NOTES & COMMENTS

SOUTH AFRICA'S REFORMED INVESTMENT REGIME AS A MODEL FOR DEVELOPING COUNTRIES

by
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Beginning in 2012, South Africa decided to unilaterally terminate many Bilateral Investment Treaties (BITs) with European countries—this represented a departure from the 1990s, where South Africa, like many other developing countries, entered into BITs with wealthy, capital-exporting states in the hopes of attracting foreign direct investment. In 2015, South Africa enacted, in place of the BITs, the Protection of Investment Act, designed to protect foreign investors while also providing the state more freedom to regulate in the public interest. This Comment analyzes the history of South Africa's BIT policy, and argues that South Africa has suffered minimally, if at all, in terms of foreign investment. South Africa's approach could be used as a model for other developing countries. This Comment proposes conditions that other countries should meet to effectively follow the South Africa model.

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INTRODUCTION

Since the rise of Bilateral Investment Treaties (BITs)[1] in the second half of the 20th century, the use of BITs to attract investment has become widespread all over the world.[2] By signing BITs with wealthy, capital-exporting states, developing countries hope to attract foreign direct investment (FDI) to stimulate their economies and make up for a lack of local capital.[3] However, the usefulness of such treaties to

[1] BITs are a form of International Investment Agreement (IIA). A BIT is an investment treaty between two countries, while the term IIA can refer to other types of treaties that have investment provisions within them. Although most of the points in this Comment apply to all IIAs, this Comment will use the term BIT throughout, firstly because many of the sources use the term BIT (especially the ones referring specifically to South Africa), and secondly because all the agreements discussed specifically in this Comment (the ones signed between South Africa and European countries) are in fact BITs. For an overview of BITs and IIAs, see Peter Muchlinski, *The Framework of Investment Protection: The Content of BITs*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 37, 37–38 (Karl P. Sauvant and & Lisa E. Sachs eds., 2009).

[2] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 204 (4th ed. 2017).

[3] *Id.* at 221 (stating that "[t]he view that securing foreign investment protection through investment treaties facilitated such flows was a reason given for the increase in the number of bilateral investment treaties").

attract investment to developing countries has come into doubt in recent years as the costs of these treaties have become increasingly apparent.[4] The Republic of South Africa, like many developing countries, signed a series of BITs with developed countries without fully appreciating the limits such treaties placed on its ability to make policy.[5] Eventually, the government of South Africa decided to unilaterally terminate investment treaties with most European countries.[6] This Comment will examine South Africa's experience with foreign investment both during and after its experiment with BITs and analyze whether other developing countries can use its approach as a model. In short, this Comment will argue that South Africa's approach can be used as a model for other developing states, as long as they meet certain other conditions as well.

Although the history of investment treaties dates back to the 19th century and before, the development of modern BITs began in 1959 with the signing of a treaty between West Germany and Pakistan.[7] Other European countries followed suit in the 1960s and 1970s, with Switzerland, Italy, and France all signing at least one BIT by 1969.[8] The following decades saw the United States, China, and other countries join the trend.[9] By the 1990s, a consensus had emerged among U.S.-based institutions—such as the International Monetary Fund and the World Bank—that the best way for developing countries to build economic prosperity was to attract foreign investment, and that signing BITs was necessary to achieve this goal.[10] This conven-

[4] *See generally* Lise Johnson & Lisa Sachs, *The Outsized Costs of Investor–State Dispute Settlement*, 16 ACAD. INT'L BUS. INSIGHTS, no. 1, 2016, at 10.

[5] S. AFR. DEP'T OF TRADE & INDUS., BILATERAL INV. TREATY POL'Y FRAMEWORK REVIEW: GOV'T POSITION PAPER 14 (2009) [hereinafter BIT POLICY REVIEW] (noting there was "a lack of understanding regarding the real nature and consequences of BITs at that time" and stating that "Cabinet was not fully appraised of the dangers inherent in BITs").

[6] *International Investment Agreements Navigator: South Africa*, UNCTAD: INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa (last visited Dec. 27, 2021) [hereinafter UNCTAD South Africa Database] (click on the respective short titles to see type of termination).

[7] RUDOLF DOLZER & CHRISTOPHER SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 6 (2d ed. 2012).

[8] *Id.* at 6–7; KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 353 (2010).

[9] DOLZER & SCHREUER, *supra* note 7, at 7.

[10] *See* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 441–42 (2010) (suggesting that developing countries have signed BITs as part of the "Washington Consensus"); *see also* Sarah Babb, *The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor*, 20 REV. INT'L POL. ECON. 268, 270 (2012) (listing the World Bank, International Monetary Fund, Inter-American Development Bank, and others as the "heterogeneous array of technocratic and political supporters" of the Washington Consensus).

tional wisdom was part of a larger set of policy prescriptions for developing countries, sometimes referred to as the "Washington Consensus,"[11] which also included deregulation, privatization of state enterprises, and avoidance of large fiscal deficits.[12] Like most developing countries, the newly democratic South Africa that emerged from the end of apartheid in 1994 followed the Washington Consensus blueprint,[13] liberalizing its economy and signing BITs with developed countries, including a series of treaties with European countries between 1994 and 2000.[14]

Today, there are more than 2,800 BITs worldwide, involving almost all of the world's countries.[15] In addition, many multilateral trade agreements contain investment clauses that mirror the provisions of standard BITs—these include the North American Free Trade Agreement (NAFTA),[16] and its recent replacement, the United States-Mexico-Canada Agreement (USMCA).[17] While they vary in their particulars, most BITs contain the same basic elements.[18] They obligate the signatory states to follow certain guidelines in their treatment of investors and investments from the other state.[19] In the case of a dispute between an investor and a state, most BITs provide for dispute resolution before an arbitral panel, often involving the International Centre for the Settlement of Investment Disputes (ICSID).[20] Generally, an investor is not required to exhaust (or even engage with) local remedies before starting arbitration.[21] The BITs between South Africa and the European countries discussed in this Comment follow this basic pattern.[22]

Despite the conventional wisdom that BITs benefit developing countries by

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[11] *See* sources cited *supra* note 10.

[12] Ziyad Motala, *Free Trade, the Washington Consensus, and Bilateral Investment Treaties the South African Journey: A Rethink on the Rules on Foreign Investment by Developing Countries*, 6 AM. U. BUS. L. REV. 31, 35 (2016).

[13] *See id.* at 32 ("In the immediate aftermath of South Africa's first democratic elections, the country embraced the Washington Consensus and the underlying notion of free trade.").

[14] UNCTAD South Africa Database, *supra* note 6.

[15] *International Investment Agreements Navigator: Bilateral Investment Treaties (BITs)*, UNCTAD: INV. POL'Y HUB https://investmentpolicy.unctad.org/international-investment-agreements (last visited Dec. 27, 2021) (reporting there are 2,825 BITs, with 2,257 in force).

