

The constitutionalisation of foreign direct investment regulation in South Africa

Shelton Tapiwa Mota Makore

LLB, LLM, LLD (UFH)

Senior Lecturer, Department of Mercantile Law, University of the Free State

ORCID ID: <https://orcid.org/0000-0002-4515-8122>

Elizabeth Snyman-Van Deventer

Bluris, LLB, LLM, LLM, LLD (UFS)

Professor and Head of the Department of Mercantile Law, University of the Free State

ORCID ID: <https://orcid.org/0000-0002-9464-9892>

SUMMARY

The process of constitutionalising foreign direct investment in South Africa intensified with the enactment of the Protection of Investment Act 22 of 2015, euphemistically referred to herein as the Act, which revamped the country's foreign direct investment regime. Prior to the promulgation of the Act, South Africa had terminated most of its treaties which govern foreign direct investments in 2010, leaving investors without adequate domestic legal protection except that which is offered under the country's general principles of commercial law(s). Underlying the constitutionalisation project is the need to ensure that various bilateral and multilateral investment agreements concluded by South Africa are properly calibrated and aligned with constitutional imperatives and provisions contained in the Bill of Rights. Constitutional compliance of foreign direct investment regulation is necessary for achieving sustainable development, fairness, and egalitarianism. The constitutionalisation of foreign direct investment regulation under the Act occurred against the backdrop of the view that South Africa should actively develop adequate domestic policy space in foreign direct investment regulation accommodative of the government's constitutional obligations to redress past inequalities, advancement of democratic ethos, and the rule of law, without unjustifiably infringing on the rights of foreign investors. This article explores the constitutionalisation of foreign direct investment regulation under the Act. It argues that although the Act has, to some extent, constitutionalised investment regulation in South Africa by obliging the government to conclude investment agreements which comply with the supreme law of the country, the Constitution, the Act does not provide sufficient substantive distributive justice imperatives nor adequately align the country's foreign direct investment regime with the Constitution. Finally, the article offers recommendations on how South Africa can, *inter alia*, strengthen its constitutionalisation of the foreign direct investment regime to achieve greater investor protection without undermining the country's economic, social, political, cultural, ecological developmental needs and interests.

Keywords: Constitutionalisation, policy space, investor protection, pluriversal

1 Introduction

Conceptually, the term constitutionalisation refers to a juridical term used to describe the process of subjecting all actions of the state, non-state entities, quasi-state bodies, juristic persons, and natural persons to compliance with the processes, structures, principles, precepts, rights, and values of the Constitution.¹ In the context of South Africa, the constitutionalisation of foreign direct investment law is, *inter alia*, associated with the significant attempt to ensure that investment transactions, acts, and agreements are brought into harmony with the supreme law of the land, which is the country's Constitution.² Importantly, the idea of constitutionalisation hinges on the view that the Constitution as the *lex fundamentalis* generates superlative norms which require the design of a foreign direct investment regime that furthers the realisation of the rights contained in the Bill of Rights.³ On that note, the enactment of the Protection of Investment Act 22 of 2015 in South Africa sought to give effect to the constitutionalisation process by aligning the country's investment obligations with the Constitution.⁴ However, whether the Act adequately constitutionalised investment arrangements by aligning them with the Constitution will be a subject of examination in this article.⁵ This article explores the constitutionalisation of foreign

- 1 X Zhang & W Liu 'The rule of law and foreign direct investment' (2021) 203 *Advances in Economics, Business and Management Research* 118-122; A Gani 'Governance and foreign direct investment links: Evidence from panel data estimations' (2007) 14 *Applied Economics Letters* 753-756; P Mudau 'Constitutionalisation of public service and administration in Africa' (23 March 2021) *AfricLaw* <https://africlaw.com/2021/03/23/constitutionalisation-of-public-service-and-administration-in-africa/> (accessed 25 August 2026); Q Li 'Democracy, autocracy, and tax incentives to foreign direct investors: A cross-national analysis.' (2006) 68 *The Journal of Politics* 62-74; NM Perrone 'The emerging global right to investment: Understanding the reasoning behind foreign investor rights' (2017) 8 *Journal of International Dispute Settlement* 673-694.
- 2 H Lee, G Biglaiser & JL Staats 'Legal system pathways to foreign direct investment in the developing world' (2014) 10 *Foreign Policy Analysis* 396.
- 3 K Malan 'Deliberating the rule of law and constitutional supremacy from the perspective of the factual dimension of law' (2015) *Potchefstroom Electronic Law Journal* 1207; A Peters 'Constitutionalisation' J d'Aspremont & S Singh (eds) *Concepts for international law: Contributions to disciplinary thought* (2019) 141.
- 4 K Bosman 'South Africa: Trading international investment for policy space' Stellenbosch University Department of Economics Working Paper 04/2016 (2016) <https://ideas.repec.org/p/sza/wpaper/wpapers259.html> (accessed 2 April 2024); L Mhlongo 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 35 *Speculum Juris* 211.
- 5 X Carim 'International investment agreements and Africa's structural transformation: A perspective from South Africa' in K Singh & B Ilge (eds) *Rethinking bilateral investment treaties: Critical issues and policy choices* (2016) 60.

direct investment regulation under the Act.⁶ The primary objective is to determine whether the Act fosters a set of constitutional social practices, principles, values and policy space that constitutionalise the regulation of foreign direct investment to advance sustainable development and social justice in South Africa.⁷

This article is divided into four parts. The first part commences by unravelling the meaning of constitutionalisation. In the second part, the article turns to examine the necessity of constitutionalising investment regulation in general, including the need to create adequate policy autonomy and transformation for South Africa to regulate its foreign direct investments, while simultaneously complying with its obligations found under the rules-based international foreign direct investment governance. The article then presents a discussion on the constitutionalisation of foreign direct investment under the Act with a view to determining whether this process has introduced a revamped foreign direct investment regime that is constitutionally compliant. Finally, the article offers recommendations on how South Africa can strengthen its constitutionalisation of foreign direct investment regulation to achieve investor protection without undermining the pertinent regulatory space necessary to create a durable social justice-driven constitutionally compliant investment regime.

2 Defining the concept of constitutionalisation

Any discussion concerning the constitutionalisation of foreign direct investment regulation in South Africa through the Act will be incomplete without first ascertaining in depth the meaning of the phenomenon of constitutionalisation and its constitutive elements.⁸ A critical reading of academic literature demonstrates that the concept of constitutionalisation is assigned various meanings by scholars due to its elasticity, malleability, and dynamic character.⁹ Whilst these flexible terminological traits associated with the phenomenon of constitutionalisation enable the concept to have a wide academic application, it also subjects the same to attacks because of its lack of

6 J Bonnitcha, SH Nikiéma & T St John 'Rethinking national investment laws: A study of past and present laws to inform future policy-making' (International Institute for Sustainable Development 2023) <https://www.iisd.org/system/files/2023-07/rethinking-national-investment-laws-en.pdf> (accessed 25 August 2026).

7 Act 22 of 2015; see S Lester 'Rethinking the international investment law system' (2015) 49 *Journal of World Trade* 213.

8 M Disant 'The constitutionalisation of law: General considerations based on the French example' (2019) 34 *Tulane European and Civil Law Forum* 79; G Teubner 'Self-constitutionalising TNCs? On the linkage of "private" and "public" corporate codes of conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 617.

9 Miriam Webster Dictionary 'constitutionalise' <https://www.merriam-webster.com/dictionary/constitutionalise> (accessed 25 August 2026).

specificity.¹⁰ This raises some pertinent questions related to the exact meaning that the concept engenders.¹¹ Despite its contestability, the concept of constitutionalisation has gained prominence mainly because of the proliferation of other transnational urgencies, institutions, arrangements, and sites other than the government that are increasingly performing the activities of the government.¹² Therefore, constitutionalisation is the term used to describe the attempt to subject the exercise of public power, and performance of public function through whatever the medium of its exercise, including by private parties and corporate entities, to the discipline of constitutional spirit, rules, precepts, procedures and superlative norms.¹³ Constitutionalisation imposes constitutional checks on the decentralisation of the state's sovereignty that has become common due to globalisation.¹⁴

Historically, the origination of the phenomenon of constitutionalisation is situated in the 18th-century revolutionary developments which birthed the modern political theory and idea of constitution with its notable edifices such as democracy, the notion(s) of rule of law, limited government and constitutionalism.¹⁵ In the contemporary era, the drivers of constitutionalism are many, including Aristotle, Plato, and Socrates, but more prominently it is Niccolò Machiavelli, a distinguished Florentine philosopher and statesman who is widely considered to have formulated the earliest school of thought that formed the basis of modern constitutionalism.¹⁶ Machiavelli revived the science of politics, positing the idea of constitutionalism through an intense study of ancient republics in his discourse termed *Il Principe and the Discorsi*.¹⁷ In this treatise, Niccolò Machiavelli vehemently argued that there is a need to apply reason to the structure and activities of governance to achieve justice and the common good.¹⁸ Machiavelli distinguished scholarship became foundational to the ideas advanced

