refusal by South Africa to enter into any new BITs or to revoke, cancel, or refuse to renew all existing BITs could cause panic among investors and provoke capital flight – a possibility which South Africa cannot afford to risk. On the other hand, a graduated reduction in the proliferation and/or renewal of traditional models of BITs is an option which merits consideration. Such a gradual shift in policy would be less likely to cause capital flight, and therefore less likely to impact negatively upon the South African economy

“Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital” 2006 USC Center in Law, Economics and Organization Research Paper No. C06-15 at 31, available at: http://law.usc.edu/academics/assets/docs/C06_15_paper.pdf; Susan Franck, “Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law” *19 Pac McGeorge Global Bus. & Dev L.J.* (2007) at pp 348–353 (surveying the empirical literature, including studies by Hallward-Dreimer, Rose-Ackerman and Tobin, UNCTAD, Salacuse and Sullivan, Neumayer and Spess, and Swenson, on the topic of how investment treaties affect foreign investment).

⁹ L. Peterson, ‘Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration’, International Centre for Human Rights and Democratic Development, 2009, Volume 3 of *Investing in Human Rights* series, available at: <http://www.dd-rd.ca/site/PDF/publications/globalization/HIRA-volume3-ENG.pdf>.

While the DTI review successfully identifies some of the problems inherent in past and present generations of BITs, it does not actually examine the potential alternatives that are open to the Government in addressing these problems. An exhaustive listing of options and a discussion of their respective advantages and disadvantages is beyond the scope of the present comments but should, we submit, form part of the Government's BIT review process. Relevant options for consideration may include:

- a) Drafting and adoption of a new model BIT for South Africa. Such a model BIT would need to be drafted carefully in order to respond to the many shortcomings identified in the DTI review and in the writings of numerous academics and civil society organisations. A model BIT would seek to replace all existing BITs, either through immediate renegotiation of existing BITs (where partner countries are amenable to this) or through renegotiation of bilateral investment relations as and when existing BITs expire. This option would continue the present tradition of reciprocal, bilateral investment agreements, but with a significant shift in the terms and emphasis of such agreements so as to take account of South Africa's unique developmental needs and social transformation objectives. Any model BIT should serve to standardise investment relations across multiple bilateral partners. Negotiating parameters (that is, pre-authorised departures from the model text) would therefore need to be clearly defined and bounded so that conflicts between South Africa's commitments under its various bilateral investment treaties and its human rights obligations under international law and the Constitution will not arise again in future.

- b) Drafting and adoption of a unilateral investment protection policy. In lieu of continuing to propagate a patchwork of reciprocal bilateral agreements with various countries, South Africa could opt to offer a standardised set of investment protections to all foreign investors irrespective of the existence of BITs with the investors' home countries. Such a unilateral policy might be viewed as akin to a unilateral offer in contract law, which would become binding upon the Government upon "acceptance" of the offer by a foreign investor (eg the actual

making of a qualifying investment within South Africa). This option would completely harmonise the protections offered to all foreign investors across all nationalities and would obviate the need for any further investment treaty negotiations. Because it would also provide a high degree of certainty, such a policy may well help to stimulate increased FDI into South Africa. In order to operate effectively, the offer would have to be drafted in such a manner as to be considered binding at the level of international law. The obvious drawback of this approach is that it would do nothing to protect the investments of South Africans investing abroad, which the DTI review has rightly identified as an important policy objective. Thus, any unilateral investment protection policy would need to be accompanied by a parallel strategy to ensure similar protections for South African investors abroad by other means.¹⁰

- c) Drafting and adoption of a model investment chapter for inclusion in all future free trade agreements (FTAs). Since trade agreements are increasingly negotiated on a regional, rather than bilateral basis, this option would reduce the number of investment agreements by which South Africa is bound and would increase consistency across those agreements. It would also serve to bring international trade law and international investment law more closely into alignment with one another, thereby promoting a more holistic approach to international economic law at the global level. It is important to note that a model investment chapter for FTAs could either incorporate the option of investor-state dispute resolution (as was done in chapter 11 of the North American Free Trade Agreement) or intentionally omit it (as was recently done in the FTA between the US and Australia). Both options should be fully and carefully deliberated in light of the past experience of South Africa and other countries.¹¹

¹⁰ One possibility would be to include investor protection provisions in future trade negotiations with other countries. South Africa's trading partners might be enticed to accept obligations toward South African investors in exchange for certain market access commitments on the part of South Africa.

¹¹ For further comments on investor-state dispute settlement options, see section 5 below.

- d) Initiation of a new, developing country-driven multilateral investment protection policy. The international community's repeated failure to adopt a suitable multilateral agreement on investment (MAI) is well-known. However, in the years since the OECD's last major attempt, many countries – both developed and developing – have been forced to come to terms with the potential of BITs to unduly constrict governments' policymaking space and governments' ability to regulate their internal affairs in the public interest. Meanwhile, as the DTI review notes, global capital flows have become increasingly complex; they are no longer exclusively one-directional (flowing from developed to developing countries), and increasing inter-linkages between countries' economies have rendered all countries more susceptible to the impact of volatility in the financial markets of other countries.

As a result, it may be that the concerns of developing and developed countries are now much more closely aligned than was the case during the previous failed attempts at negotiating a multilateral investment agreement. A new negotiating agenda, if crafted from a developing country perspective and showing sensitivity to the highly complex interests at stake, may now be welcomed on the world arena. South Africa might consider taking the lead in mobilising a coalition of key developing countries to advocate for and craft such a new MAI agenda. This strategy might be pursued as a longer-term goal in tandem with one of the above-listed strategies for the shorter term.

Three caveats are important: 1) this list is not exhaustive; 2) the above-listed options are not mutually exclusive; and 3) each of the listed options raises complex challenges that should be closely investigated before any policy recommendations are made. Moreover, it is imperative that the evaluation of these and other options include careful scrutiny of the mechanisms available within each option for protecting and promoting human rights as well as sustainable and equitable development, in line with South Africa's constitutional imperatives. Notwithstanding the complexities, we submit that the Government should seize the opportunity created by this BITs policy review to embark

upon this difficult task in the interest of harnessing the power of foreign investment in service of South Africa's developmental needs.

3.2 Need for a comprehensive, publicly available catalogue of all existing BITs

Section 2 of the DTI review states that "the specific working methodology of the team consisted of:

- An assessment of the status of BITs;
- Location and analysis of the texts of same;
- Compilation of a detailed index of BITs concluded, ratified and those under negotiation
- Assessment of policy/strategies informing the conclusion of BITs".

The final review only addresses the last of these four objectives. While anecdotal reference is made to several of South Africa's BITs throughout the review, no index of BITs has been appended and no BITs texts appear to have been published in connection with the review.

In our view, it remains imperative that the Government complete its task by collecting and making publicly available all of South Africa's existing BITs texts without further delay. Ideally, the texts of all of the BITs which South Africa has negotiated or is in the process of negotiating should be made available for download on the DTI's website, along with a routinely updated listing of the respective signing dates and ratification information for each current or prospective treaty. This type of transparency is crucial not only to inform potential foreign investors of their rights and obligations when investing in South Africa, but also to enable government officials, academics, and civil society organisations to critically evaluate the texts and make ongoing suggestions for improvements. As an immediate step, the documents should be released electronically to any interested members of the public so that they can be viewed, analysed, and publicised freely and without delay.

3.3 Regional considerations

The review points out that the African Union has not yet developed an investment policy framework. It also highlights the Protocol on Finance and Investment that has been adopted but not yet ratified by the SADC states and mentions that some of South Africa's present BITs may conflict with the SADC Protocol. A detailed analysis of these conflicts should be undertaken. Because regional integration is a stated policy objective of the Government, we recommend that any new overarching national investment strategy be drafted with all of South Africa's current regional commitments in mind. Any new draft strategy text should be cross-checked against all existing texts and commitments so as to avoid the proliferation of further conflicts between the obligations contained in various legal texts. In addition, the South African national strategy should be drafted in such a manner as to complement regional efforts to promote human rights and human development through economic upliftment across Africa.

3.4 Country-specific considerations

Two country-specific considerations mentioned in the DTI review merit particular comment. First, the review makes reference to the *von Abo* case, in which “diplomatic protection has been raised in the context where no BIT was in place to protect [the] interests”¹² of South African investors investing in Zimbabwe. We note that other investors (in the *Campbell* cases) have turned to the SADC tribunal to challenge the lawfulness of certain land expropriations. Hundreds of other such cases have been brought before domestic courts across Zimbabwe and in other African countries. These cases suggest that diplomatic protection and regional ties may not be sufficient, in and of themselves, to protect South African investors when they invest in other African countries. Many of these cases involve not only unlawful property expropriations, but also other human rights violations, such as forced removals, kidnappings, beatings, harassment, and imprisonment without lawful grounds.