[16] North American Free Trade Agreement, ch. 11, Dec. 17, 1992, 32 I.L.M. 289.

[17] United States-Mexico-Canada Agreement, ch. 14, July 1, 2020, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last visited Dec. 27, 2021).

[18] Muchlinski, *supra* note 1, at 37–38.

[19] *Id.* at 46.

[20] *Id.* at 67.

[21] *See* DOLZER & SCHREUER, *supra* note 7, at 235–36 (explaining why investors prefer not to resort to domestic courts, and thus why most BITs provide for "granting the foreign investor direct access to arbitration with the host state").

[22] *See* BIT POLICY REVIEW, *supra* note 5, at 8.

attracting investment, by the mid-2000s, a backlash against BITs emerged in the developing world.[23] As investors began to appreciate the true scope of the protections contained in these treaties, arbitral proceedings against states increased in frequency and several large awards were granted to investors,[24] leading to widespread criticism of BITs.[25] Critics charged that standard BITs limited developing countries' ability to protect the environment, local communities, and other matters of genuine public interest;[26] unfairly benefited corporations from wealthy countries at the expense of developing countries struggling to overcome poverty and colonialism;[27] and subjected developing countries to judgments by an arbitral system systemically biased towards investors.[28] In particular, the interpretation of anti-expropriation provisions to include "regulatory" or "indirect" expropriation proved controversial.[29] Dispute resolution mechanisms led to large multinational corporations receiving awards measuring in the billions of dollars from developing states over their environmental and other regulations—giving an impression that BITs were a tool of global corporate interests in pursuit of profits in poor countries.[30] In South Africa, a group of European mining interests took the South African government to arbitration over its Black Economic Empowerment laws, which were designed to benefit

[23] *See, e.g.*, Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 63 (2011) ("[T]he rise of investment treaties and investment treaty arbitrations, the breadth of some interpretations of investors' rights by some arbitral tribunals, and a number of significant awards against states have attracted critical attention from various states as well as from public interest groups and academics of public and international law.").

[24] For example, an arbitration against the Czech Republic in 2003 awarded nearly $270 million to the investor. CME Czech Republic BV (Neth.) v. Czech Republic, Final Award on Damages (Mar. 14, 2003), 9 ICSID Rep. 264 (2006). Also, in three disputes against Pakistan, the awards given may exceed the total foreign exchange reserves of that country. SORNARAJAH, *supra* note 2, at 213 & n.45.

[25] Schill, *supra* note 23, at 63.

[26] *Id.* at 67.

[27] *See* KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL 387 (2013) (arguing that the outcome of contests between investors and states has "manifested within the law, largely legitimising the position asserted by investors and capital-exporting states and shaping it into an instrument that protected solely investors").

[28] SORNARAJAH, *supra* note 2, at 540 (citing Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014)).

[29] *See* Yosra Abid, *The Quest for Domestic Regulatory Space in the Investment Chapter of the Comprehensive and Progressive Trans-Pacific Partnership*, 27 WILLAMETTE J. INT'L L. & DISPUTE RES. 28, 37 (2020) ("It is regulatory expropriation, or indirect expropriation (as opposed to physical taking or direct expropriation), that has caused most of the controversy.").

[30] *See* MILES, *supra* note 27, at 387 ("[T]he repetition of that dynamic of assertion, challenge, and reassertion of high-level investor protection has also meant that its original conceptualisations embedded in imperialism have remained imbued within modern international investment law.").

South Africans who had been harmed by generations of racist policies under apartheid.[31]

That arbitration, along with the rising global criticism of BITs, led the South African government to reconsider its international investment policies.[32] After a review of investment policy by the South Africa Department of Trade and Industry in 2009,[33] South Africa decided to unilaterally terminate many BITs with European countries (which will hereinafter be referred to as the "South Africa-EU BITs") starting in 2012.[34] To replace these treaties and protect foreign investors, South Africa passed the Protection of Investment Act (PIA) in 2015.[35] The PIA differed from standard BITs in several important ways, all intended to allow the state more freedom to regulate in the public interest.[36] In addition to the substantive differences, the new framework provides for arbitration only after exhaustion of local remedies and only between South Africa and the investor's home state.[37]

This Comment will examine South Africa's decision to withdraw from the BIT system and the effect this decision has had on foreign investment in South Africa in the context of global criticism of the current status quo of international investment law. I will argue that South Africa's new investment law framework gives it the freedom to address issues of vital public interest that developing countries lack under standard BITs. I will also argue that, in contradiction to the Washington Consensus of the 1990s, South Africa has suffered minimally, if at all, in terms of foreign investment from its decision. Balancing the benefit of freedom to make policy against a minimal cost in investment, I suggest that South Africa's approach could be used as a model for other developing countries, and suggest the conditions that other countries should meet for South Africa to be a useful model.

The structure of this Comment is as follows. Following this introduction, Part I will give a more in-depth history of the development of the standard BIT and its spread in the developing world, along with the historical context around South Africa's decision to negotiate BITs with many developed countries in the 1990s. Part II will cover South Africa's problems with the BITs it negotiated in that time, and its decision to terminate and replace them with a domestic legal regime. This Part

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[31] Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf.

[32] *See* BIT POLICY REVIEW, *supra* note 5.

[33] *Id.*

[34] UNCTAD South Africa Database, *supra* note 6; Engela C. Schlemmer, *Dispute Settlement in Investment-Related Matters: South Africa and the BRICS*, 112 AM. J. INT'L L. UNBOUND 212, 213 (2018).

[35] Protection of Investment Act No. 22 of 2015 (S. Afr.).

[36] *See infra* notes 158–75.

[37] Protection of Investment Act § 13(5).

will discuss how those BITs placed unexpected limits on South Africa's post-apartheid development goals, leading to the *Foresti* case, in which South Africa was accused of violating its BIT obligations through its Black Economic Empowerment laws. This Part will then discuss the domestic legal regime that South Africa promulgated to replace the BITs, and highlight the differences between the South African government's freedom to make policy under this new regime and under the former BITs. Part III will analyze the evidence regarding foreign direct investment in South Africa before and after its termination of the BITs. This Part will engage with the larger debate over the effectiveness of BITs in attracting investment, and consider whether South Africa's approach can be used as a model.

I. HISTORICAL BACKGROUND OF BILATERAL INVESTMENT TREATIES AND SOUTH AFRICA

In order to understand South Africa's decision to terminate its BITs with the European countries, it is necessary to understand the global historical forces and South Africa-specific context that led to the signing of those treaties in the first place. The global trends that led to a rise in BITs also contributed to the conditions in South Africa that led to its signing BITs with many wealthy countries.