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- 10 M Jovanović & I Krstić 'Human rights and the constitutionalization of international law' in T Várady & M Jovanović (eds) *Human rights in the 21st century* (2020) 5.
 - 11 LE Peterson & KR Gray 'International human rights in bilateral investment treaties and in investment treaty arbitration' (International Institute for Sustainable Development 2003) https://iisd.org/pdf/2003/investment_int_human_rights_bits.pdf (accessed 25 August 2026).
 - 12 J Shawa & I Štiks 'The constitutionalisation of cities and the future of global society' (2023) 30 *Identities: Global Studies in Culture and Power* 297.
 - 13 KL Scheppele 'The social lives of constitutions' in P Blokker & C Thornhill (eds) *Sociological constitutionalism* (2017) 35.
 - 14 Scheppele (n 13) 36.
 - 15 H Wheeler 'The foundations of constitutionalism' (1975) 8 *Loyola of Los Angeles Law Review* 583.
 - 16 V Cox 'Machiavelli and the *Rhetorica ad Herennium*: Deliberative rhetoric in *The Prince*' (1997) 28 *The Sixteenth Century Journal* 1109; DS Grewal & J Purdy 'The original theory of constitutionalism. A review of: *The sleeping sovereign: The invention of modern democracy*' (2018) 127 *Yale Law Journal* 669.
 - 17 D Owen 'Machiavelli's *il Principe* and the politics of glory' (2017) 16 *European Journal of Political Theory* 44.
 - 18 E Benner *Machiavelli's Prince: A new reading* (2013) 4.

later by Albert Venn Dicey, a thoughtful British jurist and constitutional theorist.¹⁹ Dicey, in his treatise *Introduction to the Study of the Law of the Constitution*, penned in 1885, argued that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.²⁰ This thesis subjects all actions, including those from the government such as laws and declarations, to the whims of the rule of law as propagated by a competent body in a particular polity.²¹

In Africa, the idea of constitutionalisation can be located within the broader actions and articulations advanced by some academic commentators and constitutionalists such as Nelson Rolihlahla Mandela, Klare, Moseneke, among others.²² Whether the contributors to the constitutionalisation project are drawn from Europe, Africa, or elsewhere, the overarching ideology behind these proponents is that constitutionalisation is a preeminent principle which should guide the exercise and distribution of government power in public and private arrangements.²³ Its central focus is to constrain the abuse of official power when these entities perform government activities, including entering into various foreign direct investment treaties.²⁴ It protects citizens' rights in investment regulation, which naturally interferes with the realisation of their rights, including socio-economic rights.²⁵ Constitutionalisation of investment regulation promotes access to justice for communities impacted by the admission of investment capital and the operations of multinational corporations in the host state.²⁶ It ensures procedural fairness over a range of foreign direct investment

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- 19 D Lino 'The rule of law and the rule of empire: AV Dicey in imperial context' (2018) 81 *Modern Law Review* 740.
 - 20 Lino (n 19) 742.
 - 21 AV Dicey *Lectures Introductory to the Study of the Law of the Constitution* (1885) 2.
 - 22 PN Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 354; D Moseneke 'The fourth Brain Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal of Human Rights* 309; C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal of Human Rights* 250.
 - 23 H Botha 'Metaphoric reasoning and transformative constitutionalism (Part 1)' (2002) *Journal of South African Law* 612.
 - 24 O Quirico 'From investment protection to sustainability (via a Multilateral Investment Court): The EU and a new universal model for investment agreements?' in O Quirico & KK Williams (eds) *The European Union and the Evolving Architectures of International Economic Agreements* (2023) 57; G van Harten 'Leaders in the expansive and restrictive interpretation of investment treaties: A descriptive study of ISDS Awards to 2010' (2018) 29 *European Journal of International Law* 510.
 - 25 I Damjanovic 'The reform of international investment law: Whose rule of law?' (2024) 15 *European Journal of Risk Regulation* 3.
 - 26 G van Harten 'Investment treaty arbitration, procedural fairness, and the rule of law' in SW Schill (ed) *International investment law and comparative public law* (2010) 627.

decisions made by state officials.²⁷ Constitutionalisation is a term of political philosophy, institutional morality, and legal construct.²⁸ It conveys the idea of government not under men but under just constitutional laws.²⁹ It is an antithesis to domestic investment regulation, which enables dispossession, displacement, and the trumping of fundamental rights of people in deference to absolute investor protection rights.³⁰ The concept of constitutionalisation addresses the moral and legal dimension of international investment arrangements by subjecting them to equal and just laws.³¹ Constitutionalisation of foreign direct investments accords the state power to safeguard the material interest of its people through the protection of the country's regulatory, political and economic sovereignty. It challenges and provides a rejoinder to the neoliberal construct which sidelines and disregards domestic developmental interest in favour of absolute investor protection.³²

3 Legal and theoretical rationales underpinning the constitutionalisation of investment regulation

Having dissected the meaning of the term constitutionalisation in this part of the article, it is necessary to explore the rationale behind the constitutionalisation of South African Investment regulation under the Act.³³ Whilst there are numerous reasons which justify the South African constitutionalisation drive, this part of the article will only explore the

27 MH Kramer *Objectivity and the rule of law* (2007) 44.

28 CN Donald 'Legal philosophy and cosmopolitan constitutionalism. Debates on morality, unity, and power' (2020) 14 *The Age of Human Rights Journal* 1 <https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/5479/4789> (accessed 17 April 2024).

29 A Reinisch & SW Schill (eds) *Investment protection standards and the rule of law* (2023) 7.

30 A Reinisch 'The rule of law in international investment arbitration' in P Pazartzis & M Gavouneli (eds) *Reconceptualising the rule of law in global governance, resources, investment and trade* (2016) 376; TV Ananthavinayagan 'Critical perspectives on international investment law' in J Chaisse, L Choukroune & S Jusoh (eds) *Handbook of international investment law and policy* (2021) 2163.

31 RC Stendel 'Moral damages as an "exceptional" remedy in international investment law – re-connecting practice with general international law' (2021) 81 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 938.

32 L González García 'The role of human rights in international investment law' <https://www.matrixlaw.co.uk/wp-content/uploads/2016/05/The-role-of-human-rights-in-international-investment-law.pdf> (accessed 25 August 2026); K Miles *The origins of international investment law: Empire, environment, and the safeguarding of capital* (2013) 32.

33 DM Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 *Law, Democracy & Development* 24; C Albertyn '(In)equality and the South African Constitution' (2019) 36 *Development Southern Africa* 556.

most pertinent reasons, including recognition of the material supremacy of the Constitution, the need to advance transformative constitutionalism, and social justice in investment regulation.³⁴ Section 8 of the Constitution of South Africa states that the Bill of Rights not only creates obligations applicable vertically between the state and its subjects, but rather generates obligations between one citizen or private body and another.³⁵ Section 39(2) of the South African Constitution is a statutory interpretation clause which obliges the courts of law, any tribunal or forum that interprets and applies the law when settling disputes brought before to promote compliance with the spirit, purport and objects of the Bill of Rights.³⁶ These constitutional provisions envisage the constitutionalisation of the law, including foreign direct investment regulation through the holistic application of the Bill of Rights vertically and horizontally to increase the appropriation of the Constitution in all legal spaces, either public or private relationships.³⁷ The need to appropriate the obligations contained in the Bill of Rights arises from the view that investment treaties once concluded, places obligations on states to reorganise their domestic laws including private laws governing property, companies, intellectual property, contracts potentially using a one-size-fits-all construct that can potentially undermine the wider variation, interests and core-values reflected in these internal legal institutions.³⁸ The investor-state dispute settlement exacerbates this tension, further distorting domestic private law arrangements and constructs.³⁹ This subtle trait of international investment law produces inefficiency, unfairness, and distributional

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- 34 Y Mupangavanhu 'The constitutionalisation of contract law in light of the public and private dichotomy in South Africa: An analysis of selected cases' (2023) 37 *Speculum Juris* 23; K Reddy 'The evolving role of business in contributing to social justice in South Africa in terms of legislative measures' (2016) 13 *Corporate Ownership and Control* 466; AJ Van Der Walt 'Transformative constitutionalism and the development of South African property law' (2005) 4 *TSAR* 656.
- 35 MG Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18 *Potchefstroom Electronic Law Journal* 3104.
- 36 BM Mupangavanhu 'Impact of the Constitution's normative framework on the interpretation of provisions of the Companies Act 71 of 2008' (2019) 22 *Potchefstroom Electronic Law Journal* 5.
- 37 P Fitzpatrick 'The new constitutionalism: The global, the postcolonial and the constitution of nations' (2006) 10 *Law, Democracy & Development* 4.
- 38 JJ Garcia Blesa 'Indeterminacy, ideology and legitimacy in international investment arbitration: Controlling international private networks of legal governance?' (2022) 35 *International Journal for the Semiotics of Law* 1970; D Bhana *Constitutionalising contract law: Ideology, judicial method and contractual autonomy* (PhD thesis, 2013 University of Witwatersrand) 4.
- 39 EM Hafner-Burton, ZC Steinert-Threlkeld & DG Victor 'Predictability versus flexibility: Secrecy in international investment arbitration' (2016) 68 *World Politics* 413; JA Maupin 'Public and private in international investment law: An integrated systems approach' (2014) 54 *Virginia Journal of International Law* 367.

inequities within the host country that have eluded many regulators across the globe.⁴⁰

3 1 Constitutionalisation as an instrument for advancing transformative constitutionalism in investment regulation

Given the above, the constitutionalisation of foreign direct investment regulation in South Africa is predicated on the need to advance transformative constitutionalism to offset the assumption that foreign direct investment is a *sine qua non* for economic development and that its importation and exportation must be facilitated through absolute investor protection measures.⁴¹ This is the neoliberal logic which international investment law has thrust upon developing countries, including South Africa.⁴² This assumption that foreign direct investment leads to economic development is contestable.⁴³ Historically, the importation of foreign direct investment in South Africa has been an avenue for exploitation of the country's economy.⁴⁴ Although there are enormous economic development benefits derivable from foreign direct investments, the negative effects of unregulated or poorly regulated foreign direct investments on the host country's economy, including on labour rights, human rights, and environmental rights, cannot be overemphasised.⁴⁵ The perceived economic harm caused by guarantees of investor protection and instrumentalisation of *laissez-faire* market fundamentalism necessitates the constitutionalisation of investment

40 E Guntrip 'Self-determination and foreign direct investment: Reimagining sovereignty in international investment law' (2016) 65 *International and Comparative Law Quarterly* 832; J Puukka *Treaty shopping in international investment law: Setting limits on corporate restructuring to gain access to investment protection* (Master's thesis, University of Helsinki 2018) 1; M Sornarajah (ed) *The international law on foreign investment* (2017) 10.