¹² Review at Executive Summary, p 7.

In *Kaunda v President of the Republic of South Africa*,¹³ the Constitutional Court said the following regarding the duty of the South African Government in respect of diplomatic protection to its citizens abroad:

“[69] There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.

[70] There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.”

It is thus imperative that the Government consider all available mechanisms for improving the human rights and property protections offered by other nations to South Africans when investing and traveling abroad. This also speaks to the need for integrated international complaint procedures that protect human rights on an equal footing with investment rights, as will be taken up below.

Second, with respect to the Americas, section 4.2.5 of the review states that there [i]s a need to strengthen economic analysis of relations and also to streamline and focus attention on identified strategic partners.” We suggest that the Canada-South Africa BIT merits particular attention and analysis. This BIT is much more development-friendly than many of South Africa’s other BITs, and by incorporating certain provisions and concepts from WTO law and practice, the BIT also moves investment relations between the two countries into closer alignment with their parallel trade relations. While consistency and coherence between trade and investment commitments are to be desired, the importation of trade law into investment treaties should not be undertaken without careful analysis of the potential consequences. The Government should thus undertake

¹³ 2005 (4) SA 235 (CC).

the analysis recommended in part c) of comment 3.1 above before undertaking any review of the Canada-South Africa BIT or concluding any further BITs based on this model. As an example, Article II of the Canada-South Africa BIT contains a special Most Favoured Nation and National Treatment clause which gives Canadian investors certain “pre-establishment” rights relating to market access under the BIT. The Government should give careful consideration to whether any such “pre-establishment” rights for foreign investors should be included in BITs, or whether they should instead be reserved for FTAs or other similar agreements.

3.5 The special case of sovereign wealth funds (SWFs)

Section 4.2.3 of the review contains a brief discussion of the special considerations raised by investment within South Africa by “Sovereign Wealth Funds” (SWFs). The review identifies “competition-related concerns; sabotage, espionage or impeding the implementation of host country policies; and foreign sovereign immunity” as particular concerns.

In our view, SWFs present unique challenges and may require the adoption of special regulatory mechanisms within the framework of any new overarching investment policy. Not all SWFs are the same. They vary greatly as to: the sources and methods of obtaining the wealth which is managed by the fund; the private versus public administration of the fund; the goals and objectives of the fund; the beneficiaries of the fund, etc. For example, the Norwegian Pension Fund (the largest in Europe and fourth largest in the world) operates under relatively strict ethical guidelines. It has, for example, withdrawn investments from WalMart by reason of WalMart’s failure to respect labour rights and from Rio Tinto (the world’s largest mining company) on the grounds of environmental damage.¹⁴

¹⁴See T. Macalister, “Ethical business: Norway ejects mining giant Rio from its pension portfolio”, *Guardian*, 9 Septmeber 2008. For a list of the twenty six companies that have faced disinvestment, see http://en.wikipedia.org/wiki/The_Government_Pension_Fund_of_Norway. Despite the examples given, some of the Norwegian Pension Fund’s investments remain controversial.

Thus we do not wish to suggest that all SWF funds are inherently suspect. Yet reports have indicated that at least some of the monies managed by certain SWFs may be generated from illicit sources and/or may be acquired through practices which violate international human rights standards. A special policy should therefore be crafted to oversee the inward flow of SWF investments into South Africa. The special SWF regulatory scheme should not unnecessarily impede the ability of legitimate SWFs to invest in South Africa. However, it should ensure that South Africa does not become complicit in any human rights violations by providing a safe haven for monies that were obtained in violation of international human rights law. In crafting a special regulatory mechanism to oversee SWF investments, the Government should review its obligations under several bodies of international law, including: international human rights law, anti-corruption law, anti-money laundering law, and the law on international cooperation in criminal matters. One approach could be to require sovereign wealth funds to emulate the Norwegian model with its system of guidelines and Council of Ethics.¹⁵

4. Observations on BITs Provisions and “Micro Policy Framework”

We have expressed some reservations above as to the necessity of maintaining BITs in their present form given the doubts over whether they serve a principled or instrumental purpose. In the event that South Africa proceeds with some form of BITs or any similar type of international investment agreement, we make the following recommendations as to content.

4.1 Preambular language

The DTI review recommends that parties to BITs “must ensure that the preamble is consistent with the substantive provisions of a BIT. It may be advisable to introduce more specific language into preambles that emphasises the fact that investment promotion and protection should not undermine other key public values and should

¹⁵ See generally, A. Føllesdal, ‘Ethical investment: Workable and Effective? The case of the Norwegian Government Pension Fund’, *Economia Exterior* (2006), English version available at: <http://folk.uio.no/andreasf/ms/Follesdal-2006-politica-exterior.rtf>.

promote sustainable development.”¹⁶ We endorse these recommendations. In addition, all of South Africa’s BITs’ preambles should include specific references to: sustainable and equitable development; human rights (including economic, social and cultural rights); poverty alleviation; socio-economic transformation and the promotion of substantive equality; human development; and environmental protection and preservation. We further recommend that these terms should be concretely defined in each BIT’s definition section (and consistently across BITs) so as to minimise any ambiguity in their interpretation.

4.2 Scope of the investment agreement

The review notes that some recent BITs have “attempt[ed] to clarify the different dimensions of the scope of application of the agreement in one single provision”. We endorse this approach. Such an article should include:

- a) all of the definitions of terms now commonly found in BITs (“investor”, “investment”, “returns”, etc);
- b) the new definitions suggested in paragraph 4.1 above;
- c) any other provisions relating to subject matter jurisdiction and personal jurisdiction, including exceptions and exclusions from coverage;
- d) the territorial coverage of the agreement; and
- e) the temporal application of the agreement.

Consolidating these scope-related provisions into a single article will help to improve both clarity and legal certainty.

4.2.1 Definition of investment

The review rightly recognises that the definition of “investment” included in various BITs has changed over time.¹⁷ However, the review does not go far enough in exploring the contours of what should now be included in a modern definition of investment. The Government should take care not to presume, on the basis of a few more recent examples

¹⁶ Review at p 27, section 3.1.

¹⁷ Review at p 29, section 3.2.3.

of particular BITs, that the debate over what constitutes an investment is now settled. Rather, the definition of investment must be precisely drafted so as to include only the types of investment which the Government decides, after careful deliberation, merit coverage under an international investment agreement. Categories of investment which the Government determines should not be covered should be explicitly disqualified for coverage under the terms of the BIT or other relevant agreement.

There are numerous types of investment which remain controversial and which merit further examination, including:

- a) Assets that are speculative in nature – these must be specifically defined and excepted in order to avoid coverage under BITs.
- b) Property not acquired for economic benefit or business purposes – Luke Eric Peterson has pointed out that non-profit and not-for-profit investments by foreign civil society and philanthropic organisations should be protected on an equal footing with for-profit investments in order to encourage such investors to become more deeply involved in promoting important public policy efforts within South Africa, such as human rights promotion and environmental preservation.¹⁸
- c) Investments by majority (and/or controlling) shareholders versus minority (and/or non-controlling) shareholders – the review notes the debate over various types of “control criteria” that may be made applicable to BITs.¹⁹ This debate should be fully and carefully explored. On one hand, limitations on coverage for shareholders could assist in preventing conflicts between the claims of companies (who may claim BITs protection as juristic persons) and the claims of individual shareholders (who may claim BITs protection as natural persons). Such limitations could be drawn by analogy to the limitations within domestic securities laws, which sometimes prescribe the circumstances in which actions

¹⁸ See Peterson, Human Rights and Bilateral Investment Treaties, above n 9.

¹⁹ Review at p 30-31, section 3.2.4.3.

must be brought directly by a corporation as opposed to when they may be brought as “derivative actions” by shareholders. On the other hand, however, it is important to bear in mind that a corporation wishing to invest in South Africa may experience difficulty in raising the necessary capital if shareholders have no right to bring claims on their own behalf under South Africa’s BITs or other investment policies. These issues should be carefully weighed before any decision on a control criterion is taken.