A. The Protection of Foreign Investors in International Law, the Washington Consensus, and the Spread of BITs

While agreements between states to protect their nationals' foreign investments date back to at least the 18th century, the modern idea of investor protection in the form of BITs slowly became standardized in the decades after the Second World War.[38] By the 1970s, the elements of the BIT had been mostly set[39]: foreign investments could not be expropriated without full, market-value compensation;[40] investors were entitled to "full protection and security" for their investments;[41] investors were entitled to "fair and equitable treatment" from the host state;[42] and investors

[38] DOLZER & SCHREUER, *supra* note 7, at 1, 4.

[39] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 3, 14 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) ("These new bilateral investment treaties [signed in the 1970s] were remarkably uniform in content and contained several distinctive features.").

[40] *Id.* at 15.

[41] *Id.* at 16 & n.105 (quoting Treaty Between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investment, Trin. & Tobago-U.S., at art. II, § 3(a), Sept. 26, 1994, S. TREATY DOC. No. 104-14 (1994)).

[42] *Id.* at 16 (quoting Treaty Between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and

were also accorded "national" treatment[43] and "most favored nation treatment"[44] (a promise that foreign investors would receive legal treatment at least equal to citizens of that country and of third countries, respectively). Investor-state dispute settlement provisions also became a standard feature by the 1970s,[45] with ICSID being established under the World Bank by multilateral treaty in 1965.[46]

Compared to later decades, however, the total number of BITs stayed relatively low in this period.[47] For the developing world, this era was marked by the end of the European colonial empires and by the Cold War, the struggle for power and influence between capitalist countries led by the United States and communist countries led by the Soviet Union and China.[48] Regarding the status of foreign investments, many new post-colonial states rejected the existence of an obligation under international law to respect foreign investments and called for economic decolonization via the nationalization of natural resources.[49] In 1974, the United Nations General Assembly passed the Charter of Economic Rights and Duties of States, which purported to give every state the right to "nationalize, expropriate or transfer ownership of foreign property" with a duty to pay "appropriate compensation," "taking into account [the] relevant laws and regulations and all circumstances that the State considers pertinent."[50] These measures were intended to combat inequalities that existed after decolonization, and push back against the ideologies of capital-exporting states.[51]

The end of the Cold War brought at least a temporary end to the dispute over whether states could expropriate foreign investments without compensation, as developing countries agreed to treaties that conditioned expropriation on the payment of full market value compensation in an effort to attract investment.[52] When the capitalist countries emerged victorious from the Cold War in the 1990s, many de-

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Reciprocal Protection of Investment, *supra* note 41, at art. II, § 3(a)).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 18–19.

[46] *Id.*

[47] *See* U.N. Conference on Trade & Development, *IIA Issues Note: Recent Trends in IIAs and ISDS* 2 (Feb. 2015) (advance copy) (graph of IIAs signed from 1980 to 2014).

[48] CAROLE K. FINK, COLD WAR: AN INTERNATIONAL HISTORY 93–95 (2014).

[49] DOLZER & SCHREUER, *supra* note 7, at 4.

[50] G.A. Res. 3281 (XXIX) A, Charter of Economic Rights and Duties of States, at 52 (Dec. 12, 1974).

[51] SORNARAJAH, *supra* note 2, at 27.

[52] See *id.* at 205 for a discussion of the reasons why developing countries started signing BITs after the end of the Cold War, including signaling "that a state previously committed to certain ideological stances inimical to foreign investment has changed its policy," competition to attract investment, and pressure from international financial institutions.

veloping countries were struggling with debt crises, poverty, and the violent aftereffects of decades of interference from Cold War rivals, former colonial overlords, or both.[53] The solution to these problems, according to U.S.-based institutions such as the World Bank, the International Monetary Fund, and the U.S. government, was a bundle of policies that eventually became known as the Washington Consensus.[54] Among these policies were free trade, market liberalization, and the encouragement of foreign direct investment.[55] According to the World Bank, foreign direct investment was necessary to improve the "efficiency" of developing countries' economies "through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade."[56] These institutions conditioned aid loans (which developing countries desperately needed) on policy reform along these lines.[57] To encourage foreign investment, these institutions agreed that developing countries should sign BITs with wealthy, capital-exporting countries.[58] As a result, the number of BITs and similar agreements skyrocketed in the 1990s.[59] Among the countries which engaged in a spree of treaty-signing along Washington Consensus lines was a newly democratic South Africa.

B. The Historical Background to South Africa's BIT Policy

Like much of the developing world, the Republic of South Africa was greatly affected by European imperialism, the Cold War, and the emergence of the post-Cold War Washington Consensus. However, the history of South Africa must be understood in the context of the generations-long struggle against the brutal system of racial discrimination known as apartheid. The inequalities and poverty created by this system gave rise to both the conditions leading to South Africa's signing of

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[53] *See, e.g.*, Elizabeth Schmidt, *Africa*, in THE OXFORD HANDBOOK OF THE COLD WAR 265, 266 (Richard H. Immerman & Petra Goedde, eds. 2013) ("In the face of growing poverty and collapsed states, African nations were expected to pay off enormous debts incurred by cold war dictators.").

[54] *See* Motala, *supra* note 12, at 35.

[55] *Id.*; *see also* Nicholas Guyatt, *The End of the Cold War*, in THE OXFORD HANDBOOK OF THE COLD WAR 605, 611 (Richard H. Immerman & Petra Goedde, eds. 2013) (The IMF and World Bank were "particularly insistent on 'opening up' the developing world to foreign investment and speculation.").

[56] World Bank Grp. [WBG], *Legal Framework for the Treatment of Foreign Investment: Volume II: Guidelines*, at 35 (1992), http://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf.

[57] Babb, *supra* note 10, at 275.

[58] Motala, *supra* note 12, at 32.

[59] U.N. Conference on Trade & Development, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, at xi, U.N. Doc. UNCTAD/ITE/IIT/2006/5 (2007) ("Since the early 1990s, the number of BITs has increased significantly.").

BITs and the decision to terminate them.