41 M Sornarajah 'Mutations of neoliberalism in international investment law' (2011) 3 *Trade, Law and Development* 209.

42 BK Sebake 'Neoliberalism in the South African post-apartheid regime: Economic policy positions and globalisation impact' (2017) *Proceedings of the 2nd Annual International Conference on Public Administration and Development Alternatives* <https://studev.mandela.ac.za/studev/media/Store/documents/SGD%20Knowledge%20Repository/4-Neoliberalism-in-the-South-African-post-apartheid-regime-B-Sebake.pdf> (accessed 25 August 2026).

43 F Cheru 'Overcoming apartheid's legacy: The ascendancy of neoliberalism in South Africa's anti-poverty strategy' (2001) 22 *Third World Quarterly* 525.

44 J Bonnitcha, SH Nikiéma & T St John *Rethinking National Investment Laws: A Study of Past and Present Laws to Inform Future Policy-Making* (International Institute for Sustainable Development 2023) <https://www.iisd.org/system/files/2023-07/rethinking-national-investment-laws-en.pdf> (accessed 25 August 2026).

45 KW Glaister, N Driffield & Y Lin 'Foreign direct investment to Africa: Is there a colonial legacy?' (2020) 60 *Management International Review* 315; Guntrip (n 40) 830.

regulation in South Africa to establish an effective regulatory regime for investment protection.⁴⁶

3.2 Constitutionalisation as an instrument for dealing with the negative effects of a free market-based investment regulatory ideology

The advancement of a neoliberal investment regime by its drivers, such as international institutions and hegemonic superpowers, creates an apparent operational conflict in the host country between free market-induced legal norms and the idea of constitutionalism.⁴⁷ This is because an investment regime that is based entirely on free-market ideology causes problems in the host's economy. After all, it commodifies the country's natural resources such as land, vital mineral resources, and other material resources into merely objects of commercial trafficking, exploitation, mercantilism, and profiteering, based on freedom of trade.⁴⁸ The promotion of the unrestrained right(s) to freedom of trade at the expense of adhering to higher constitutional prescriptions and norms related to first, second, and third generation rights, including socio-economic rights, directs and offends the idea of a constitutional state which imposes limitations on all natural rights and their holders.⁴⁹ It is necessary for regulators to correct the shortcomings of a neoliberal investment regulation by reframing such an investment framework through constitutionalisation processes.⁵⁰

The globalisation of norms of investment protection through arbitration, projected as a species of an international investment law, has pushed the discussion on the need to constitutionalise investment regulation in South Africa.⁵¹ The concomitant ascendancy of the doctrine

46 S Gelb 'Foreign direct investment links between South Africa and China' (Trade & Industrial Policy Strategies 2010) https://www.tips.org.za/files/foreign_direct_investment_links_between_south_africa.pdf (accessed 25 August 2026).

47 A Langalanga 'Imagining South Africa's foreign investment regulatory regime in a global context' SAIIA Occasional Paper 214 (South African Institute of International Affairs 2015) <https://saiia.org.za/wp-content/uploads/2015/04/Occasional-Paper-214.pdf> (accessed 25 August 2026).

48 M Wilson 'COVID-19 and the modern plantation: Debunking the neoliberal moral economy' (2021) 33 *Cultural Dynamics* 185.

49 L Delany, L Signal & G Thomson 'International trade and investment law: A new framework for public health and the common good' (2018) 18 *BMC Public Health* 602; AC Cutler 'Transformations in statehood, the investor-state regime, and the new constitutionalism' (2016) 23 *Indiana Journal of Global Legal Studies* 96.

50 J Paine 'Investment protection standards as global constitutional law' in SW Schill & CJ Tams (eds) *International investment protection and constitutional law* (2022) 256.

51 G van Harten 'Five justifications for investment treaties: A critical discussion' (2010) 2 *Trade, Law & Development* 59; A Friedman 'Flexible arbitration for the developing world: Piero Foresti and the future of bilateral investment treaties in the Global South' (2010) 7 *Brigham Young University International Law & Management Review* 39.

of the rule of law in international investment law arbitration to justify the absolute protection of foreign investment and the private power interests without adequately considering the potential human rights abuse which maybe committed by multinational corporations generates skewed norms which forms the basis of the need to constitutionalise investment regulation in South Africa.⁵² The version of the rule of law promoted under international investment law is not largely based on the achievement of substantive equality between local entrepreneurs and their counterparts, foreign investors.⁵³ It prioritises the protection of foreign investors and their assets through standards of treatment and compensation mechanisms in various BITs.⁵⁴ Lamentably, this systems does not accord the same rights to the host states to have the same access to foreign arbitration to institute arbitration claims against abusive conduct of MC in the same manner that foreign investors have.⁵⁵

3 3 Constitutionalisation as an instrument to establish a pluriversal social justice-driven investment regime

The constitutionalisation of investment regulation in South Africa is also foregrounded on the need to move towards a pluriversal investment regime which is centred on social justice rather than just investor-centric.⁵⁶ It can be contended that transplantation of international investment norms and rules through BIT into the domestic legal architecture of the host countries without taking into account broad social justice concerns which arises in such arrangements may yield undesirable results which militates against the country's anti-poverty goals.⁵⁷ This view is not novel given that there has been a heated legal debate about the degree to which international investment law rules are accommodative of the social justice concern of the peripheries and the

52 On the definition of a multinational company see Y Aharoni 'On the definition of a multinational corporation' in A Kapoor & PD Grub (eds) *The multinational enterprise in transition: Selected readings and essays* (1972) 3: Langalanga (n 47); M Zamboni 'Dis-incorporating corporate social responsibility' (2016) SSRN <http://dx.doi.org/10.2139/ssrn.2851009> (accessed 25 August 2026).

53 SW Schill 'International investment law and the rule of law' in J Lowell, JC Thomas & J van Zyl Smit (eds) *Rule of Law Symposium 2014: The importance of the rule of law in promoting development* (2015) 81

54 OECD *Fair and Equitable Treatment Standard in International Investment Law* OECD Working Papers on International Investment 2004/03 (2004) <http://dx.doi.org/10.1787/675702255435> (accessed 25 August 2026).

55 RS Wisner & N Gallus 'Nationality requirements in investor-state arbitration' (2004) 5 *The Journal of World Investment and Trade* 928.

56 Paine (n 50) 259.

57 D Schneiderman 'Investment arbitration as constitutional law: constitutional analogies, linkages, and absences' in T Schultz & F Ortino (eds) *The Oxford handbook of international arbitration* (2020) 426; MF Qumba 'The exhaustion of local judicial remedies in investor-state dispute settlement: A proposal for the African Continental Free Trade Agreement on Investment Protocol' (2021) 25 *Law, Democracy and Development* 157.

poor in developing countries.⁵⁸ The most noticeable substantive social justice critique of international investment rules has been provided by human rights scholars who rail against the expansion of a system of investment regulation which attaches more value on free market ideals of sanctity of property, the importance of keeping commercial obligations and free flow of investment to the detriment of the primacy of other values such as human rights, environment and *jus cogens* principles of international law.⁵⁹ Therefore, the constitutionalisation project seeks to promote social justice by establishing a pluriversal investment regime based on the values of substantive equality and egalitarianism.⁶⁰

4 The legal geography and background of South African investment regulation in the process of constitutionalisation

Prior to constitutionalisation, the regulatory framework governing foreign investments in South Africa was largely provided under multiple and fragmented rules contained in various BITs.⁶¹ During the inception of democracy, after 1994, South Africa adopted the Economic Cooperation and Development prototype template for the regulation of its various BITs characterised by a strict adherence to customary international law principles.⁶² At that time, South Africa viewed BITs as having minimal legal consequence, with less attention being paid to the implications of obligations generated by these BITs.⁶³ Although the subsequent adoption of the South African Constitution, 1996, imposed

58 N Tzouvala 'The ordo-liberal origins of modern international investment law: Constructing competition on a global scale' in JD Haskell & A Rasulov (eds) *New voices and new perspectives in international economic law* (2020) 52.

59 S Gill & AC Cutler (eds) *New constitutionalism and world order* (2014) 19.

60 K Jayasuriya 'Globalisation, sovereignty, and the rule of law: From Political to economic constitutionalism?' (2001) 8 *Constellations* 20.