- d) Ordinary claims to money (eg from sales contracts) – these have historically been interpreted as falling outside the scope of BITs coverage, but some recent investor-state disputes have opened up the possibility that BITs might be interpreted as applying to such claims.²⁰ We would propose their exclusion. Elevating ordinary claims to money into an international treaty violation could have far-reaching consequences for domestic policy concerning debt recovery, insolvency, and the rehabilitation of debtors.
- e) Intellectual property rights that go beyond the provisions of the WTO TRIPS agreement and its exceptions – this issue is likely to become more important as foreign direct investment streams shift from primarily commodities and simple manufacturers to more knowledge-intensive products and services. Any BITs coverage of non-tangible property rights should at a minimum ensure that the WTO-authorized derogations from internationally recognised intellectual property rights (such as those that may be necessary to protect public health)²¹ are not infringed upon by BITs. The UN Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child have increasingly addressed this issue in their observations on periodic reports by state parties. For example, in the case of the Philippines, the Committee on the Rights of the Child stated:

²⁰ See eg *Petrobart Ltd v. the Kyrgyz Republic*, Arbitral Award, Arbitration No. 126/2003 (Mar. 29, 2005), rendered by the SCC Arbitration Institute, available at: <http://www.investmentclaims.com> and 2005(3) STOCKHOLM INT’L ARB. REV. 45–100.

²¹ See the Doha Declaration on the TRIPS agreement.

“58. The Committee finally expresses its concerns at the risk that Free Trade Agreements currently negotiated with some other countries may negatively affect the access to affordable medicines.

59. The Committee recommends that the State party: ... (f) Make use – in the negotiations of Free Trade Agreements – of all the flexibilities reaffirmed by the Doha Declaration and the mechanisms at its disposal to ensure access to affordable medicines in particular for the poor and most vulnerable children and their parents”.²²

A thorough review of the advantages and disadvantages of bringing each of these and other types of investment within the coverage of any BIT or other similar investment agreement is clearly needed before a new definition of “investment” is drafted.

4.2.2 Definition of investor

Like the definition of “investment”, the definition of “investor” presents numerous difficulties which must be further investigated before any new definition is drafted.

4.2.2.1 Indirect shareholders

At present there is no general international law requirement that an investment must be directly held by an investor in order to qualify for coverage under a BIT. This has led to a certain amount of “forum shopping”, in which prospective foreign investors may opt to incorporate a shell company in a country that maintains a particularly favourable BIT with South Africa and then make their investments through that company in order to obtain the protections of that BIT. As an example, the Czech Republic-South Africa BIT contains a special provision exempting Broad-based Black Economic Empowerment measures from certain BIT-based claims. However, a Czech investor who wished to avoid this bar could easily do so by incorporating a shell company in Italy and then

²² *Philippines, Concluding Observations*, U.N. Doc. CRC/C/15/Add.259, 3 June 2005. See also, UN Press Release, *US-Peru Trade Negotiations : Special Rapporteur on Right to Health Reminds Parties of Human Rights Obligations*, 5 July 2004; Caroline Dommen, “Human Rights and Trade: Two practical suggestions for promoting coordination and coherence”, in *Human Rights and International Trade* (Oxford University Press, 2005) (Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi, eds).

challenging the BEE provision under the Italy-South Africa BIT, which contains no BEE exemption.²³ Many other examples of similar forum shopping problems could be cited.²⁴

To address this, rules for determining the nationality to be imputed to any investor who claims coverage under a BIT must be clearly laid down and must be standardised across all of South Africa's BITs. This would reduce the ability of foreign investors to forum shop. Moreover, it should be noted that standardising both the substantive and procedural provisions of all RSA BITs and/or adopting a unilateral investment protection policy would dramatically reduce the incentive to forum shop, since the same protections would then be available to all investors irrespective of nationality.

4.2.2.2 Dual nationals

One issue that has received little attention in model BITs (and none in the DTI review) is the question of how dual nationals should be treated under BITs. Under general principles of international law, a person (or juristic person) having more than one nationality is entitled to claim the protections offered under any or all of them. In the investment law context, this can give rise to unintended consequences in cases where a national of a host state emigrates and obtains a second nationality and then later decides to invest some of his or her capital back into the original country of origin (the host state). For example, in the ICSID case of *Wena v Egypt*, an Egyptian national successfully brought an international arbitration claim against the Government of Egypt for violations of the Egypt-UK BIT, because the investor had obtained dual citizenship prior to making his investment. The end result is that domestic investors may be able to avoid using the domestic courts simply by obtaining a second (foreign) nationality. While this may not

²³ In fact, it is also possible that a Czech investor might be able to evade the Czech BIT's BEE exemption simply by pointing out that Italian investors are not subject to the exemption, which constitutes a violation of the Czech BIT's MFN provision. This will be taken up in the below comments on MFN provisions.

²⁴ One of the most controversial examples involved an American corporation, Bechtel, which had its official place of registration in the Netherlands. This strategic registration choice later paved the way for the corporation's arbitration challenge against Bolivia when the Bolivian government decided to cancel a water concession contract with the company on public health grounds. The claim was eventually settled after much national and international outcry. See the tribunal's Decision on Jurisdiction, October 21, 2005, available at: http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf.

always be an easy task for natural persons, it is quite simple for juristic persons, which are often deemed to have the nationality of the State of incorporation.

Some commentators argue that dual nationals should indeed be permitted to claim the protections of BITs in order to help stem the tide of capital flight and “brain drain” from developing to developed countries and to encourage ex-patriots to re-invest in their home countries rather than abroad. However, many of the primary rationales cited in justification of BITs do not apply to persons having the nationality of the host state as well as some other nationality. For example, such persons are not likely to face discrimination in the domestic courts on the grounds of their nationality; they do not lack familiarity with local laws and customs; and they are able to avail themselves of all of the services and rights enjoyed by local citizens of the host country on an equal basis with domestic investors.

In addition, it may be that allowing dual nationals (who are essentially domestic investors) to evade the domestic court system by resorting to BITs could lead to several undesirable consequences. First, it could weaken the credibility of the South African judiciary.²⁵ Second, it could increase the likelihood that international arbitral decisions may be made which conflict with South African law and policy. And finally, it could rob the South African courts of the opportunity to develop a body of jurisprudence in complex international economic disputes, which would in turn make it difficult to bring these disputes entirely back within the domestic court system’s jurisdiction in future, should the Government at some point decide to do away with traditional BITs.

In light of these concerns, the Government should carefully weigh whether or not persons having South African nationality or permanent residency should qualify for protection under RSA BITs or other investment treaties. The Government should include in its investment treaties a clear jurisdictional provision addressing this question.

²⁵ Eg if South African investors are observed to prefer supra-national dispute resolution mechanisms to their own domestic courts.

4.2.5 Entry into force and constitutional validity

The DTI review rightly notes the confusion over whether the ratification and entry into force of BITs should be governed by subsection 231(2) or 231(3) of the Constitution.²⁶

Moreover, the precise relationship between each of these subsections and subsection 231(4) is not entirely clear, as the *Quagliani* case mentioned in the review has shown. The following observations are apposite with respect to this debate:

- a) The ratification process historically followed by the Government for BITs – to our knowledge, none of South Africa’s existing BITs has been submitted for approval by Parliament or the National Council of Provinces; thus, it seems clear that all of the Republic’s BITs to-date have been presumed to fall under section 231(3) of the Constitution.
- b) Whether BITs are “self-executing” treaties - Section 231(4) of the Constitution states that a provision of an international agreement “that has been approved by Parliament” is self-executing unless it is inconsistent with the Constitution. In light of the above observation that none of South Africa’s BITs has been approved by Parliament, it seems clear that none of them can be considered to be “self-executing”.
- c) Which ratification process *should* be followed for BITs – Given the vast public interest implications that the conclusion and ratification of BITs raise, it is not at all clear that BITs or other similar agreements should be treated as “technical, administrative or executive” in nature. A strong argument can be made that the parliamentary approval of investment agreement texts (as prescribed in section 231(2) of the Constitution) should be preferred over the less exacting standards of section 231(3). It is true that most BITs in most nations have historically been classified as “executive” agreements and therefore have not attracted scrutiny from national legislatures before entering into force. However, the pitfalls of

²⁶ Review at p 32, section 3.2.6.

failing to subject BITs to a prior legislative approval process has become clear in recent years. Numerous BIT-based arbitral decisions issued against states have begun to severely constrict governments' sovereign policymaking space and have comprised the ability of states to fulfill their obligations – including human rights obligations – under other international treaties and domestic constitutional texts.

In light of these concerns, we suggest that the Government should re-consider whether it is appropriate to continue to treat BITs as falling under section 231(3). Indeed, if the Government decides to move forward with a model BIT, a unilateral investment policy, or a model investment chapter for inclusion in South Africa's free trade agreements (see comments in section 3.1 above), we take the view that the model text and any permissible deviations from it should be approved by Parliament, following appropriate public participation as required by the Constitution, prior to adoption. This would then leave the DTI free to conclude further agreements on the basis of the model text without having to obtain parliamentary approval in each instance.