Racial inequality and oppression existed in South Africa from the very beginning of European settlement in the 17th century, starting with the widespread conquest and enslavement of indigenous peoples and the seizure of land by European settlers.[60] The discovery of diamonds, gold, and other precious metals in the late nineteenth century created an extraction economy in which skilled work was reserved for white South Africans; profits went to large foreign corporations, and the vast majority of the population was intentionally kept in poverty to provide low-cost labor.[61] The pre-existing system of racial classification was formalized in the late 1940s and early 1950s under a series of laws that would collectively be known as the apartheid system.[62] The population was legally classified into four categories: white, African, Coloured, and "Asiatic" (Indian); intermarriage or sexual activity between whites and the other "races" was forbidden.[63] This segregation "was extended to virtually every sphere of human activity,"[64] including the forced removal of African, Coloured, and Indian South Africans from large parts of the cities into segregated suburbs;[65] the segregation of public amenities such as restaurants and public transport; and the strict regulation of which educational and employment opportunities were available to which races.[66] Political power was held by the white minority, as the limited forms of non-white political participation that had existed were stamped out by 1970.[67]

Resistance to the oppression of non-whites by the white minority predated the formal institution of apartheid,[68] but during the apartheid era such resistance was largely associated with the African National Congress (ANC).[69] After the Sharpeville Massacre of 1960 and the banning of the ANC,[70] the ANC responded by forming

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[60] CHARLES H. FEINSTEIN, AN ECONOMIC HISTORY OF SOUTH AFRICA 22 (2005).

[61] *Id.* at 93, 109–12.

[62] NIGEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, APARTHEID, DEMOCRACY 104 (5th ed. 2012).

[63] *Id.* at 104–05.

[64] *Id.* at 105.

[65] *Id.*

[66] T. R. H. DAVENPORT & CHRISTOPHER SAUNDERS, SOUTH AFRICA: A MODERN HISTORY 639 (5th ed. 2000).

[67] The last vestige of non-white participation in national politics, the ability of Coloured people to elect four white representatives to Parliament, was abolished in that year. WORDEN, *supra* note 62, at 106.

[68] *See, e.g.*, DAVENPORT & SAUNDERS, *supra* note 66, at 262 (describing the "intense activity among African and Coloured leaders in [the] face of the proposal to exclude them from an effective role" preceding the formation of the Union of South Africa in 1910).

[69] *See* WORDEN, *supra* note 62, at 109 (describing how ANC membership increased over tenfold in the early 1950s).

[70] *See* DAVENPORT & SAUNDERS, *supra* note 66, at 414 (describing how a total of 18,000

the military wing of the party, Umkhonto we Sizwe ("Spear of the Nation," usually abbreviated as MK), in 1961.[71] Nelson Mandela, one of the leaders of the ANC, was captured and imprisoned in 1962, where he would remain until released in 1990.[72] Resistance to apartheid over the next several decades would range from nonviolent marches and strikes to guerilla warfare, sabotage, and bombing campaigns.[73] The state reacted with overwhelming force to any resistance to the racial order.[74] This period of resistance against apartheid, and brutal enforcement of the system by the state (often referred to as "the Struggle" in South Africa today) was affected by the same global trends affecting the rest of the developing world. In the midst of the Cold War, the apartheid state framed its violent suppression of the ANC and other resistance organizations as a necessary defense against "communism" in South Africa, and received military and economic support from the western powers as late as the 1980s.[75] The end of the Cold War, international isolation, and the effects of decades of resistance led the government to release Mandela (among other political prisoners), and finally negotiate the end of apartheid with the ANC and other resistance parties in the early 1990s.[76] The country's first democratic elections occurred in 1994, and Nelson Mandela became the first president of a post-apartheid South Africa that year.[77]

The ANC government of the mid-to-late 1990s faced deep challenges from the very beginning. As part of the "economic and social legacies of apartheid," it faced "a large pool of unskilled and unemployed labor, acute and widespread poverty, and poor access to education, health, and other basic public amenities for a large majority of the population."[78] Despite calling for nationalization of land, mines, and other resources during its time as a resistance party,[79] the ANC government of Nelson Mandela followed a milder course: trying to achieve economic stability and growth

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people were detained in the days after the banning of the resistance parties after Sharpeville).

[71] *Id.* at 420.

[72] *Id.* at 423 (capture and imprisonment); *id.* at 559 (release).

[73] WORDEN, *supra* note 62, at 124–25.

[74] *Id.* at 117.

[75] Schmidt, *supra* note 53, at 273–74.

[76] *See* WORDEN, *supra* note 62, at 131.

[77] *Id.* at 156.

[78] Michael Nowak, *The First Ten Years After Apartheid: An Overview of the South African Economy*, *in* POST-APARTHEID SOUTH AFRICA: THE FIRST TEN YEARS 1, 1 (Michael Nowak & Luca Antonio Ricci, eds., 2005).

[79] The Freedom Charter, adopted by the ANC and other resistance movements in 1955, demanded, among other things, that "[t]he mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole," and "all the land re-divided amongst those who work it." AFR. NAT'L CONG., FREEDOM CHARTER (June 26, 1955), https://www.anc1912.org.za/the-freedom-charter-2/. "[T]he Freedom Charter remained a benchmark of opposition to apartheid into the 1990s." WORDEN, *supra* note 62, at 115.

via mainstream economic strategy, while promulgating efforts to redistribute wealth via affirmative action and land reform.[80] Like most developing countries at the time, South Africa followed the Washington Consensus roadmap of economic deregulation and free trade.[81] One part of this general trend was the signing of BITs with wealthy, capital-exporting states.

South Africa's first BIT was signed with the United Kingdom, whose government was afraid that the post-apartheid regime might expropriate or nationalize the property of its nationals who had invested in South Africa.[82] The U.K. government presented the treaty—a "'standard' OECD model"—to the outgoing government in 1992–1993, which accepted it without any negotiations.[83] The new government lacked expertise in this area of international law, and was eager to show that South Africa was friendly to foreign investors (contrary to the long-standing characterization of the ANC as communists and radicals by the old regime).[84] Accordingly, it accepted the treaty proffered by the United Kingdom and used it as a model for future BITs, leading to similar treaties with other European states.[85] Over the next six years, South Africa signed BITs with 27 countries.[86] Most importantly, 11 involved wealthy states in the European Union which, between them, represented a significant portion of South Africa's inward FDI as of 1994.[87] These 11 treaties have all since been terminated.[88]

II. THE INCOMPATIBILITY BETWEEN SOUTH AFRICA'S BIT COMMITMENTS AND ITS POLICY GOALS, AND THE ATTEMPT TO REPLACE BITS WITH DOMESTIC LEGISLATION

The BITs signed in the mid-to-late 1990s in South Africa contained the same standard provisions as most BITs signed around the world at the time. However, the unanticipated implications of these provisions stood in direct contrast with other

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[80] *Id.* at 156–57.

[81] Motala, *supra* note 12, at 35.

[82] Randall Williams, *Nothing Sacred: Developing Countries and the Future of International Investment Treaties*, INT'L INST. FOR SUSTAINABLE DEV. 2 (Nov. 2009), https://www.iisd.org/system/files/meterial/developing_countries_and_the_future_of_IIAs.pdf.

[83] Mohammed Mossallam, *Process Matters: South Africa's Experience Exiting its BITs* 7 (Glob. Econ. Governance, Working Paper No. 2015/97); *accord* Williams, *supra* note 82, at 2.