61 F Adeleke *Benchmarking South Africa's Foreign Direct Investment Policy* SAIIA Policy Insights 13 (South African Institute of International Affairs 2015) http://www.saiia.org.za/doc_view/802-benchmarking-south-africa-s-foreign-direct-investment-policy (accessed 25 August 2026).

62 Langalanga (n 47).

63 As above. It is noteworthy that before the inception of the democratic dispensation South African negotiators, regulators and other government officials did not fully comprehend the risk which arose from poorly negotiated bilateral investment treaties. The executive branch of the government itself did not fully appreciate the possible consequences of asymmetrical foreign direct investment treaties. Consequently, the executive concluded bilateral investment treaties which were overly in favour of the interest of investors without preserving the necessary policy space to pursue other critical interests. It is clear from the *travaux préparatoires* of various investment treaties concluded by South Africa before 1994 that South Africa's inexperienced negotiators at that time lacked pertinent knowledge about the utility of investment law in furthering developmental objectives such as distributive justice in general

obligations on the government to implement economic and social measures to achieve socioeconomic redress, this obligation was not transposed to the country's international investment agreements.⁶⁴ This view was evident when South Africa was brought before the International Centre for Settlement of Investment Disputes (ICSID) in 2007 by a group of investors (Piero Foresti)⁶⁵ from Italy and Luxembourg, who had filed a claim against the country's government on the basis that South Africa's Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRD Act) contained provisions that amounted to the expropriation of their mineral rights, thus violating the BITs that South Africa had signed with other countries.⁶⁶ South Africa defended its MPRD Act by arguing that it protected existing mineral rights and allowed for their uninterrupted use as long as companies also complied with an accepted constitutional mandate that requires government to advance broader-based transformation.⁶⁷ Whilst the matter was eventually settled, it initiated conversations about the need to further constitutionalise investment regulation in South Africa.⁶⁸

Subsequently, following a review of South Africa's investment policy framework, it was decided that certain BITs with European countries would be terminated.⁶⁹ The micro-environmental review scrutinised the legal obligations under existing BITs and evaluated the changes that would be needed for government to safeguard its own policy objectives.⁷⁰ It was argued that the BITs displayed a disconnection

resulting in the adoption of ones sided investment treaties. See N Yazbek 'Bilateral investment treaties: the foreclosure of domestic policy space' (2010) 17 *South African Journal of International Affairs* 104.

64 J. Mayer 'South Africa's reformed investment regime as a model for developing countries' (2022) 25 *Lewis & Clark Law Review* 1247.

65 See *Piero Foresti, Laura de Carli and Others v Republic of South Africa* ICSID case no ARB (AF)/07/1.

66 MF Qumba 'Safeguarding foreign direct investment in South Africa: Does the Protection of Investment Act live up to its name' (2018) 25 *South African Journal of International Affairs* 342.

67 *Piero Foresti* (n 65) para 2.

68 A Farish 'Protection of Investments Act – A balancing Act between policies and investments' (2016) *De Rebus* 26 <https://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/> (accessed 25 August 2026).

69 L Mhlongo 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 35 *Speculum Juris* 212; C Paton 'Investment bill marks shift in SA's trade policy' *Business Day* 4 November 2013 <http://www.bdlive.co.za/business/trade/2013/11/04/investment-bill-marks-shift-in-sas-trade-policy> (accessed 25 August 2026).

70 M Mossallam 'Process matters: South Africa's experience exiting its BITS' http://www.globaleconomicgovernance.org/sites/geg/files/GEG%20WP_97%20Process%20matters%20%20South%20Africa's%20experience%20exiting%20its%20BITS%20Mohammad%20Mossallam.pdf (accessed 25 August 2026). More than 100 stakeholders from business, labour, government, local and international institutions participated in the review to inform and update the executive on the legal implications and impact of BITs on South Africa's developmental agenda.

between South Africa's domestic imperatives and what it had committed itself to at an international level.⁷¹ As before, the argument was that the existing BITs hindered South Africa's transformation objectives and its general public-interest policymaking ability.⁷² Secondly, they offered disproportionately more protection to foreign investors than to domestic investors, with the latter not enjoying similar access to international arbitration panels.⁷³ Thirdly, the South African Constitution provided adequate protection for foreign investors, which should reshape domestic investment regulations to achieve a better constitutional balance.⁷⁴ Fourthly, international arbitration panels tended to rule in favour of corporate interests at the expense of the host nation's policies.⁷⁵ The South African government also noted other significant countries with similar concerns, such as Brazil, which had not implemented its BITs; India and Indonesia, which were reviewing theirs; and Australia, which had eschewed investor-state dispute settlement in its free trade agreement with the United States.⁷⁶ Interestingly, however, Australia has since included investor-state dispute settlement in its foreign trade agreement with South Korea, showing its continued commitment to the regulation of FDI through international investment law.⁷⁷

The South African government subsequently started to develop domestic legislation to provide for the regulation of FDI, which resulted in the Promotion and Protection of Investment Bill presented in November 2013 and signed into law as the Protection of Investment Act in December 2015.⁷⁸ The principles behind this law are regarded as being in line with the trend for governments to rework their foreign investment regimes to expand their domestic policy space.⁷⁹ The

71 As above.

72 As above.

73 J Reed 'South African revolutionizing foreign investment protection system' (2014) 6 *Yearbook on Arbitration and Mediation* 296; M Weiniger, G Satryani & H Ambrose 'Dawn of a new era for investment protection in South Africa – draft investment law to replace protections offered under investment treaties published for public comment' (22 November 2013) *Herbert Smith Freehills* <https://www.hsfkramer.com/notes/arbitration/2013-11/dawn-of-a-new-era-for-investment-protection-in-south-africa-draft-investment-law-to-replace-protections-offered-under-investment-treaties-published-for-public-comment> (accessed 25 August 2026).

74 Langalanga (n 47); Cutler (n 49) 97.

75 M Sattorova *The impact of investment treaty law on host states: Enabling good governance* (2018) 15.

76 B Kritz 'Rethinking foreign investment frameworks' *The Manila Times* 10 December 2014, 6; P Draper & A Langalanga 'Does the draft investment bill threaten foreign investors' rights?' *Business Day* 2 April 2014 <https://saiaa.org.za/research/draft-investment-bill-requires-amendment/> (accessed 2 July 2024); C Yayi 'Do bilateral investment treaties erode institutional quality?' (2017) SSRN <https://doi.org/10.2139/ssrn.2877454> (accessed 25 August 2026).

77 Langalanga (n 47) 19.

78 Protection of Investment Act 22 of 2015.

79 L Ensor 'Business raises the alarm over investment bill' *Business Day Live* 19 February 2015.

European Union and European investors did not question the government's decision to embark on a review of its investment policies, and despite the objections raised, some investors were sympathetic towards the government's objectives.⁸⁰ However, serious concerns were raised about the way in which the review had been undertaken, and many investors therefore challenged the content of the law.⁸¹ In its initial form, the law was the subject of intense criticism, particularly in light of the uncertainty that had emerged as government considered several changes to policy and legislation that private-sector economists believed were weighing on investor and business confidence in the country.⁸²

Notwithstanding South Africa's transition to democracy in 1994, foreign investors had retained concerns about the country's long-term political stability.⁸³ Furthermore, South Africa's economy had already been weighed down by issues such as chronic power shortages and labour unrest, resulting in lacklustre economic growth.⁸⁴ It was noted that a range of proposed legislation, including the (then) Promotion and Protection of Investment Bill, the Expropriation Bill and a policy proposal on land reform, were 'significantly contributing to low business confidence in South Africa'.⁸⁵ That debate coincided with the government's decision to revoke BITs, which sparked suspicion that the revocation was a prelude to expropriation. At the same time, government intervened in Walmart's planned acquisition of Massmart, obliging Walmart to set up a fund to promote local procurement.⁸⁶ Subsequently, South Africa's domestic politics and use of nationalisation as a policy instrument only strengthened foreign investors' fears that their interests were unprotected, particularly against the backdrop of what government land reform policies brought about in Zimbabwe. The discussion below examines changes introduced by the Act to determine whether they sufficiently constitutionalise investment regulation in South Africa, thereby potentially addressing the concern that investors had with regard to the protection of their assets.

80 Mayer (n 64) 1247.

81 As above.

82 As above.

83 SAIIA 'South Africa's Draft Promotion and Protection of Investment Bill – A submission by the South African Institute of International Affairs' <https://saiia.org.za/news/saiia-submission-on-south-africas-draft-promotion-and-protection-of-investment-bill/> (accessed 25 August 2026)

84 K Bosman *South Africa: Trading International Investment for Policy Space* Stellenbosch Working Paper Series WP04/2016 (Stellenbosch University Department of Economics 2016) <https://www.ekon.sun.ac.za/wpapers/2016/wp042016/wp-04-2016.pdf> (accessed 25 August 2026).