- d) Substantive constitutionality checks needed in advance of ratification – whatever ratification process the Government chooses to follow when concluding future investment agreements, we submit that each agreement must first be subjected to a thorough and public constitutional “vetting” process *before* ratification takes place. The ongoing *Piero Foresti* dispute against the Government has acutely highlighted the importance of ensuring that all of South Africa's BIT texts are in line with its Constitution. In *Piero Foresti*, a group of foreign investors is claiming that the application of certain black economic empowerment criteria to them is “unfair and inequitable” under the “fair and equitable treatment” provisions of two of South Africa's BITs, even though such measures are not only envisioned but specifically authorised by the Constitution. Moreover, the investors claim that they are entitled to a higher amount of compensation for any expropriation under the BITs than South African investors in the same circumstances would be entitled to under domestic law. If this claim is accepted

by the international arbitral tribunal, then it will mean that South Africa's BITs are in violation of the Constitution's equality guarantees.

To prevent further problems of this nature from arising, it is imperative that no further investment agreements come into force without first passing a comprehensive constitutionality test in respect of each of the agreements' provisions. Such a constitutionality test should ensure, in particular, that any international agreement contemplated by the Government will not unduly restrict its power to take measures of a restitutionary nature aimed at securing more equitable distribution of resources and will not otherwise impede human rights progress in any way. Indeed, this pre-ratification vetting process must take into account, *inter alia*, all of the human rights, environmental, and sustainable development goals and obligations of the Government.

We recommend that the Government study the process prescribed by the USA Trade Act of 2002 as one example of a pre-ratification vetting mechanism. It should be noted however that the US approach was developed for trade negotiations, not specifically investment negotiations. In addition, (and perhaps largely because it was designed for reciprocal trade negotiations under WTO rules), the US approach presumes that the US will continue negotiating each new treaty on a case by case basis with each trading partner and that a new vetting process should therefore be conducted for each new treaty.

By contrast, our preference with respect to South Africa's investment policy would be for the Government to develop a single overarching investment strategy and/or model agreement that would apply across all negotiating partners. The pre-adoption vetting process we have in mind would include a pre-approval of both the investment strategy or model agreement and any possible deviations from it that may be permitted to negotiators. Thus, under our recommendation, the vetting process should theoretically only need to occur once (at least until the

next time the Government undertakes to review and revise its overarching investment policy).

4.2.6 Amendment and termination

The DTI review notes:

“Most RSA BITs provide that agreements will remain valid for a period of ten (10) years. More recent RSA BITs provide for a period of fifteen (15) years or even longer. Most BITs provide that after the initial fixed period has ended, each party may terminate the treaty, usually with one year’s written notice.”

This statement is correct insofar as it goes. But the review’s summary of termination and amendment provisions fails to take cognisance of four important points concerning termination and amendment. First, most BITs contain automatic renewal provisions. For example, the RSA-Belgolux BIT states:

“Unless notice of termination is given by either Contracting Party at least six months before the expiry of its period of validity, this Agreement *shall be tacitly extended each time* for a further period of ten years.”²⁷

Thus, the window in which South Africa may unilaterally terminate most of its BITs is limited. If the Government fails to terminate a particular BIT during the stipulated notification period, then the BIT may well continue in force for another 10 years. This is another reason why the DTI should compile a clear and accurate catalogue of all RSA BITs. We recommend that the DTI also record, alongside the relevant signing dates and ratification dates, the expected termination dates of each treaty and the termination notification period if the treaty contains an automatic renewal provision.

Secondly, the Government should bear in mind that the termination and amendment provisions included in most BITs do not definitively control the Government’s policymaking space in respect of the re-negotiation (amendment) or termination of BITs. The Vienna Convention on the Law of Treaties provides the general international law context underlying BITs. Article 39 of that Convention states that “[a] treaty may be

²⁷ BIT between South Africa and the Belgo-Luxembourg Economic Union, article 12(2) (emphasis added).

amended by agreement between the parties.” Similarly, Article 54 provides that the termination of a treaty may take place “at any time by consent of all the parties.” Thus, if any of South Africa’s BIT partners is open to re-negotiating or terminating a BIT prior to the stated termination date of that BIT, then the Government need not wait for the agreement to lapse. Amendment or termination negotiations can commence immediately.

Third, pursuant to Article 59 of the Vienna Convention, if any of South Africa’s present BIT partners is open to drafting an entirely new investment treaty at any point in time (even if not during the BIT’s specified amendment period), then the RSA’s existing BIT with that State may be terminated or suspended directly by the adoption by both parties of the new treaty.²⁸

Fourth, the Government enjoys even more “wobble room” with respect to the re-negotiation of texts that have been signed but not yet ratified. As the DTI review notes, the majority of South Africa’s current BITs fall into this category.

These points all emphasise that the Government can and should consider all available policy options in creating an overarching investment strategy, including the near-term revision of all of South Africa’s existing BITs, irrespective of their stated termination dates.

²⁸ This is known as the “last in time” principle. Article 59 of the Vienna Convention spells out various conditions as follows:

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.”

4.3 Standards of treatment

4.3.1 National treatment

The DTI review provides an excellent discussion of some of the major challenges that can arise as a result of the national treatment clauses typically contained in BITs.²⁹ We endorse the recommendation that the Government should include exceptions, both specific and general, to the national treatment provision in all of its future investment treaties.

In particular, we agree that exemptions to the national treatment requirement should be explicitly carved out for the following purposes:

- a) Measures adopted in order to redress past injustices or to promote the achievement of substantive equality across South African society in accordance with the Constitution. This exception should be drafted broadly so as to cover all potentially necessary “affirmative action” types of measures, including not only broad-based black economic empowerment measures but also measures aimed at advancing the interests of women, children, persons with disabilities, the poor, and other historically disadvantaged groups. The exception should make clear that no such measure which is mandated or permitted under the South African constitution shall be deemed to be a violation of the national treatment standard of the investment treaty.

- b) Measures aimed at promoting and sustaining local cultural practices and their associated economic activities, including media industries.

We recommend that the Government also carefully review the specific and general exceptions to national treatment that have been suggested in the IISD Model BIT, the Norwegian Model BIT, the Canadian Model BIT, and the Indian Model BIT to determine

²⁹ Review at pp 36-38, section 4.3.2.

whether any further exceptions may be necessary in the context of South Africa's investment treaties.

One issue that merits particular attention is the question of performance requirements. As the DTI review notes, some investment treaty texts have attempted to limit the circumstances in which countries may impose performance requirements upon foreign investors, for example relating to the percentage of local content that must be used in production processes, the size of the local labour force to be employed, or the percentage of goods and services that must be exported by the foreign investor. Yet performance requirements are often important components of the industrial and economic development strategies of developing countries. The same is true of subsidy programmes and other special incentives designed to promote domestic "infant industries" in the face of fierce international competition.

In recognition of these concerns, some recent model BIT texts suggest allowing issues related to economic development policy to remain open for negotiation between the contracting parties. For example, Article 8 of the Norwegian Model Investment Agreement³⁰ includes restrictions on performance requirements in square brackets in order to indicate that there is room for negotiation over these matters.³¹

³⁰ See <http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc>. For commentary, see "Comments on the Model for Future Investment Agreements" (English translation), available at: [http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/2008/Forklarende%20vedlegg%20\(engelsk\)%20-%20final.doc](http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/2008/Forklarende%20vedlegg%20(engelsk)%20-%20final.doc).