[84] WORDEN, *supra* note 62, at 157 (explaining the goal of South Africa's 1990s economic strategy was "to attract foreign investment, promote job creation, and encourage economic growth as South Africa took its place in a globalizing world market"); *see also* Schmidt, *supra* note 53, at 274 (discussing the "constant reference to communists as the enemy" by the apartheid state).

[85] Williams, *supra* note 82, at 2.

[86] UNCTAD South Africa database, *supra* note 6.

[87] *Id.*

[88] *Id.*

legal developments in post-apartheid South Africa, particularly the progressive Constitution of 1996 and the Black Economic Empowerment laws, designed to overcome the racial inequality caused by apartheid. After these contradictions became evident in the late 2000s, particularly with the *Foresti* arbitration,[89] the South African government (still under control of the ANC, as it remains today) conducted a review of BIT policy that began in 2009 and led to the termination of most BITs in 2014.[90] The government's attempt to replace those BITs with a domestic legal regime came with the Protection of Investment Act in 2015, which came into force in 2018.[91]

A. South Africa's Post-Apartheid Policies to Encourage Racial Equality

The immediate economic goals of the South African government after the transition to democracy were to "address the havoc wrought by decades of apartheid," as Nelson Mandela put it in an address to the World Economic Forum Southern Africa Summit in 1994.[92] This meant addressing inequalities in housing, income, healthcare, and education, although the government was wary of risking political and economic stability to achieve these goals.[93]

The new Constitution, which took effect in 1996, reflects these goals in its preamble: to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights,"[94] and to "[i]mprove the quality of life of all citizens and free the potential of each person."[95] The new Constitution included several provisions intended to encourage this result, as did other laws passed in South Africa since 1994, including the Black Economic Empowerment laws and new laws relating to natural resource extraction.

1. The Constitution of 1996

The Constitution, drafted and ratified after the transition to democracy, is one of the most progressive constitutions in the world.[96] The South African Constitutional Court, considering the "great disparities in wealth" in South Africa, explained

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[89] *See infra* Section II.C.

[90] *See generally* BIT POLICY REVIEW, *supra* note 5.

[91] Protection of Investment Act 22 of 2015 (S. Afr.); *South Africa: Protection of Investment Act Came into Effect*, UNCTAD: INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3315/protection-of-investment-act-came-into-effect (last visited Dec. 27, 2021).

[92] Nelson Mandela, President of the Republic of S. Afr., Address at the World Econ. F. S. Afr. Summit (June 9, 1994), http://www.mandela.gov.za/mandela_speeches/1994/940609_wef.htm.

[93] *Id.*

[94] S. AFR. CONST., 1996, pmbl.

[95] *Id.*

[96] Jorge M. Farinacci-Fernós, *South Africa's Forward-Looking Constitutional Revolution and*

in 1997: "These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."[97] This commitment is expressed in the preamble and in positive guarantees to, among other things, the environment, housing, health care (including reproductive health care), education, and "the right to use the language and to participate in the cultural life of their choice."[98] However, the section of the Constitution which is most problematic for South Africa's BIT commitments is Section 25, relating to property.

Section 25 prohibits "arbitrary deprivation of property," but allows expropriation "in the public interest" and "subject to compensation."[99] While this may appear similar to other constitutions, such as the U.S. Constitution's Fifth Amendment,[100] Section 25 does not require "fair" or market-value compensation. The amount of compensation required must only be "just and equitable, reflecting an equitable balance between the public interest and the interests of those affected,"[101] and take into account a number of factors, of which market value is only one.[102] Furthermore, the public interest explicitly includes "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."[103] Section 25 also provides that the constitutional protection of property would not stop the state from "taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination."[104] Section 25 is a clear mandate to address wealth and land inequality, if necessary through expropriation, without necessarily guaranteeing market value to the previous owner.[105]

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the Role of Courts in Achieving Substantive Constitutional Goals, 53 REVISTA JURÍDICA UNIVERSIDAD INTERAMERICANA P.R. 531, 534–35 (2019) ("South Africa's Constitution is the crown-jewel of modern constitutionalism.").

[97] *Soobramoney v. KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) at para. 8 (S. Afr.) (quoted in Farinacci-Fernós, *supra* note 96, at 538).

[98] S. AFR. CONST., 1996, ch. 2, § 30.

[99] *Id.* at ch. 2, § 25(1)–(2).

[100] U.S. CONST. amend. V.

[101] S. AFR. CONST., 1996, ch. 2, § 25(3).

[102] *Id.* The other factors include the current use of the property; the history of the acquisition and use of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation. *Id.*

[103] *Id.* at ch. 2, § 25(4)(a).

[104] *Id.* at ch. 2, § 25(8).

[105] In fact, Section 25 commands the state to take positive land redistribution efforts: "The state *must* take reasonable legislative and other measures . . . to foster conditions which enable citizens to gain access to land on an equitable basis." *Id.* at ch. 2, § 25(5) (emphasis added). It also provides for restitution of land taken during apartheid. *Id.* at ch. 2, § 25(7).

Furthermore, and contrary to language in most BITs, the Constitutional Court has interpreted this section to not require compensation for regulatory or indirect expropriation. In *Agri South Africa v. Minister for Minerals and Energy*,[106] which involved the alleged expropriation of mineral rights under the Mineral and Petroleum Resources Development Act (MPRDA, discussed in greater detail below), the court distinguished between the "deprivation" of a legal right, which does not require compensation, and "expropriation," which does: "Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails State acquisition of that property in the public interest and must always be accompanied by compensation."[107] Furthermore, the court decided, "There can be no expropriation in circumstances where deprivation does not result in property being acquired by the State."[108] In the United States, in contrast, the Supreme Court has held that regulations that deprive a property owner of the right to use their property are effectively the same as expropriation of the property, and require compensation under the Fifth Amendment.[109]

2. Black Economic Empowerment

Section 9(2) of the Constitution of 1996 states that to promote equality, "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."[110] The "legislative and other measures" taken to achieve this goal fall under the umbrella of "Black Economic Empowerment" (BEE). The Broad Based Black Economic Empowerment Act of 2003[111] (which defined "black people" as "a generic term which means Africans, Coloureds and Indians," a definition this Comment will follow[112]) set the objectives of BEE as, among other goals, "promoting economic transformation in order to enable meaningful participation of black people in the economy."[113] To achieve this goal, the law directs the Minister of Trade and Industry to issue "codes of good practice" for state and public entities.[114] State organs and public entities

[106] *Agri S. Afr. v. Minister for Min. & Energy* 2013 (7) BCLR 727 (CC) (S. Afr.).

[107] *Id.* at para. 48.

[108] *Id.* at para. 59.

[109] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[110] S. AFR. CONST., 1996, ch. 2 § 9(2).