85 As above.

86 As above.

5 Reading constitutionalisation of investment regulation under the Act

The preamble of the Act states that it seeks to protect investors and their investments and to achieve a balance of rights and obligations that applies to investors and matters connected therewith.⁸⁷ It further recognises the importance of investment as instrumental for advancing sustainable development, which leads to economic development, poverty alleviation, and employment creation.⁸⁸ A deduction which can be made from the Act's preamble is that the constitutionalisation of foreign investment regulation is a *sine qua non* for the achievement of the various United Nations (UN) Sustainable Development Goals (SDGs).⁸⁹ It implicitly recognises that the realisation of the UN SDGs, such as eradicating poverty, ending hunger, reducing inequality, promoting decent work, and economic growth, is, to some degree, predicated on the capacity to properly govern foreign direct investment to ensure that it becomes an instrument for economic development.⁹⁰ The Act's preamble's preliminary statement unequivocally demonstrates that one of the objectives of this law is to constitutionalise investment regulation in South Africa through recognising the obligation to advance constitutional values such as openness, transparency and accountability in investment process, regulation, creating a conducive environment that facilitates investments, adoption of a sound legislative framework for protecting all investments, pursuant to constitutional obligations protect the right to just administrative action, access to information and other related rights investment regulation.⁹¹ It acknowledges the government right to regulate and the obligation to take measure to protect the rights of certain categories of historically disadvantaged persons in South Africa.⁹²

Although in law, the preamble of the Act, just like in any other legislation, does not generate binding legal obligations, it is not without value either.⁹³ Plato posit that preambles should be capable of

87 Preamble to the Protection of Investment Act 22 of 2015.

88 As above.

89 United Nations Development Programme 'What Are the Sustainable Development Goals' <https://www.undp.org/sustainable-development-goals> (accessed 25 August 2026).

90 United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) 'Foreign Direct Investment and Sustainable Development In International Investment Governance' <https://www.unescap.org/sites/default/files/publications/STII%20No.90%20version%204-final.pdf> (accessed 25 August 2026); B Arthur, M Saha, FA Sarpong & KD Dutta 'Unlocking Africa's potential: The transformative power of foreign direct investment for sustainable development' (2024) 10 *Heliyon* e26507; R Marenga 'The policy and legal framework for sustainable foreign direct investment in Namibia' (2019) 21 *Journal of Sustainable Development in Africa* 62.

91 Preamble to the Protection of Investment Act 22 of 2015.

92 As above.

93 K Roach 'The uses and audiences of preambles in legislation' (2001) 47 *McGill Law Journal* 129.

persuading citizens to obey the law by rationally and poetically appealing to their minds, hearts, and conscience.⁹⁴ Arguably, Plato's perspective of preambles is not necessarily reflective of the contemporary versions of preambles.⁹⁵ Roach observes that whilst preambles have become part of the modern legislative edifice, they barely have a positive impact on their audiences because they are not couched in poetic, persuasive common language which strikes at the heart of the hearers as Plato envisaged.⁹⁶ Although this argument holds some water, it can be submitted that the use of phrases such as sustainable development, historically disadvantaged persons, conscious, recognising, considering, desirous, and reaffirming, are emotionally packed phraseologies with highly charged legislative diction which can positively induce all constituencies, parties and stakeholders to participate in the effective regulation and constitutionalisation of foreign direct investments. Rudaman⁹⁷ advances that a preamble is vital for legislative construction as it provides a preliminary statement that explains the purpose of legislation, thereby putting it in its legal, historical and contemporary context.⁹⁸ It guides the juridical interpretation of this legislation, which is essential to the proper placement and contextualisation of investment regulation within the scheme of South Africa's constitutionalism.⁹⁹ A critical reading of the preamble of the Act demonstrates that the Act is embedded with the need to constitutionalise investment regulation.¹⁰⁰ The Act takes a new paradigm towards the protection of foreign investment by ensuring that it is achieved in a manner which promotes sustainable development, transformative constitutionalism in pursuit of an egalitarian society in South Africa.¹⁰¹

Aside from the above, the Act also provides a comprehensive definition of investments which is largely constitutionally compliant.¹⁰² Section 2 (1) of the Act recognises material/corporeal and immaterial/incorporeal forms of investments including (a) the establishment of a lawful enterprise acquired or expanded by an investor in accordance with South African laws, committing resources of economic value over a reasonable period of time, in anticipation of profit; (b) the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or (c) the holding, acquisition or merger by such an

94 Plato *The Laws* M Schofield (ed) T Griffith (trans) (2016) 10; FD Miller Jr 'The rule of reason in Plato's Laws' in JA Jacobs (ed) *Reason, religion, and natural law: From Plato to Spinoza* (2012) 31; Dutra & Stalley 'An introduction to Plato's Laws' (1985) *Classical World* 608.

95 D Cohen 'Law, autonomy, and political community in Plato's Laws' (1993) 88 *Classical Philology* 310.

96 Roach (n 93) 130.

97 A Rudman 'Preamble' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (2023) 20.

98 Rudman (n 97) 21.

99 As above.

100 Preamble to the Protection of Investment Act 22 of 2015.

101 As above.

102 As above, s 2.

enterprise with another enterprise outside the country including acquisition or merger with another foreign enterprise.¹⁰³ Section 2 (2) of the Act states that shares, debentures, bonds, copyrights, loans, returns, rights and concessions possessed by an enterprise as an asset qualify to be an investment. The Act offers a constitutionalised definition of investment accommodative of the material and immaterial forms of investment property/ investment property/investment assets in sync with general principles of law and the Constitution.¹⁰⁴

The constitutionalisation of foreign direct investment regulation under the Act is achieved by incorporating standards of treatment found under international investment law into this legislation.¹⁰⁵ Section 8 (1) of the Act outlaws the treatment of foreign direct investor and their investments less favourably than South African investors who are in the same circumstances.¹⁰⁶ This means the Act contains the National Treatment (NT) standard, an important principle which enjoins the state not to unfairly discriminate against and exploit foreign investors and their investments.¹⁰⁷ It constitutes a minimum standard of treatment in international investment law, which is a part of an emerging global constitutional law similar to the domestic systems of public law.¹⁰⁸ Through enshrining the NT standard into the Act, the legislation aligned South African investment regime with the Constitution including the advancement of the rule of law in investment regulation as well as the right to equality provided under section 9 of the Constitution which provides that ‘everyone’ including natural and justice persons have the right to enjoy full and equal protection of the law.¹⁰⁹

Although the Act's encapsulation of the NT is commendable as it extends legal protection to foreign investors and their investments, the Act does not contain the Most Favoured Nation Treatment (MFN) standard, and a fair and equitable treatment standard.¹¹⁰ It can be

103 As above.

104 AJ Van der Walt & RM Shay ‘Constitutional analysis of intellectual property’ (2014) 17 *Potchefstroom Electronic Law Journal* 63.

105 M Du ‘International investment law and the rule of law: The case of China’ (2024) 33 *Washington International Law Journal* 314; LO Sadiq ‘Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries’ (2014) 9 *Journal of International Commercial Law and Technology* 231.

106 S 8(1) of the Protection of Investments Act.

107 JW Salacuse ‘Of handcuffs and signals: Investment treaties and capital flows to developing countries’ (2017) 58 *Harvard International Law Journal* 130; J Kurtz ‘The merits and limits of comparativism: National treatment in international investment law and the WTO’ in SW Schill (ed) *International Investment Law and Comparative Public Law* (2010) 243.

108 JW Salacuse *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 24.

109 See S 9 of the South African Constitution, 1996.

110 International Institute for Sustainable Development ‘The Most-Favoured Nation Clause in Investment Treaties’ <https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf> (accessed 25 August 2026).

strongly maintained that although the omission of the MFN from the Act represents a radical departure from the standards of treatment found in international investment law in general, such digression is necessary because the MFN is a superior treatment operationalised by a specific treaty or agreement existing between the parties and should not be part of the law of general application such as the Act.¹¹¹ This approach to the constitutionalisation of investment regulation is commendable as it is predicated on reciprocity and ensures that South Africa does not grant absolute investment protection which is inconsistent with the Carvo Doctrine and its developmental interests of non-investor nature.¹¹²

Notwithstanding the above, Mhlongo¹¹³ observes that the Act places an obligation on the State not to treat foreign investors and their investments 'less favourably than South African investors' in 'like circumstances' without defining the meaning of the term 'like circumstances'.¹¹⁴ In determining whether the treatment of investors is not less favourable than that of South African investors, the Act requires each investment case to be viewed in accordance with its merits, taking into account the terms of the investment arrangement.¹¹⁵ Mhlongo argues that although the term 'like circumstances' appears to be sound, it is problematic because, in reality, a foreign investor will never be in 'like circumstances' with other domestic investors.¹¹⁶ This is because domestic and foreign investors who invest in the same sector can be theoretically deemed to be in the same circumstances, as a foreign investor does not legally possess the same rights and duties as a domestic investor.¹¹⁷ A domestic investor is accorded more rights by the domestic systems of public law by virtue of being a citizen or falling into special categories of certain persons.¹¹⁸ These special categories of persons include those who are conferred special treatment because they are from historically disadvantaged backgrounds as defined under Black Economic Empowerment (BEE) policies and Laws.¹¹⁹ Whilst Mhlongo's argument has some merits, it can be contended that reality has shown that foreign direct investors, in some instances, are afforded more protection than domestic investors because of their political and

111 AY Vastardis 'Most favoured nation treatment' in D Schneiderman & G Van Harten (eds) *Rethinking Investment Law* (2023) 38.

112 W Nabalende 'Protecting foreign investments using the Calvo doctrine' (2020) 1 *Financing for Development* 169.

113 L Mhlongo 'A critical analysis of the Protection of Investment Act 22 of 2015' (2019) 34 *Southern African Public Law* 12.