³¹ Article 8 states:

1. "No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of the other Party:
 - i. [to export a given level or percentage of goods or services;]
 - ii. [to achieve a given level or percentage of domestic content;]
 - iii. [to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;]
 - iv. [to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;]

Even so, caution must be exercised in considering the approaches to domestic development topics adopted by various countries' model BITs. Most Model BITs advocate for a "negative list" approach, which prohibits states from providing preferential treatment to domestic firms unless they have specifically excepted that particular preferential treatment within the text of the investment agreement. The problem with the "negative list" approach is that it places the onus on developing countries to look into their crystal balls when negotiating investment agreements and try to come up with a comprehensive list of every type of national treatment exception they might potentially

- v. [to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;]
 - vi. [to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory, except when the requirement]
 - (a) is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws, or
 - (b) concerns the transfer of intellectual property and is undertaken in a manner not inconsistent with the TRIPS Agreement;]
 - vii. [to locate its headquarters for a specific region or the world market in the territory of that Party;]
 - viii. [to supply one or more of the goods that it produces or the services that it provides to a specific region or the world market exclusively from the territory of that Party;]
 - ix. [to achieve a given level or value of research and development in its territory;]
 - x. [to hire a given level of nationals;]
 - xi. [to achieve a minimum level of domestic equity participation other than nominal qualifying shares for directors or incorporators of corporations.]
2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1.
 3. Performance requirements, other than those referred to in paragraph 1, shall only be applied in the public interest and shall be set forth in the national legislation of the Party imposing the requirement and published in the official gazette or otherwise be publicly available according to Article [Transparency] so that investors may become acquainted with them before the investment decision is made. All performance requirements shall be applied against all investors and their investments in a non-discriminatory, transparent and objective manner.
 4. A Party may not apply new performance requirements to existing investments, or amend existing performance requirements in a manner restricting the commercial freedom of the investor, except where such requirements are at the same time made applicable to all other investors in that Party."

wish to experiment with in the future. Developing countries are still establishing and testing their economic models for various sectors of the economy. They must preserve sufficient room to continue necessary experimentation without fear of violating the national treatment commitments of their investment treaties.³²

As a counterpoint to the negative list approach, the General Agreement on Trade in Services (GATS) utilises a “positive list” approach, whereby all sectors to be covered by the agreement must be specifically listed by the negotiating parties, and parties are free to list as many or as few sectors as they deem fit. However, caution must also be taken with negative list approaches, since negotiations over such listings are usually asymmetric. For example, in the context of the GATS, the only developing countries who have positively listed the water sector (of particular interest to European multinational countries) are all countries who were applying for HIPC debt relief. Therefore, the procedure for the drafting of such treaties needs to explicitly take account of imbalances in the relative bargaining strength of the negotiating parties (in other words, their power relations).

Lastly, in any treaty which authorises investor-state dispute settlement of any kind, the Government must draft any national treatment clause and all exceptions in such a manner as to clarify that the national treatment standard applies only to post-establishment investment activities. Since pre-establishment (or market access) rights are negotiated reciprocally at the state-to-state level under the auspices of the WTO, investor-state dispute settlement should not be available for any alleged national treatment violations that occur at the pre-establishment phase of an investment.

4.3.2 Most-favoured nation (MFN) treatment

Two observations with respect to MFN clauses are noteworthy. First, should South Africa opt to adopt a unilateral investment protection policy of the type mentioned above,

³² For example, South Africa may at some point decide to invest in developing a strong computer or bio-medical industry, but attempts to promote such sectors could risk future legal claims if they did not fall within one of the specific exceptions included in South Africa’s investment treaties.

the importance of MFN clauses would fall away, as all foreign investors would automatically be entitled to the same treatment.

Secondly, the relationship between MFN clauses and the “other agreements” clauses often found in BITs is poorly understood. “Other agreements” clauses typically guarantee to foreign investors the most favourable treatment that is available under either the BIT, the domestic laws and regulations of the host State, or any other treaty or law that may be in existence or may come into existence at any time in the future.³³ In interaction with BITs’ MFN clauses, such “other agreements” clauses could potentially extend the rights and protections offered to foreign investors significantly beyond those contained within the BITs themselves. As noted above, there has been a trend in recent years toward including investment protection chapters within broader free trade agreements. If this trend continues, and particularly if South Africa or any of its regional integration partners becomes party to such an agreement, then it is possible that the combination of an MFN + Other Agreements clause could enable investors to pursue investor-state dispute settlement for the resolution of pre-establishment investment claims.

As indicated in the previous comment, we believe the Government should exercise extreme caution when it comes to market access commitments and investor-state dispute settlement mechanisms. For this reason, the LRC strongly endorses the review’s conclusion that “[e]xplicit language should be included in BITs to exclude the possibility of extending MFN treatment to dispute resolution provisions, in light of pronouncements in the *Maffezini* case.”

³³ An example of this can be found in article 7(1) of the South Africa-Belgolux BIT, which provides:

“If provisions in the legislation of either Contracting Party or in international agreements entitle investments by investors of the other Contracting Party to treatment more favourable than is provided by this Agreement, the investors of the other Contracting Party shall be entitled to avail themselves of the provisions that are the most favourable to them...”

4.3.3 The “fair and equitable treatment” standard and the “minimum standard of treatment” under international law

Any consideration of the fair and equitable treatment standard as contained in BITs must begin with an appreciation of the increasingly central role this standard has played in investor-state arbitrations in recent years. While early investor-state disputes tended to focus on traditional expropriations, the past decade has seen a sharp increase in the number of arbitral awards that have found violations of the fair and equitable treatment standard and have issued monetary awards against governments even where no expropriation or other treaty violations have been found. Thus, it is essential that the exact meaning of the obligations contained within this standard be clearly understood by all parties in advance of the conclusion of any further investment treaty texts.

The DTI review correctly points out the ambiguity in the interpretation of the “fair and equitable treatment” standard commonly included in BITs and the “minimum standard of treatment under international law”, which derives from customary international law on the international responsibility of states for injury to aliens and which binds States on a state-to-state level irrespective of the existence of any BITs. As the review notes:

“Very few BITs attempt to clarify the meaning and relationship between the standards of fair and equitable treatment, full protection and security (these standards are either treated together or separate with regard to formulations in BITs) and how they relate to minimum standards that may be set by international law. Though the fair and equitable standard is commonly used in BITs, the standard itself lacks a precise meaning.”

The review then goes on to recommend that the relationship between the two standards should be formally clarified, as has been done in the NAFTA context.

We endorse the recommendation to formally clarify this issue but we submit that the NAFTA declaration does not go far enough. Part B of the NAFTA Free Trade Commission’s “Notes of Interpretation of Certain Chapter 11 Provisions”³⁴ merely clarifies that the “full protection and security” and “fair and equitable treatment”

³⁴ NAFTA Free Trade Commission, Statement of July 31, 2001.

provisions within the NAFTA text do not require treatment that goes beyond the customary international law minimum standard of treatment of aliens. While this is helpful in clarifying the relationship between the two standards, it does nothing to clarify the content of the actual obligation upon the contracting states.

There is widespread disagreement among scholars as to what now constitutes the customary international law minimum standard. The standard has evolved over time, beginning with the very basic notion announced in the *Neer* case that a state's treatment of an alien must not amount to "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."³⁵ While this early statement of the obligation seems fairly innocuous, it remains unclear precisely how far beyond this basic statement the minimum standard of treatment under customary international law has now extended. Some scholars and tribunals have argued the existence of far more exacting standards, while others have proposed quite lenient ones.

We submit that the interpretation of such standards is too important to be left to the determination of ad hoc arbitral tribunals on a case by case basis. The precise content of the fair and equitable treatment standard must be clearly spelled out in all of South Africa's future investment treaty texts. Moreover, South Africa should clearly state its understanding of the minimum standard of treatment under customary international law in all of its investment treaties and should clarify the difference between its interpretation of this standard and the interpretation to be ascribed to the fair and equitable treatment standard, if any.

Finally, we urge the Government to include a modified "Calvo" clause in all of its future investment agreements. The DTI touches upon the Calvo doctrine in the review's Executive Summary³⁶ but fails to make any recommendation concerning the adoption of this doctrine. Notwithstanding its controversial history, the Calvo doctrine is highly

³⁵ *L.F. Neer and Pauline E. Neer v. Mexico*, 21 *American Journal of International Law* 555, 556 (1927).

³⁶ Review at p 8.

relevant to South Africa's BITs policy review process. The *Piero Foresti* dispute has shown that at least some investors have interpreted South Africa's BITs as promising them greater protections to foreign investors under international treaty law than are available to domestic investors under South African law.³⁷ Any South African international treaty which purported to grant to foreigners any substantive rights or protections³⁸ exceeding those enjoyed by South Africans under South African law would necessarily violate the Constitution's clear equality provisions and would therefore be unconstitutional *ab initio*. We therefore strongly recommend that the Government avoid the possibility of concluding any unconstitutional investment treaties by inserting a clear statement in each of its future investment treaties clarifying that such treaties shall in no case be interpreted as granting to foreign investors more favourable treatment than that which is granted to domestic investors.

4.4 Expropriation

4.4.1 Terminology

The review commendably points out several of the many different terms that are used in investment treaties to describe various types and levels of "expropriation" and notes that governmental actions may be classified as "direct" or "indirect" expropriation, as "measures tantamount to" expropriation, etc.³⁹ As the review notes, the ambiguity in these terms "leaves the prospect that legitimate government regulation will be deemed to constitute a form of 'indirect' expropriation." We submit that it is imperative that all BITs or other investment agreements contain precise definitions of each of these terms. Moreover, all investment texts should clearly define the phrase "legitimate regulatory action" and should contain a general exception provision clarifying that such action shall not be deemed expropriatory or compensable.