[111] Broad-Based Black Economic Empowerment Act 53 of 2003 (S. Afr.) (amended by Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 (S. Afr.)).

[112] *Id.* § 1. The reader should be aware that this definition is different than that of the similar term used in the United States, where the word "Black" refers to African Americans and people of African descent. This Comment will also follow the South African statutes in leaving the word "black" uncapitalized, again in contrast to the conventions in the United States.

[113] *Id.* § 2(a).

[114] *Id.* § 9.

must "take into account and, as far as is reasonably possible, apply" the codes, including when "entering into partnerships with the private sector."[115] Thus, while the law only directly applies to state organs, private companies must also comply if they wish to do business with the state.[116] In addition, the law directs the government to partner with industry stakeholders to create "transformation charter[s]" that provide standards for BEE within that specific industry.[117]

3. The Mineral and Petroleum Resource Development Act

Historically, the mining industry was both the main source of South Africa's wealth and the arena for the most egregious abuses of the apartheid era.[118] As the Constitutional Court explained in the opening paragraph of its *Agri South Africa* opinion:

> South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87% of the land and the mineral resources that lie in its belly in the hands of 13% of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.[119]

Today, those legislative measures are represented by the Mineral and Petroleum Resource Development Act of 2002 (MPRDA).[120] The MPRDA has a similar objective to the other BEE laws discussed above: to "promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa."[121] To that end, the MPRDA made the state the "custodian," but not the owner—the MPRDA stops short of the outright nationalization of the mines, as interpreted by

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[115] *Id.* § 9–10.

[116] *See* Deepa Vallabh, Maud Hill, Bernice Abrahams, Dumisani Lucas & Aphelele Binta, *Cross-Border Joint Venture and Strategic Alliance Guide (South Africa)*, LEXISNEXIS: PRACTICAL GUIDANCE 3–4 (Oct. 25, 2020), https://cms.law/en/zaf/publication/cross-border-joint-venture-strategic-alliance-guide (discussing the effects of BEE laws on foreign businesses).

[117] Broad-Based Black Economic Empowerment Act 53 of 2003 § 12.

[118] *See* FEINSTEIN, *supra* note 60, at 109–12 (discussing the role of gold in the economy of South Africa and the industry's dependence on the exploitation of black South Africans).

[119] *Agri S. Afr. v. Minister for Min. & Energy* 2013 (7) BCLR 727 (CC) at para. 1 (S. Afr.).

[120] Mineral and Petroleum Resources Development Act 28 of 2002 (S. Afr.) (amended 2008).

[121] *Id.* at ch. 2, § 2(c).

the Constitutional Court[122]—of the mineral and petroleum resources of South Africa.[123] Holders of most non-active mineral rights under the old mining laws (including common-law rights) would have to apply to convert these "old order rights," as they are called in the Act, into "new order rights" within two years of the entering into force of the MPRDA, or lose them.[124] In order to convert these rights, rights-holders would need to meet certain requirements, including BEE requirements set out in a Mining Charter, which came into force at the same time as the MPRDA.[125] Specifically, the Mining Charter required that "historically disadvantaged South Africans" own more than 25% of any mining company.[126] This requirement would eventually lead to the *Foresti* case, discussed below.

Taken together, these laws show that redistribution of income and property was an explicit goal of the post-apartheid South African regime. Furthermore, these measures for reduction of inequality are explicitly *not* colorblind—they were aimed to help black South Africans achieve the economic power they were denied during apartheid. Unfortunately, the South African government did not realize that, in its quest to secure foreign investment under a Washington Consensus model of development, it made treaty commitments that were incompatible with these policies.

B. Conflicts Between South Africa's Laws and BIT Commitments

South Africa's early BITs, signed with European countries in the first five years of democracy, contained the standard provisions seen in most BITs of the era.[127] Thus, they contained protection against expropriation without compensation and guarantees of national treatment, most-favored nation treatment, fair and equitable treatment, full protection and security, and prohibitions against unreasonable, arbitrary, or discriminatory treatment.[128] Although the South African government apparently believed that these provisions would not impose any substantive obligations beyond "basic investor rights,"[129] these commitments would prove problematic for the intended transformation of the South African economy. Of these, provisions

[122] *Agri S. Afr.*, 2013 (7) BCLR 727 (CC) at para. 71 ("What is, however, clear is that, whatever 'custodian' means, it does not mean that the State has acquired and thus has become owner of the mineral rights concerned.").

[123] Mineral and Petroleum Resources Development Act ch. 2, § 3.

[124] *Id.* at sched. II, § 1(iii) (definition of "old order mining right"); *id.* at sched. II, § 6(1), (8) (old order rights "cease[] to exist" if not converted within two years).

[125] *Id.* at ch. 7, § 100(2) (directing the promulgation of a Charter).

[126] Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, GN 1639 of GG 26661 § 2 (13 Aug. 2004).

[127] *See generally* BIT POLICY REVIEW, *supra* note 5, at 24–45 (discussing the content of South Africa's BITs).

[128] *Id.*

[129] *Id.* at 14.

related to expropriation, national treatment, fair and equitable treatment, and discriminatory treatment would prove particularly incompatible with South Africa's post-apartheid policy goals and the legal methods put in place to achieve them. These BITs also contained standard dispute resolution clauses, which would lead South Africa to be taken to arbitration over these issues in the *Foresti* case.

1. Expropriation

As discussed above, the South African Constitution allows expropriation for a public purpose, with a requirement that the state pay "just and equitable" compensation in which market value is only one of many factors to be considered.[130] It also distinguishes deprivation of rights to use property with expropriation, in which the state takes ownership of the property itself.[131] Both of these policies are contrary to the language present in traditional BITs, [132] such as the South Africa-EU BITs.

The South Africa-EU BITs do not distinguish between deprivation and expropriation. In fact, they often include language that can be interpreted to explicitly include the kind of regulatory expropriation the South African Constitution does not recognize. For example, the South Africa-United Kingdom BIT refers to "measures having effect equivalent to nationalisation or expropriation."[133] The Netherlands BIT prohibits "any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments."[134] Other South Africa-EU BITs contain similar language.[135] Arbitral tribunals interpreting such clauses have found expropriation in a number of cases where the state did not come into actual possession of the property.[136] For example, an ICSID tribunal, interpreting expropriation language in NAFTA that is similar to those in the South Africa-EU BITs, found that Mexico expropriated a U.S. investor's property when the local authority refused to grant a construction permit for a hazardous waste dump after local protests against it.[137] Comparing these decisions to the South African Constitutional Court's interpretation of expropriation under Section 25 in the *Agri South Africa*

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[130] *Supra* notes 101–05 and accompanying text.

[131] *Supra* notes 106–09 and accompanying text.