114 Sec 8 of the Protection of Investment Act 22 of 2015.

115 Mhlongo (n 113) 12.

116 Mhlongo (n 113) 13.

117 As above.

118 Mhlongo (n 113) 14.

119 Mhlongo (n 113) 15.

economic muscles.¹²⁰ TNC's in particular wield more power and operate in cahoots with the local elites who clandestinely provide them with exceptional treatment and rights by shielding them from legislative oversight and criminal prosecutions related to human rights, environmental, and labor violations.¹²¹

It can be strongly argued that elevating foreign investors to the same position as indigenous citizens or local peoples by granting them equal economic rights may be undesirable.¹²² Such an approach would be an affront to the idea of transformative constitutionalism and the advance of social justice, which requires priorities to be given to those who are poor and the peripheries to close the economic disparities existing in society.¹²³ Differentiation in treatment may be fair in international investment regulation because of the imperative to improve the material economic conditions of the economically disadvantaged person.¹²⁴ This means the Act's approach to the treatment of foreign investors is correct as it constitutionalises investment regulation by ensuring that it focuses on meeting not only the needs of mercantilists but rather upholding the rights of the poor, including the realisation of their constitutional rights such as human dignity, freedom, and equality.¹²⁵

In the same vein, the Act further constitutionalises investment through various regulatory edifices, including enshrining the right for the investor to repatriate funds provided in section 11 of the Act.¹²⁶ By legislating

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- 120 C Annacker 'Fragmentation and integration in international investment law: Plus ça change' (2023) 38 *ICSID Review – Foreign Investment Law Journal* 501; E Kuvvet 'Anti-corruption courts and foreign direct investments' (2021) 72 *International Review of Economics & Finance* 573; V Bath & T Gu 'Foreign investment, investment treaties and corruption in China and Hong Kong' in N Teramura, L Nottage & B Jetin (eds) *Corruption and Illegality in Asian Investment Arbitration* (2024) 233.
 - 121 H Raeschke-Kessler & D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *The Journal of World Investment & Trade* 49; Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review: Government Position Paper* (June 2009) <https://static.png.org.za/docs/090626trade-bi-lateralpolicy.pdf> (accessed 26 August 2026).
 - 122 OK Fauchald 'International investment law in support of the right to development?' (2021) 34 *Leiden Journal of International Law* 181.
 - 123 F Francioni 'Access to justice, denial of justice and international investment law' (2009) 20 *European Journal of International Law* 729.
 - 124 O Suttle 'Justice and authority in investment protection' (2022) 15 *Law and Development Review* 258; D Schneiderman 'International investment law's unending legitimization project' (2017) 49 *Loyola University Chicago Law Journal* 244; S Das 'Fine balance: Empire, neoliberalism, and the fair and equitable treatment standard in international investment law' (2023) 24 *The Journal of World Investment & Trade* 660.
 - 125 JT Gathii & OD Akinkugbe 'Symposium introduction: Centering voices from the Global South on investor-state dispute settlement reform: A debate' (7 September 2020) *Afronomicslaw* <https://www.afronomicslaw.org/2020/09/07/symposium-introduction-centering-voices-from-the-global-south-on-investor-state-dispute-settlement-reform-a-debate/> (accessed 25 August 2026).
 - 126 S 11 of Protection of Investment Act 22 of 2015.

South Africa's obligation to permit the payment, conversion, and repatriation of investment funds, the Act enables foreign investors to enjoy the financial benefits derivable from their investments.¹²⁷ This obligation ensures that foreign investors are not treated less favourably than South Africans, who generally have access to funds generated from their inward investments. However, section 11 of the Act shows that the obligation to repatriate funds is not an absolute one, but of a relative nature.¹²⁸ The section's use of the words 'may repatriate funds' is couched in non-peremptory language, as repatriation of funds depends on the tax obligations of the investor in question, the applicable foreign exchange rules, and the need to temporarily restrict repatriation of funds to ring-fence scarce foreign currency in a financial crisis, and the achievement of balance of payments.¹²⁹ The Act's provision relating to the repatriation of the fund is congruent with South Africa's obligation (s) under Article VIII of the Agreement of the International Monetary Fund (IMF) requiring member states to liberalise the flow of investments.¹³⁰

It can be posited that one of the significant regulatory features of the Act is its embodiment of the right to regulate, which constitutionalises foreign direct investment.¹³¹ Significantly, section 12 (1) of the Act safeguards the legal right of the South African State or any other organ of the state to adopt constitutional or other legislative measures in derogation of substantive commitments it has undertaken under BIT and international investment law to redress the historical, social, and economic inequalities and injustices; (b) uphold the values and principles espoused in section 195 of the Constitution; (c) uphold the rights guaranteed in the Constitution; (d) promote and preserve cultural heritage and practices, Indigenous knowledge and biological resources related thereto, or national heritage; (e) fostering economic development, industrialisation and beneficiation; (f) achieving the progressive realisation of socio-economic rights; or (g) protecting the environment and the conservation and sustainable use of natural resources.¹³² Indeed, section 12 of the Act modernises and constitutionalises investment regulation in South Africa by ensuring that it incorporates the right to regulate as a central feature, which allows the government to take measures that advance distributive justice, an essential ingredient for the establishment of an egalitarian society.¹³³

127 T Kondo 'A comparison with analysis of the SADC FIP before and after its amendment' (2017) 20 *Potchefstroom Electronic Law Journal* 1.

128 S 11 of Protection of Investment Act 22 of 2015.

129 As above.

130 IMF 'Articles of Agreement' <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> (accessed 14 July 2024); United Nations Conference On Trade And Development 'Transfer Of Funds' <https://unctad.org/system/files/official-document/psiteiitd20.en.pdf> (accessed 25 August 2026).

131 S 12 of Protection of Investment Act 22 of 2015.

132 As above.

133 As above.

Arguably one of the most important aspects of the constitutionalisation of investment regulation from the perspective of the Act is a guarantee of due process when the government or organ of state adopts measures to advance the public welfare goals mentioned above.¹³⁴ The implication is that when a State takes a measure which affects foreign direct investments, it must be related to some constitutionally and legislatively public policy objective, rather than merely extraneous reasons. Such measures should also not be entirely disproportionate in light of other legally protected interests that are restricted by the measure.¹³⁵ This means every measure taken by the government or organ of the government that adversely affects the rights of any persons, including those of foreign investors, must pass the constitutional threshold of reasonableness and proportionality provided by section 36 of the Constitution in a democratic society based on human dignity, equality, and freedom.¹³⁶

In addition to the above, Section 6 of the Act states that investors have the right to just administrative action, which is a core concern of South African public law that guarantees the right to have a dispute decided before fair, impartial, and independent judicial proceedings according to section 33 and the right to just administrative action in terms of section 34 of the South African Constitution.¹³⁷ Codifying due process rights for foreign investors in domestic investment legislation is in sync with international investment law, which recognises the importance of providing supplementary due domestic process guarantees to ensure that the domestic public law process does not deny investors their procedural rights in a manner that undermines general administration of justice and rules of natural justice.¹³⁸ The constitutionalisation of the due process rights of foreign investors under the Act ensures that governmental conduct is to some degree predictable thereby enabling foreign investors as legal subjects to properly plan their affairs.¹³⁹

6 Loopholes to the constitutionalisation of investment regulation under the Act

Notwithstanding the constitutionalisation of foreign direct investment regulation alluded to under the Act, this piece of legislation is not without

¹³⁴ As above.

¹³⁵ LJ Kotzé & AJ Van der Walt 'Just administrative action and the issue of unreasonable delay in the environmental impact assessment process: A South African perspective' (2003) 10 *South African Journal of Environmental Law and Policy* 40.

¹³⁶ S 36 (1) of the Constitution of South Africa, 1996.

¹³⁷ S 11 of the Protection of Investment Act 22 of 2015.

¹³⁸ R Dolzer 'The impact of international investment treaties on domestic administrative law' (2005) 37 *New York University Journal of International Law and Politics* 966.

¹³⁹ S 11 of the Protection of Investment Act 22 of 2015.

shortcomings.¹⁴⁰ These shortcomings militate against the effectiveness of the constitutionalisation of investment regulation.¹⁴¹ In section 12, the Act provides for state-to-state arbitration to the exclusion of the common investor-state arbitration.¹⁴² The Act also requires the government to consent first before the aggrieved investor can approach an international tribunal.¹⁴³ It does not specify the manner of recourse which is available in instances where the government fails to consent.¹⁴⁴ Further, the Act does not expressly address the issue of expropriation of investments.¹⁴⁵ Section 3 of the Act requires it to be interpreted in line with the Constitution, which means that section 25, which deals with expropriation of property, is applicable to investment regulation. However, the Act should have provided for an explicit clause on expropriation issues to promote legal certainty and clarity.¹⁴⁶

7 Reconfiguring the Act's constitutionalisation of investment regulation

In order to further deepen the constitutionalisation of investment regulation under the Act, there are various law reform options which can be employed.¹⁴⁷ These law reform options include strengthening institutional capacity for oversight and monitoring, proper management of employee share ownership schemes, establishment of investment courts, creation of a sovereign fund, and tackling corruption.¹⁴⁸ The discussion below furnishes recommendations pertinent to deepening the constitutionalisation of investment regulation in South Africa.