³⁷ This particular interpretation advanced by the *Piero Foresti* claimants is disputed.

³⁸ An effective "Calvo doctrine" type of statement must carefully differentiate between substantive and procedural protections. This is so because BITs may offer procedural mechanisms such as investor-state dispute settlement to foreign investors but not to domestic ones. Thus, if a "Calvo" provision did not distinguish between the two, the provision could be read to prohibit foreign investors from utilising a BIT's investor-state dispute settlement mechanism.

³⁹ Review at pp 40-41.

The recent USA-Chile Free Trade Agreement provides an example of an attempt to clarify some of these terms. It sets out a detailed interpretative clarification as to what is meant by indirect expropriation. The suggestion made by investors that expropriation should be understood to have taken place whenever there is interference with the property rights of investors was explicitly rejected. The interpretative clarification states that:

“except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.”⁴⁰

While this represents a step in the right direction, it should be noted that this clarification does not go far enough. It does not delineate the circumstances in which investors may be entitled to recover compensation for indirect expropriations. In this respect, reference could be made to the traditional international law position that an investor may only recover compensation for an indirect expropriation where there has been improper or discriminatory conduct by the state. The USA-Chile clarification also lacks precision as to what is meant by “rare circumstances”, thereby leaving open the possibility for subjective interpretations. This, too, merits further specification.

For these reasons, we submit that South Africa’s future investment treaties should go beyond the USA-Chile FTA model when defining legitimate regulatory action which does not constitute expropriation. South Africa’s investment agreements should make clear that “public welfare objectives” include the fulfilment of South Africa’s obligations under constitutional and international law, including human rights, environment and anti-corruption law. Moreover, further analysis should be conducted to determine whether the “legitimate regulatory action” exception of South Africa’s investment agreements should be made applicable not just to the agreements’ expropriation provisions, but to other provisions as well (for example, the national treatment standard).

⁴⁰ US-Chile Free Trade Agreement at chapter 10, annex 10-D (“Expropriation”), para 4(b).

4.4.2 Linking human rights law and property rights

The draft Norwegian Model Agreement attempted to address the growing problem of expansive interpretations of “expropriation” by arbitrators by emulating the language of Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) in defining property rights.⁴¹ Corporations are able to take cases to court under this article. Marius Emberland has pointed out that the right to property is one of the rights in relation to which the European Court of Human Rights has given states the widest margin of appreciation, in order to allow them policy freedom in areas such as housing regulation and taxation.⁴²

We submit that an expropriation clause that is in alignment with the approach taken by the South African constitution and by international human rights law is similarly called for in any future South African investment treaty. We note, however, that the draft Norwegian Model Agreement makes no actual reference to the connection between its emulation of Article 1 of the ECHR and the jurisprudence of the European Court of Human Rights.⁴³ This raises the question of whether an arbitral panel or a local court would interpret the Norwegian Model Agreement in a similar fashion to the European Court.. We therefore recommend that any expropriation clause be framed in such a way as to be *explicitly* linked with international and South African human rights jurisprudence. This explicit link should in turn inform the interpretation of terms such as “investment”, “expropriation” and “legitimate regulatory action” in the context of any

⁴¹ Article 6 of the draft Norwegian Model Agreement states:

1. “A Party shall not expropriate or nationalise an investment of an investor of the other Party except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provision shall not, however, in any way impair the right of a Party to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

⁴² M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press), pp. 190-3. See also Luke Clements and Alan Simmons, “European Court of Human Rights: Sympathetic Unease” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) (M Langford, ed), pp.409-427..

⁴³ The court primarily responsible for the development of the doctrine of a “margin of appreciation”.

expropriation claim by foreign investors, so that all of these terms will be interpreted in light of human rights law.

4.4.2 Measure of compensation

The review also correctly notes the variety of compensation formulations adopted by various BITs and the equally wide variety of interpretations that have been ascribed to these by investment arbitration tribunals. As stated above, it would be unconstitutional, and possibly contrary to principles of international human rights law, to afford foreign investors greater levels of compensation than would be due to domestic investors in cases of expropriation. The Government should therefore re-draft the compensation standard to be included in future investment treaties so as to clarify that the constitutional compensation formula will be applied.⁴⁴

4.4.3 Umbrella clauses

Page 59 of the review provides a one-paragraph summary of some of the issues raised by “umbrella clauses”, which essentially transform ordinary contract violations by a host state into violations of its international investment treaties. The review makes no recommendation as to what should be done about the problems identified. We submit that any umbrella clauses must be narrowly drafted and must specify the precise interaction between BIT-based investor-state dispute settlement (if any) and the dispute settlement mechanisms selected under ordinary contracts to which the government is a party. Options include:

- a) Refusing to include any sort of umbrella clause in future investment treaties;
- b) Clarifying that the investor-state dispute settlement mechanism (if any) offered under BITs shall not be available for any alleged violations of an umbrella clause;
- c) Stating that alleged umbrella clause violations may only be brought to a BIT-based investor-state court or tribunal *after* the dispute settlement provisions specified in the contract have been fully followed and exhausted.

⁴⁴ For details, see section 25 of the Constitution.

We submit that some sort of clarification is necessary for three reasons: 1) to ensure that ordinary commercial disputes are not unnecessarily elevated to the level of international treaty violations; 2) to ensure that investors are not able to recover twice for the same alleged violation (once from an ordinary commercial arbitral tribunal, as specified under the contract, and once from an investor-state tribunal constituted under the BIT); and 3) to prevent the possibility of conflicting awards being issued by two different dispute resolution bodies concerning the same set of laws and facts.

5. Dispute resolution

Investor-state dispute settlement has become increasingly controversial in recent years as it has become apparent that important public policy issues are being affected by the resolution of BIT-based disputes by ad hoc arbitral tribunals. It is also of concern that there is significant asymmetry between the protections offered to human rights victims and those available to foreign investors under relevant international complaint procedures. The review rightly notes that “[e]xisting dispute settlement institutions were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes.” The review goes on to state:

“Solutions to the issues of dispute settlement are available. They include greater transparency; selection of arbitrators in a neutral manner rather than by the parties; proper deference to domestic dispute settlement procedures; clear separation of the functions of arbitrator and advocate; and the introduction of an appellate process. Most of these changes by now appear inescapable.”

Unfortunately, the last sentence is incorrect, as many of the reforms anticipated in the review have yet to materialise internationally. As recently as 2006, the ICSID Rules and Additional Facility Rules (two of the most frequently used sets of rules in investor-state arbitrations) were amended. Despite vigorous advocacy by civil society organisations during the revision process, the only “solution” to the identified problems actually incorporated in the 2006 amendments was the codification of the right of investor-state arbitral tribunals to accept written briefs from non-disputing parties (traditionally known

as “amicus curiae” briefs).⁴⁵ None of the other solutions mentioned in the DTI review was adopted or even seriously considered. The same appears to be true of the ongoing debates over the revision of the UNCITRAL arbitration rules.

These changes therefore remain far from “inescapable”. To bring them into being, the Government of South Africa must aggressively pursue the incorporation of these and other solutions not only at the multilateral level, but also in its own BITs or other investment-related treaties and in its domestic investment laws and policies. The following six sections highlight specific areas that South Africa should address in the revision of dispute resolution provisions in any new model investment treaty or overarching investment strategy.

5.1 Dispense with investor-state international arbitration as an immediately available remedy

We strongly recommend that consideration be given to whether the availability of immediate recourse by foreign investors to investor-state arbitration is necessary in any BITs that South Africa makes or amends with other states. We agree with the review’s conclusion that:

“There is no compelling reason why review of an investor’s claims against a state cannot be undertaken by the institutions of the state in question—provided these are independent of the public authority that is in dispute and they discharge their duties in accordance with basic principles of good governance, including an independent judiciary.”⁴⁶

It is noteworthy that Brazil, a large developing country which shares many common economic attributes with South Africa, has not used BITs and yet has managed to attract high levels of foreign investment. As the DTI review notes, Australia also recently declined to opt for investor-state arbitration under the investment section of its free trade agreement with the USA. These examples suggest that the DTI should investigate whether South Africa now or in the future may be able to adequately handle investment

⁴⁵ And even this revision does not guarantee amicus petitioners the right to view the parties’ pleadings so as to be able to prepare useful amicus submissions.