[132] See SORNARAJAH, *supra* note 2, at 245–46 for a discussion of indirect expropriation in BIT jurisprudence.

[133] Agreement for the Promotion and Protection of Investments, S. Afr.-U.K., art. 5(1), Sept. 20, 1994, 2038 U.N.T.S. 201.

[134] Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-S. Afr., art. 6, May 9, 1995, 2066 U.N.T.S. 413.

[135] BIT POLICY REVIEW, *supra* note 5, at 40.

[136] *See* Peter Leon, *Creeping Expropriation of Mining Investments: An African Perspective*, 27 J. ENERGY & NAT. RES. L. 597, 602–04 (2009) (discussing expropriation cases in BIT jurisprudence).

[137] Metalclad Corp. v. United Mex. States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 112–17 (Aug. 30, 2000), 5 ICSID Rep. 209 (2002).

case, it is clear that the anti-expropriation language in the BITs goes much farther than that of the South African Constitution.

Furthermore, the South Africa-EU BITs either explicitly require market-value compensation, such as the South Africa-Germany BIT ("compensation shall be equivalent to the value of the expropriated investment"),[138] or call for "adequate" compensation, such as the South Africa-United Kingdom BIT, which has been widely interpreted to mean full market value.[139] This requirement stands in stark contrast to the requirements of the South African Constitution, in which market value is only one factor to be considered in finding "just and equitable" compensation.[140]

2. Standards of Treatment: National Treatment, Fair and Equitable Treatment, and Non-Discrimination

The requirements of fair and equitable treatment, national treatment, and provisions relating to discriminatory practice can overlap in their requirements, but they present the same risk to South Africa's policy goals, particularly BEE laws. Since the South Africa-EU BITs do not contain exceptions for measures designed to benefit previously disadvantaged groups, laws that explicitly place certain categories of South Africans in a better economic position than foreign investors can run afoul of one or more of these standards of treatment.

Fair and equitable treatment is sometimes defined as the state acting with consistency, good faith, and in accordance to the basic assumptions of the foreign investor.[141] It has also been found to encompass "due process, nondiscrimination, and proportionality."[142] The vagueness of the fair and equitable treatment standard has allowed it to be used for a variety of state actions, and violations of fair and equitable treatment make up a majority of successful arbitration claims under BITs.[143] In the South African government's review of the country's BIT policies, this vagueness was a point of concern; as the report argued: "Due to uncertainties that exist regarding the true meaning of the fair and equitable standard, it would be preferable to spell out more clearly and comprehensively what is meant by this concept."[144]

National treatment means that a foreign investor is treated at least as well as

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[138] Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Ger.-S. Afr., art. 4(2), Sept. 11, 1995, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1416/download.

[139] *See* DOLZER & SCHREUER, *supra* note 7, at 296–97 (quoting WBG, *supra* note 56, at 41).

[140] S. AFR. CONST., 1996 § 25(3).

[141] Técnicas Medioambientales Tecmed S.A. v. United Mex. States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003), 10 ICSID Rep. 134 (2006).

[142] MTD Equity Sdn. Bhd. v. Rep. of Chile, ICSID Case No. ARB/01/7, Award, ¶ 109 (May 25, 2004), 12 ICSID Rep. 6 (2007).

[143] DOLZER & SCHREUER, *supra* note 7, at 130.

[144] BIT POLICY REVIEW, *supra* note 5, at 35.

nationals of the host state, while most-favored nation means the same, except with regard to nationals of a third state.[145] In South Africa's early BITs (with European countries), national treatment clauses were generally written vaguely, without any exclusions. For example, the South Africa-United Kingdom BIT provides that "[n]either Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals" or of a third state.[146] Other BITs from the period contain similar language.[147] The problem with this language, as the government review of BIT policy found, was that without express language excluding them, the BEE policies discussed above could be interpreted by an arbitral panel as giving some South Africans more favorable treatment than foreign nationals.[148] The same could be said for BIT clauses promising not to engage in "discriminatory treatment"—without express language to the contrary, the race-conscious laws discussed above could be considered discriminatory.

C. *The* Foresti *Case*

The flaws in South Africa's BIT policies became clear when South Africa was brought before an arbitral panel under the terms of the BITs with Italy and Luxembourg. Although the case ultimately settled, it represented a wake-up call to the South African government to the dangers of BITs.

The claimants in *Foresti v. Republic of South Africa* were seven Italian nationals and one Luxembourg corporation.[149] Between them, the claimants owned common-law mining rights prior to the date the MPRDA came into effect.[150] As discussed above, the MPRDA required owners of inactive mining rights to convert those old order rights to new order rights, and to comply with the Mining Charter, which required mining companies to meet black ownership benchmarks.[151] The claimants argued that the MPRDA violated the BITs' prohibitions on expropriation by extinguishing "certain putative old order mineral rights" and "introducing compulsory equity divestiture requirements."[152] The claimants also argued that the MPRDA violated BIT commitments to fair and equitable treatment and national

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[145] DOLZER & SCHREUER, *supra* note 7, at 198 (national treatment); *id.* at 206–07 (most-favored nation).

[146] Agreement for the Promotion and Protection of Investments, *supra* note 133, at art. 3(1).

[147] BIT POLICY REVIEW, *supra* note 5, at 37.

[148] *Id.*

[149] Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Award, ¶ 1 (Aug. 4, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf.

[150] *Id.* ¶ 54.

[151] *See supra* notes 120–26 and accompanying text.

[152] *Foresti*, ICSID Case No. ARB (AF)/07/1 ¶ 54.

treatment.[153]

The tribunal never reached the merits of the case because the claimant companies reached an agreement with the South African government to settle the case.[154] Under that agreement, the companies did not have to comply with the requirement to "sell 26% of their shares" to historically disadvantaged South Africans, but instead made commitments to process a certain amount of the minerals in South Africa and to provide a "5% employee ownership program" for the companies' employees.[155] Both sides claimed to be the prevailing party for purposes of securing attorneys' fees from the other side,[156] but it seems clear that the outcome was less than ideal from the perspective of the policy goals of the MPRDA. Shortly afterward, the government began the review that would lead to BIT termination and their replacement with domestic legislation.[157]

D. The Protection of Investment Act

The Protection of Investment Act (PIA), passed in December 2015, represents South Africa's attempt to replace the traditional BIT structure with domestic legislation. The PIA aims to strike a balance where foreign investors are protected enough that they are still willing to invest, but the state can still regulate foreign investments to achieve its policy goals.[158] The provisions of the PIA specifically address the conflicts between South African laws and the traditional BITs discussed above, and move investor protections closer to what developing countries called for in the post-imperialist/Cold War era, such as in the Charter of Economic Rights and Duties of States.[159]

The departure from the aims and provisions of standard BITs is clear from the Preamble, Purpose, and Interpretations sections of the PIA. While the preambles of traditional BITs often mention the protection of investments without mention of any other concern, the preamble of the PIA starts out with the phrase "[c]onscious of the obligation to protect and promote the rights enshrined in the Constitution," and only in the second clause recognizes "the importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa."[160] Other clauses include, importantly, "[r]ecognising the obligation to take measures to protect or advance persons, or categories of persons,

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153 *Id.* ¶ 78.