7 1 Strengthening institutional capacity for oversight and monitoring

Whilst the Act subjects investment regulation to constitutional compliance, it does not establish an explicit specialised statutory body

140 MF Qumba 'South Africa's move away from international investor-state dispute: A breakthrough or bad omen for investment in the developing world?' (2019) 52 *De Jure Law Journal* 359; T Gazzini 'Rethinking the promotion and protection of foreign investments: South Africa's Protection of Investment Act 22 of 2015' in YN Hodu & MM Mbengue (eds) *African Perspectives in International Investment Law* (2020) 132.

141 Protection of Investment Act 22 of 2015.

142 S 12 of the Protection of Investment Act 22 of 2015.

143 As above.

144 As above.

145 As above.

146 HJ Lubbe & EJ du Plessis 'Compensation for expropriation in South Africa, and international law: The leeway and the limits' (2021) 11 *Constitutional Court Review* 79.

147 E Asiedu 'Policy reform and foreign direct investment in Africa: Absolute progress but relative decline' (2004) 22 *Development Policy Review* 44.

148 MT Musakwa & NM Odhiambo 'Foreign direct investment dynamics in South Africa: Reforms, trends and challenges' (2019) 29 *Studia Universitatis "Vasile Goldi?" Arad - Economics Series* 50.

and system that provides oversight over the admission, performance, and operation of foreign direct investment to achieve various constitutional goals such as advancing social justice and transformative constitutionalism, among others.¹⁴⁹ Given that the executive arm of the South African government, together with the legislature, often lacks the institutional capacity, time, and expertise to deepen the constitutionalisation of investment regulation, the legislature lost the opportunity to establish an independent statutory-based investment body or agency through the Act that monitors the constitutional compliance of investment regulation.¹⁵⁰ Although South Africa has InvestSA, an agency that is a key part of South Africa's Department of Trade, Industry and Competition, the entity was not created under the Act and has very limited, ill-defined functions.¹⁵¹ InvestSA is an entity operating under the South African Department of Trade, Industry and Competition whose role is limited to attracting and retaining investment in South Africa.¹⁵² It can be submitted that new provisions should be added to the Act with the view to either incorporate, The InvestSA into the legal regime governing foreign direct investments as a statutory body with clearly defined powers and functions or create a new entity or investment agency conferred with the legal authority to, *inter alia*, facilitate the constitutionalisation of investment regulation in South Africa through providing oversight over investment performance.¹⁵³

The proposed investment agency or entity can be called 'The South African Investment Regulation Body (SAIB)' and endowed with the authority to carry out foreign direct investment analysis, collection of data relating to their performance, and conducting studies on international best practices concerning foreign direct investment governance and policy reforms.¹⁵⁴ Such a statutory body would also be endowed with the legal authority to carry out critical unannounced inspections of project sites, search powers, and the ability to compel interviews, reports, and the production of studies about the performance of foreign investments, thereby ensuring that foreign investors comply

149 Trade and Industrial Policy Secretariat *Determinants of Investment in South Africa: A Sectoral Approach* TIPS Occasional Paper (Department of Trade and Industry Policy Support Programme 2000) <https://www.tips.org.za/files/361.pdf> (accessed 25 August 2026).

150 National Treasury *A Review Framework for Cross-Border Direct Investment in South Africa* Discussion Document (National Treasury 2011) <https://www.treasury.gov.za/documents/national%20budget/2011/A%20review%20framework%20for%20cross-border%20direct%20investment%20in%20South%20Africa.pdf> (accessed 25 August 2026).

151 As above.

152 InvestSA *South Africa – Your Preferred Investment Destination* <https://www.investsa.gov.za/> (accessed 25 August 2026).

153 As above.

154 J Bonnitcha, SH Nikiéma & T St John *Rethinking National Investment Laws: A Study of Past and Present Laws to Inform Future Policy-Making* (International Institute for Sustainable Development 2023) <https://www.iisd.org/system/files/2023-07/rethinking-national-investment-laws-en.pdf> (accessed 26 August 2026).

with their various constitutional obligations such as human rights and labour standards.¹⁵⁵ The establishment of the SAIB would deepen the constitutionalisation of foreign direct investment regulation by providing for a balancing pro-investment governance that is aligned with the protection of public interest priorities such as employment preservation, and safeguarding the interest of small businesses and historically disadvantaged persons.¹⁵⁶

7 2 Proper management of Employee Share Ownership Schemes

In order to further strengthen the constitutionalisation of investment regulation in South Africa, there is a need to ensure that there is proper management of Worker Share Ownership Schemes (WSOP).¹⁵⁷ Various provisions governing the current WSOP should be added to the Act to advance transformative constitutionalism and social justice.¹⁵⁸ WSOPs are an important mechanism designed to facilitate employee ownership within a corporation.¹⁵⁹ It enables employees to acquire shares in the companies in which they are employed, thereby providing an opportunity to them to have a stake in the development of the business. WSOPs are largely governed by sections 95 and 97 of the Companies Act.¹⁶⁰ Section 95 provides a precise definition of employee share schemes as a 'structured initiative offered exclusively to employees, officers, and other closely affiliated individuals within the company or its subsidiaries.'¹⁶¹ These schemes, whether they are established *via* a trust or alternative means, can potentially facilitate workers' participation through the issuing of shares or granting of share options.¹⁶² From the constitutionalisation of investment regulation perspective, WSOP is

155 United Nations Conference on Trade and Development *The Evolution of FDI Screening Mechanisms: Key Trends and Features* Investment Policy Monitor No 25 (UNCTAD 2023) <https://unctad.org/publication/evolution-fdi-screening-mechanisms-key-trends-and-features> (accessed 21 July 2024).

156 AC Garriga 'Human rights regimes, reputation, and foreign direct investment' (2016) 60 *International Studies Quarterly* 160; T Voon & D Merriman 'Incoming: How international investment law constrains foreign investment screening' (2023) 24 *The Journal of World Investment & Trade* 77.

157 A Blair, T Moloko & L Mthembu 'Employee share schemes under the Companies Act' (2021) *DealMakers* Q1 8.

158 J Bonnitcha, SH Nikiéma & T St John *Rethinking National Investment Laws: A Study of Past and Present Laws to Inform Future Policy-Making* (International Institute for Sustainable Development 2023) <https://www.iisd.org/system/files/2023-07/rethinking-national-investment-laws-en.pdf> (accessed 22 July 2024).

159 TV Warikandwa 'Decolonising labour laws and repossessioning subaltern epistemologies: A review of South African and Namibian mineworkers' fight for labour rights' (2024) 45 *Obiter* 37.

160 S 97 of the Companies Act 71 of 2008.

161 S 95 of the Companies Act 71 of 2008.

162 E Kaarsemaker, A Pendleton & E Poutsma *Employee Share Ownership Plans: A Review* Working Paper 44 (University of York, The York Management School 2009) <http://www.york.ac.uk/management/research/working-paper/> (accessed 22 July 2024).

aligned with the state's constitutional obligation and transformative agenda to empower historically disadvantaged persons by providing equal access to economic opportunities.¹⁶³ WSOP has many merits, including ensuring that workers own a stake in a particular investment arrangement or business, which enables them to participate in the making of crucial business decisions.¹⁶⁴ The democratisation of investment regulation and decision-making fosters a culture of accountability, transparency, and inclusivity in business and investment. Worker ownership is also instrumental to the fulfillment of the Broad-Based Black Economic Empowerment (BBBEE) ownership requirements in companies.¹⁶⁵ Through the incorporation of various shareholders, including workers, companies can promote a more egalitarian ownership structure that complies with BBBEE legislation and is reflective of the various interests of the workforce.¹⁶⁶

Notwithstanding the above-stated benefits, the regulatory framework governing WSOP remains inadequate and fragmented. WSOPs are largely governed by sections 95 and 97 of the Companies Act.¹⁶⁷ Section 97 of the Companies Act requires the appointment of a compliance officer who is responsible for ensuring that the schemes adhere to regulatory standards.¹⁶⁸ This compliance officer is accountable to the company's directors and has the responsibility to ensure that the scheme functions within the ambit of the law in an ethical manner that protects the integrity of the company's objectives.¹⁶⁹ There is a need to add provisions relating to the WSOPs so that investors are required to establish these schemes as a part of ploughing back into the society they operate in.¹⁷⁰ These provisions relating to the WSOPs should reinforce a stakeholder-oriented approach to foreign direct investment regulation through the integration of worker representation in various investments

163 SAnews 'Worker share ownership schemes important to economic transformation' 23 April 2024 <https://www.sanews.gov.za/south-africa/worker-share-ownership-schemes-important-economic-transformation> (accessed 22 July 2024).

164 As above.

165 AD Mebratie & AS Bedi *Foreign Direct Investment, Black Economic Empowerment and Labour Productivity in South Africa* IZA Discussion Paper No 6048 (Institute for the Study of Labor 2011) <https://d-nb.info/1016697910/34> (accessed 22 July 2024).

166 C Boshoff & NE Mazibuko 'Share ownership in a retail firm: An exploratory study of employee perceptions' (1995) 26 *South African Journal of Business Management* 7.