⁴⁶ Review at p 45.

disputes within its domestic court system, thereby rendering any immediate recourse to investor-state arbitration unnecessary.

Pivotal to this inquiry is a consideration of whether foreign investors perceive the South African courts to be experienced and impartial enough to fairly protect their investments. We note that in *Lubbe and Others v Cape (Plc)*,⁴⁷ before the UK House of Lords, it was argued that the case should be heard in the United Kingdom because of South Africa's lack of experience with such complex cases, which could have delayed or frustrated the hearing of the case. That was, however, ten years ago and involved tort litigation, not economic litigation. The relevant question today is whether South African courts can now offer fair and prompt protection of the economic rights of foreign investors. In view of the current level of commercial litigation routinely taking place within the South African courts, we submit that an analysis of this question is likely to yield a positive answer.

A second question is whether any future investment agreements which do not allow for immediate recourse to investor-state arbitration should nonetheless make provision for some other form of immediate supra-national review. Some commentators have recommended that investment agreements replace investor-state arbitration with state-to-state dispute resolution provisions allowing immediate recourse by states (on behalf of investors) to ad hoc international arbitration or another forum such as the WTO.

We disagree. We are of the view that immediate recourse to state-to-state arbitration is equally inadvisable. Such an approach would not solve the deeper structural problems that have been identified in BITs, many of which arise as a consequence of unequal power relations between the negotiating parties. As is the case with the WTO, state-to-state dispute resolution provisions in investment agreements would enable powerful corporations to lobby their states to bring cases on their behalf. Since richer countries possess far more resources to prosecute such cases than poorer ones, the end result is that

⁴⁷ *Lubbe and Others v Cape (Plc)* [2000] UKHL 41; [2000] 4 All ER 268; [2000] 1 WLR 1545 (20 July 2000), www.bailii.org/uk/cases/UKHL/2000/41.html.

state-to-state dispute settlement of investment disputes could well continue to produce outcomes skewed in favour of rich nations at the expense of poor ones, as has been the case in investor-state arbitrations. One way around this problem is to require exhaustion of domestic remedies by the investor first (see section 5.2 below) before any type of international dispute resolution procedure can be launched, whether directly by the investor or by the investor's home state..

5.2 Domestic exhaustion of remedies requirements⁴⁸

We submit that all of South Africa's investment agreements should include domestic exhaustion of remedies requirements, consistent with international human rights practice. This would ensure that BITs-based dispute resolution mechanisms are brought into harmony with, rather than competition with, the South African judicial system. As an example of this approach, we draw attention to Article 15 of the Norwegian Model Agreement, quoted in full in the below footnote.⁴⁹

⁴⁸ See also the comments in part 4.2.1 above.

⁴⁹ Article 15 of the Norwegian Draft Model Agreement provides:

“1. This Article applies to legal disputes between a Party and an investor of the other Party arising directly out of an investment of the latter that falls under the jurisdiction of the former. The dispute must be based on a claim that the Party has breached an obligation under this Agreement and that the investor of the other Party has incurred loss or damage by that breach.

2. Any dispute under this Article shall, if possible, be settled amicably. The Party and an investor of the other Party should initially seek to resolve the dispute through consultation.

3. If any such dispute should arise and either

i. agreement cannot be reached between the parties to this dispute within 36 months from its submission to a local court for the purpose of pursuing local remedies, after having exhausted any administrative remedies; or

ii. there are no reasonably available local remedies to provide effective redress of this dispute, or the local remedies provide no reasonable possibility of such redress,

[and,

iii. the investor has provided a clear and unequivocal waiver of any right to pursue the matter before local courts,]

then each Party hereby consents to the submission of such dispute to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 (ICSID Convention)

Depending upon the outcome of the empirical survey recommended above (as to foreign investors' level of confidence in the South African judicial system), it may be necessary to counter-balance the inclusion of domestic exhaustion requirements against certain additional guarantees to foreign investors. Options for consideration include:

- a) Placing a time-limit on domestic exhaustion of remedies requirements, after which investors who are unable to obtain a fair resolution of their claims may take recourse to another forum. We propose a 3-year domestic exhaustion requirement. This would allow sufficient time for the South African courts to exercise jurisdiction over investment treaty-based claims while also re-assuring foreign investors that their legitimate claims will not be delayed indefinitely, should they for some reason encounter difficulties obtaining prompt and fair recompense in the domestic courts.

- b) Inclusion of a provision concerning cost recovery. One of the major advantages of investor-state arbitration, from the standpoint of foreign investors, is that it allows investors to *immediately* take their claims to a forum which they perceive as being fair without first having to incur the costs of litigating before domestic courts which may be biased against them, bogged-down with years of backlogged claims, or otherwise unlikely to provide speedy and fair dispute resolution. While we maintain that these problems are unlikely to arise in South Africa's domestic courts, it is undeniable that they have arisen on numerous occasions in other developing countries, forcing foreign investors to take recourse to BITs-based

in accordance with the provisions of this Article. The consent and the submission of the dispute by an investor under this Article shall be considered to satisfy the requirements of Article 25 of the ICSID Convention [ICSID Additional Facility Rules, with the approval of the Agreement by the Secretary General to ICSID].

[4. An investor may not submit a dispute for resolution according to paragraph [3] if more than ten years have elapsed from the date the investor first acquired knowledge of the events giving rise to the claim.]

5. Each request for arbitration shall include information sufficient to present clearly the issues in dispute so as to allow the Parties and the public to become acquainted with them. All requests for arbitration shall be made publicly available by the Parties and by ICSID.”

dispute settlement in order to obtain a just resolution of their claims. Investors who are unfamiliar with the South African court system or who otherwise doubt its efficiency or impartiality may therefore view a domestic exhaustion requirement as a prohibitively expensive “sunk cost”, essentially requiring them to “waste” 3-years’ worth of domestic litigation expenses before being able to approach an alternative forum that is perceived as being more effective.

To assuage this fear, South Africa’s investment agreements might include a provision entitling foreign investors to recover the costs, with interest, of their required 3-year domestic exhaustion efforts in the event that the domestic proceedings are later adjudged to have been either patently discriminatory or otherwise so wholly ineffective as to have been futile. Any such costs provision must be carefully drafted so as to ensure that costs may only be recovered where the actions of the domestic courts have fallen below the minimum standard required under international law. That is, costs should not be recoverable in cases of “close calls”.

5.3 Choice of forum provisions

As mentioned above, we caution against automatically presuming that ad hoc international investment arbitration is the preferable route for investor-state dispute resolution. In particular, as a complement to a domestic exhaustion of remedies requirement, the Government should consider whether there exist any suitable permanent fora for the review of investor-state disputes as an alternative to ad hoc arbitral proceedings, and if not, what steps the Government might take to help bring about such a suitable alternative review forum.

We submit that it would be preferable for investor-state disputes to be resolved by a standing tribunal having jurisdiction not only over investment treaties and the narrowly-related categories of international economic law traditionally associated with them, but also over other key bodies of law that are of concern to all nations, including human rights law, sustainable development law, and environmental law. The European Court of

Justice and the European Court of Human Rights stand out as examples of regional courts having jurisdiction over both property law – including the rights of investors who have invested in European Union Member States – and these other bodies of public interest law.

In considering its cross-cutting jurisdiction, the European Court of Justice has stated:

“(F)undamental rights form an integral part of the general principles of law, the observance of which ensures: that in safeguarding those rights, the court is bound to draw inspiration from constitutional tradition common to the member states, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those States are unacceptable in the Community; and that, similarly international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of community law.”⁵⁰

Similarly the SADC Tribunal, the regional judicial organ of the Southern African Development Community, has had occasion to pronounce itself on the supremacy of human rights within the Community in the property rights case of *Campbell v Zimbabwe*.⁵¹ The Campbell case was the first to be heard by the SADC Tribunal. In that case, the claimants filed a petition against the Government of Zimbabwe for alleged violation of SADC norms such as respect for human rights, democracy and the rule of law in relation to Zimbabwe’s land reform programme. The Tribunal stated that SADC as a collectivity as well as individual member states are under a legal obligation to respect and protect the human rights of SADC citizens and ensure that there is democracy and rule of law within member states.

We consider this a strong foundation to build upon, and we recommend that the Government study whether the SADC Tribunal or some other regional forum such as the African Court of Justice may be designated as an appropriate forum for future investor-state dispute resolution proceedings, in the same way that it is possible for the European

⁵⁰ Case 44/79, *Liselotte Haeur v Land Rhineland-Pfalz*, (1979) E.C.R. 3727.

⁵¹ *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe*, SADC (T) Case No. 2/2007.

Court of Human Rights to hear cases from foreign investors in European countries.⁵² There may of course be several risks associated with such a regional choice of forum. For instance, the SADC Tribunal is still in its infancy and has yet to establish its reputation firmly on the world stage. This could give investors cause for concern. The non-compliance of the Government of Zimbabwe with the SADC Tribunal's decisions in the *Campbell* case raises further questions as to the enforceability of decisions issued by the Tribunal. In addition, there may be concerns over the expertise and experience of SADC Tribunal members in handling complex cases involving international business transactions and international economic law. In the case of the African Court of Justice, the merger protocol has yet to come into effect and individuals and companies cannot, under current arrangements, lodge complaints directly with the Court.

All of these challenges must be taken seriously. However, we submit that equally serious problems have arisen as a result of the availability of ad hoc investor-state arbitration in BITs, including the lack of transparency of arbitral proceedings, the limited scope for civil society participation, the proliferation of wildly divergent and sometimes outright contradictory arbitral awards and the issuance of some awards that violate human rights law or that otherwise impermissibly constrict the legitimate regulatory space of sovereign states. In light of these concerns, we recommend that the Government invest in finding ways to bolster the SADC Tribunal's or African Court's capacity, credibility, and authority in relation to investor-state disputes and/or that it investigate alternative mechanisms for creating a suitable regional forum for a standing investor-state dispute resolution body that is empowered to apply not only investment law but all of the relevant bodies of law that may arise on the facts of a given dispute.

5.4 Transparency and civil society rights

Among the core values of the Constitution is a commitment to openness and transparency in the exercise of all public power.⁵³ Section 32 of the Constitution entrenches the right

⁵² Either upon direct application or by way of an application to review the decision of a member state's national courts.

⁵³ See section 1(d) of the Constitution, which envisages a "system of democratic government, to ensure accountability, responsiveness and openness".

of access to information, which applies to information held by both public and, where appropriate, private entities. The lack of transparency obligations and non-party participation rights in BITs-based dispute resolution prevents civil society organisations from playing their proper role as “public watchdogs” and thereby hinders them from protecting the public interest in investment-related dispute resolution proceedings. Various mechanisms should be considered in order to address these problems, including:

- a) Requiring all filings of the parties and all decisions of the relevant courts or tribunals (whether procedural or substantive, legal or evidentiary) to be made public;
- b) Requiring all oral proceedings to be open to the public;
- c) Stipulating that public interest organisations and other appropriate interested parties have a right to present both written and oral submissions to the relevant courts or tribunals; and
- d) Requiring any settlement agreements to be made public.

These requirements should be included directly in South Africa’s investment treaty texts so that they will be followed in all investment-related dispute settlement proceedings – whether state-to-state proceedings or investor-state proceedings – irrespective of: the forum in which a particular dispute is heard; the procedural rules applied or agreed upon by the parties to the dispute; and any objections by the parties that may be raised within the context of the dispute.

5.5 Choice of law provisions

Choice of law provisions in all of South Africa’s BITs should make clear that not only international law but also South African constitutional law and other domestic law must be applied to every dispute. This would be preferable to the current BITs choice of law clauses, most of which either refer only to the text of the BIT itself plus “relevant principles of international law” or leave the choice of law entirely within the discretion of the presiding arbitral tribunal.

In addition to requiring the application of domestic law, consideration should also be given to various ways in which the relationship between BITs and other bodies of international law might be clarified and harmonised. For example, re-drafted choice of law and conflict of laws provisions should specify that BITs must be interpreted consistently with the Constitution, international human rights law, international humanitarian law, international environmental law, and the international law on sustainable development. If the availability of ad hoc investor-state arbitration is retained (contrary to our recommendations in the previous paragraphs), then the hierarchy of laws that should apply when irreconcilable conflicts arise between different sets of applicable domestic and international laws should be clarified so that this choice is not left to the discretion of ad hoc tribunals. One might also consider requiring that at least one arbitrator on every panel be an expert in public international law and, where appropriate, international human rights law (as opposed to only appointing international commercial law experts).

5.6 Enforcement and review of arbitral awards (if ad hoc investor-state arbitration is retained)

If South Africa decides to retain the availability of immediate recourse to ad hoc investor-state arbitration, then the role of domestic courts in ultimately enforcing or setting aside investor-state arbitral awards (in the event that an ad hoc arbitral award adopts an unconstitutional interpretation of South African law or international treaty law) must also be explored. South Africa's existing obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards are apposite here, as is a consideration of whether South Africa should or should not eventually accede to the ICSID Convention (which contains much more limited review possibilities than the New York Convention). All of the implications and consequences of membership in these conventions should be explored in detail before any future action is taken.

6. Monitoring and Feedback

The Government should consider the inclusion of monitoring and feedback provisions within its BITs or other investment agreements. Such provisions would require regular

reporting by the contracting states concerning the functioning of the agreements, their impact upon issues of public interest, and their effectiveness in protecting and promoting foreign investment. To facilitate this, the Government might also consider placing all of South Africa's investment agreements on the same revision and review cycle so that an exhaustive policy review can be undertaken on a regular basis (perhaps every 10 years). This would minimise the burden of evaluating and re-negotiating different investment treaty texts at different times with different partners and could help to move South Africa's investment treaties in the direction of greater consistency. Future treaties' termination, renewal and amendment provisions could be drafted so as to coincide with this single review schedule, irrespective of their individual signing and ratification dates.

7. Obligations of Foreign Investors

We submit that current and future BITS should contain obligations on the part of foreign investors, an issue raised in the review. While the obligations of multinational corporations is still an emerging area in international law, environmental and human rights obligations amongst others have been placed on corporations under the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977 and the OECD Guidelines for Multinational Enterprises of 1976 (as revised in 2000). Moreover, the UN Global Compact requires multi-national companies to commit to ten core principles, which relate to human rights, labour rights, environmental protection, and anti-corruption.

The African Charter on Human and Peoples' Rights (Banjul Charter) must also be taken into account. Articles 27-29 of the Charter place obligations on individuals (not only states) in respect of human rights, and Article 21(5) places particular obligations on South Africa to regulate foreign economic exploitation of South African resources as follows:

“5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by

international monopolies, so as to enable their peoples to fully benefit from the advantages derived from their national resources.”⁵⁴

This would include adverse actions by foreign investors. The African Commission on Human and Peoples’ Rights commented on this provision in *SERAC v Nigeria*, Communication 155/96:

“56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (See *Union des Jeunes Avocats /Chad*). This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríguez v. Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.”

⁵⁴ The first four provisions of Article 21 relate to natural resource management and read as follows:

- “1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.”

At the national level, the South African Constitutional Court has recognised that state obligations to fulfil the right to housing require the state to act even if it causes inconvenience to other residents. In *Minister of Public Works v Kyalami Ridge Environmental Association*⁵⁵ the Court dismissed a challenge to the Ministry of Public Works' establishment of a transit camp for destitute flood victims. The decision had been challenged by a neighbouring residents' association (which was concerned about possible declines in property values) on the formal grounds that there was no legislation authorising the Government to do so, and that it contravened the town planning scheme and environmental legislation.

Cognisance should be taken of these and other similar judicial precedents in drafting investor obligation provisions for any future South African investment agreement or policy. We recommend at a minimum that investors be required to:

- a) Comply with both the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises; and
- b) Respect the human rights contained in all international human rights treaties ratified by the relevant contracting states and in the Universal Declaration of Human Rights.

The Government should also investigate what additional obligations may be required as per the African Charter on Human and Peoples' Rights. Moreover, the section on "Obligations and Duties of Investors and Investments" in the IISD Model Agreement should be considered for possible inclusion (see Articles 11-18).⁵⁶ This section of the IISD Model Agreement includes obligations relating to, inter alia: pre-establishment impact assessments, anti-corruption, post-establishment obligations, corporate governance and practices, corporate social responsibility, and investor liability. The Government should also be empowered to raise violations by transnational corporations

⁵⁵ 2001 (7) BCLR 652 (CC),

⁵⁶ See <http://www.iisd.org/investment/model/>

as defences or counter-claims in the context of dispute settlement proceedings with foreign investors. The IISD Model Agreement provides one example of how such a provision might be structured.

8. Conclusion

As our comments have shown, we are generally supportive of the approach currently being taken by the DTI in carrying out this important review of South Africa's foreign investment policy. However, further study is warranted in numerous areas before a concrete new policy can be formulated. Much work remains to be done in exploring and drafting the details of the new policy. We look forward to continuing to collaborate with and provide feedback to the Government, along with other stakeholders, as the review progresses into its next stages.