167 S 97 of the Companies Act 71 of 2008.

168 S 97 of the Companies Act 71 of 2008.

169 As above.

170 J Bonnitcha, SH Nikiéma & T St John *Rethinking National Investment Laws: A Study of Past and Present Laws to Inform Future Policy-Making* (International Institute for Sustainable Development 2023) <https://www.iisd.org/system/files/2023-07/rethinking-national-investment-laws-en.pdf> (accessed 22 July 2024).

and company boards.¹⁷¹ Further, incorporating provisions into the Act which address the financing mechanisms of the workers scheme is pertinent to the deepening of the constitutionalisation of investment regulation in South Africa.¹⁷²

7 3 Creation of Sovereign Wealth Fund

Another avenue for South Africa to reform its investment regulation in pursuit of deepening the constitutionalisation project is through the establishment of the country's sovereign wealth fund. A sovereign wealth fund is a financial instrument used to reinvest excess capital into markets or other investments.¹⁷³ Sovereign wealth has become a common mechanism that many countries use to generate profit for the benefit of their economies.¹⁷⁴ This means sovereign wealth funds are commonly state-owned financial vehicles used by governments to pool money from sectors of the economy and invest it in various profitable financial assets. In some countries, the money largely comes from the nation's budget surplus. Many nations use sovereign wealth funds as a way to accrue profit for the benefit of the nation's economy and its citizens.¹⁷⁵ The primary functions of a sovereign wealth fund are to stabilise the country's economy through diversification and to generate wealth for future generations.¹⁷⁶ In South Africa, a sovereign wealth fund can derive its resources from statutory investor contributions derived from critical sectors such as mining.¹⁷⁷ The South African government can use economic proceeds emanating from sovereign wealth funds to finance

171 Department of Trade, Industry and Competition *Worker Share Ownership: Building a Shared Prosperity – Worker Ownership for an Inclusive South African Economy* (the dtic 2024) <https://www.stateofthenation.gov.za/assets/downloads/WSOP-A5-Booklet.pdf> (accessed 25 August 2026).

172 As above.

173 MT Kusuma, TH Pangestu & R Raytona 'Establishment of a sovereign wealth fund through investment management institution in realising optimisation of foreign investment' (2021) 2 *Indonesia Private Law Review* 126.

174 J Chen 'Financing the sustainable development goals: The role of African sovereign wealth funds' (2019) 51 *New York University Journal of International Law and Politics* 1262.

175 M Ncube 'Sovereign wealth funds and Africa's unique challenges' (21 August 2017) *Quantum Global Group* <http://quantumglobalgroup.com/article/sovereign-wealth-funds-and-africas-unique-challenges> (accessed 25 August 2026).

176 XE Karametaxas 'Sovereign wealth funds as socially responsible investors' in G Adinolfi, F Baetens, J Caiado, A Lupone & AG Micara (eds) *International Economic Law: Contemporary Issues* (2017) 272.

177 International Working Group of Sovereign Wealth Funds *Sovereign Wealth Funds: Generally Accepted Principles and Practices – "Santiago Principles"* (2008) <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> (accessed 25 August 2026).

various pro-poor initiatives such as road construction, building low-income housing, electrification, among others.¹⁷⁸

7 4 Establishing Investment Courts

South Africa can strengthen its constitutionalisation of foreign direct investment regulation by establishing specialised investment courts to protect the rights of foreign investors by encouraging the use of local courts.¹⁷⁹ Given that South Africa already has specialised commercial crimes courts, labour courts, competition tribunals, tax courts and land courts, the creation of investment courts would be plausible.¹⁸⁰ There are various countries from which South Africa can take lessons, including Indonesia, which has been able to link its obligations under international investment law with its national legislation by creating an investment-state dispute settlement system as a viable alternative to the use of domestic courts.¹⁸¹ Investment courts in South Africa would provide the necessary ‘oversight’ mechanism to ensure that foreign direct investments are governed in a way that recognises the significance of the country’s right to regulate in light of various public interests.¹⁸² Adding a section to the Act which provides for the establishment of investment courts would safeguard the country’s policy sovereignty and other pro-development needs.¹⁸³

7 5 Tackling Corruption

Another pathway for deepening the constitutionalisation of foreign direct investment regulation is through combating corruption in foreign direct investment activities and operations.¹⁸⁴ Foreign direct investment is especially susceptible to corrupt activities for many reasons, including income differentials which push a foreign investor to pay bribes and for public officials to engage in extortion.¹⁸⁵ Corruption often damages the

178 B Demeyere ‘Sovereign wealth funds and (un)ethical investment: Using “due diligence” to avoid contributing to human rights violations committed by companies in the investment portfolio’ in G Nystuen, A Follesdal & O Mestad (eds) *Human Rights, Corporate Complicity and Disinvestment* (2011) 183.

179 PwC & Strategy& *South Africa Economic Outlook: Unlocking Foreign Direct Investment (FDI) as a Driver of Business and Economic Development* (29 April 2024) <https://www.strategyand.pwc.com/a1/en/assets/pdf/sa-economic-outlook/unlocking-foreign-direct-investments.pdf> (accessed 25 August 2026).

180 DM Howard ‘Creating consistency through a World Investment Court’ (2017) 41 *Fordham International Law Journal* 2.

181 CN Arina ‘Logical consequences in Indonesia’s position in investment disputes in arbitration forum ICSID’ (2022) 15 *Indonesian Law Journal* 37.

182 As above.

183 JW Yackee ‘Toward a minimalist system of international investment law?’ (2009) 32 *Suffolk Transnational Law Review* 318.

184 V Linhartová & D Vávrová ‘Corruption and its impact on foreign direct investment’ (2017) 4 *New Trends and Issues Proceedings on Humanities and Social Sciences* 379.

185 E Asiedu ‘On the determinants of foreign direct investment to developing countries: Is Africa different?’ (2002) 30 *World Development* 110.

investment climate of a country, which compromises the government's anti-poverty strategy.¹⁸⁶ This is because corruption creates a barrier that impedes investors from having access to the country's economy, thereby severely limiting the country's developmental prospects.¹⁸⁷ South Africa should strengthen its anti-corruption legislative framework including the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Prevention of Organised Crime Act 121 of 1998, the Financial Intelligence Centre Act 31 of 2001, the Protected Disclosures Act 26 of 2008, the International Cooperation in Criminal matters Act 75 of 1996, the Criminal Procedure Act 51 of 1977, the Public Finance Management Act 1 of 1999, the Municipal Finance Management Act 56 of 2003, the Companies Act 70 of 2008.¹⁸⁸ Provisions that deal with transparency, openness and disclosure in investment activities or operations should be added to the Act to strengthen the country's anti-corruption approach to investment regulation.¹⁸⁹

8 Conclusion

This article has explored the constitutionalisation of foreign direct investment regulation in South Africa. It has demonstrated that the enactment of the Act provided a further pathway for the constitutionalisation of foreign direct investment regulation by ensuring that the South African investment regime complies with the supreme law of the country, which is the Constitution.¹⁹⁰ The article has posited that the constitutionalisation of investment regulation in South Africa is not an instantaneous event but rather a comprehensive progressive process of aligning the country's investment architecture with the provisions of the Constitution to achieve transformative constitutionalism, an egalitarian society underpinned by social justice through the instrumentality of a constitutionally compliant investment regime.¹⁹¹ It has been argued that the constitutionalisation of foreign direct investment regulation in South Africa is about disciplining and

186 TJ Mosikari, TC Nthebe & JH Eita 'Does corruption hamper inward FDI in South Africa from other African countries? A gravity model analysis' (2019) 72 *Economia Internazionale/International Economics* 513.

187 TS Masipa 'The relationship between foreign direct investment and economic growth in South Africa: Vector error correction analysis' (2018) 18 *Acta Commercii* a466, 2.

188 South African Government *National Anti-Corruption Strategy 2020-2030* (2021) https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf (accessed 26 August 2026).

189 P Gomes Pereira, S Lehmann, A Roth & K Attisso *Study on Anti-Corruption Architecture of the Republic of South Africa* (GIZ 2012) https://baselgovernance.org/sites/default/files/2019-01/south_africa_anti-corruption_architecture.pdf (accessed 22 July 2024).

190 National Treasury *A Review Framework for Cross-Border Direct Investment in South Africa* Discussion Document (National Treasury 2011) <https://www.treasury.gov.za/documents/national%20budget/2011/A%20review%20framework%20for%20cross-border%20direct%20investment%20in%20South%20Africa.pdf> (accessed 26 August 2026).

191 Garcia Blesa (n 38) 1973.

domestication of the neoliberal international investment regime, which is a compulsory element of world globalisation, and ensuring that it is congruent with the provisions of the country's Constitution.¹⁹² The article has argued in favour of further constitutionalisation of investment regulation in South Africa by adding provisions to the Act which deepen the institutional capacity and monitoring mechanism for the performance of foreign investments, proper management of employment share-ownership schemes, creation of the sovereign wealth fund, the establishment of investment courts, and tackling investment-related corruption. These changes would strengthen the constitutionalisation of the investment regime to achieve greater distributive justice and investor protection without undermining South Africa's economic, political, ecological developmental needs and interests.¹⁹³

192 Sornarajah (n 41) 206.

193 J Bonnitcha, SH Nikièma & T St John *Rethinking National Investment Laws: A Study of Past and Present Laws to Inform Future Policy-Making* (International Institute for Sustainable Development 2023) <https://www.iisd.org/system/files/2023-07/rethinking-national-investment-laws-en.pdf> (accessed 22 July 2024).