154 *Id.* ¶ 79.

155 *Id.*

156 *Id.* ¶¶ 85, 89.

157 *See* BIT POLICY REVIEW, *supra* note 5.

158 Protection of Investment Act 22 of 2015 pmbl. (S. Afr.).

159 *See supra* notes 50–51 and accompanying text.

160 Protection of Investment Act, at pmbl.

historically disadvantaged in the Republic due to discrimination."[161] After the preamble, in the substantive sections, the PIA states that it must be "interpreted and applied in a manner that is consistent with . . . the Constitution."[162]

In place of the vague "fair and equitable treatment" found in traditional BITs, the PIA contains a section entitled "[f]air administrative treatment."[163] The PIA promises investors that the government will "ensure administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors."[164] It also promises investors the right to be provided with written reasons and administrative review on administrative decisions, and access to government-held information.[165]

Like most BITs, the PIA promises national treatment: "Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances."[166] Importantly, however, the national treatment section explicitly addresses the kind of race-based policies discussed above. Namely, it states that national treatment will not be interpreted to extend to foreign investors the benefit of any policy resulting from any laws intended to "promote the achievement of equality in South Africa"[167] or intended to benefit "persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic."[168] In addition, the PIA explicitly reserves to the government the right to regulate, including "redressing historical, social and economic inequalities and injustices."[169]

As for property, the PIA promises physical protection and protection against expropriation, but not to the extent that traditional BITs do. Rather than "full protection and security," as promised in many BITs, the PIA only promises the level of physical security equal to that "generally provided to domestic investors . . . subject to available resources and capacity."[170] As for expropriation, the PIA simply states

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[161] *Id.*

[162] *Id.* § 3(b).

[163] *Id.* § 6.

[164] *Id.* § 6(1).

[165] *Id.* § 6(2)–(4).

[166] *Id.* § 8(1). The PIA includes several factors to be considered for whether investments are in "like circumstances," including the "effect of the foreign investment on the Republic, and the cumulative effects of all investments," "effect on third persons and the local community," and "direct and indirect effect on the environment." *Id.* § 8(2).

[167] *Id.* § 8(4)(d).

[168] *Id.*

[169] *Id.* § 12(1)(a).

[170] *Id.* § 9. This language is perhaps a reaction to an arbitration against South Africa by a Swiss investor in 2001, in which the panel ruled that South Africa had violated its BIT obligation to provide full protection and security by failing to effectively protect the claimant's game farm from vandalism and theft by nearby residents. *See* Luke Eric Peterson, *Swiss Investor Prevailed in*

that "[i]nvestors have the right to property in terms of section 25 of the Constitution."[171] As discussed above, that is a far different level of protection compared to that enjoyed under traditional BITs.

Finally, the PIA addresses dispute resolution, a frequent target of criticism of traditional BITs.[172] Instead of allowing investors to take the state to arbitration before the ICSID or another international organization, the PIA provides three options in the case of a dispute between the investor and the government. First, the investor can request mediation.[173] Second, the foreign investor can rely on domestic courts.[174] Finally, the government can consent to international arbitration, subject to the exhaustion of domestic remedies (an important qualifier absent in most BITs).[175] However, this arbitration must be conducted on a state-to-state basis, between South Africa and the investor's home state.[176]

Overall, the PIA addresses the concerns put forth in the government's critical review of its previous BIT policy, while still offering foreign investors many of the protections they enjoyed under BITs. While the PIA moves the needle decidedly in the direction of the state, a foreign investor still cannot be treated arbitrarily, or deprived of property without due process of law. Foreign investors cannot be discriminated against, except with regard to laws that mitigate racial injustice. A foreign investor can, with the change from BIT to PIA, be forced to comply with South Africa's BEE laws. Foreign investors also now know that, in the event of expropriation for the purpose of land reform or other racial justice initiatives, the compensation they receive may not equal full market value. Without BITs, these are the conditions that foreign investors must accept if they wish to access South Africa's markets and abundant natural resources.

III. SOUTH AFRICA'S POTENTIAL AS A MODEL FOR OTHER COUNTRIES

Although South Africa's particular experience of BITs conflicting with its post-

2003 in Confidential BIT Arbitration Over South Africa Land Dispute, INV'T ARB. REP. (Oct. 22, 2008), https://www.iareporter.com/articles/swiss-investor-prevailed-in-2003-in-confidential-bit-arbitration-over-south-africa-land-dispute/. The panel rejected South Africa's argument that it had provided the most protection it could with limited resources, reasoning that such an argument would permit a state to "'escape' its responsibilities by virtue of having done 'the best it could in the circumstances.'" *Id.*

[171] Protection of Investment Act § 10.

[172] SORNARAJAH, *supra* note 2, at 540 (discussing "greater scrutiny" of investment arbitration).

[173] Protection of Investment Act § 13(1).

[174] *Id.* § 13(4).

[175] *Id.* § 13(5).

[176] *Id.*

apartheid goals of racial economic redistribution might be unique, the broader experience is not. Many developing countries that signed BITs in the 1990s have since realized that their policy-making space is more limited than they realized, and that important national goals conflict with commitments under BITs.[177] Can South Africa's path of forgoing BITs with wealthy countries for a domestic legal regime be a useful model for these other developing states?

Evidence from the first half-decade of South Africa's post-BIT era suggests that it may be a successful model. South Africa has gained valuable freedom to make policy to pursue its national goals—not only with the laws already on its books, but also with more drastic reforms that might be considered in the future. Moreover, the country seems to have suffered little if any drop in FDI as a direct result of terminating the treaties. As explained in greater detail below, studies over the past two decades have delivered mixed results on the effectiveness of BITs to attract FDI. South Africa's experience over the past five years would appear to weigh against the usefulness of BITs for this purpose. At the very least, it shows that a BIT is not necessary to attract FDI, and that other factors are more important.

It is true, however, that South Africa has many advantages in attracting investors that other developing countries lack—including a relatively advanced economy and a functioning democracy. It also has vast supplies of natural resources, beyond what many developing countries can offer. However, South Africa also has problems common to many other developing states, including high levels of corruption, crime, and political instability. Overall, it seems that many developing countries—though perhaps only those that meet some minimum level of good governance and have abundant natural resources—could follow South Africa's model if they have important national goals that are impeded by BIT obligations signed in the hope of attracting FDI.

A. Do BITs Increase FDI?

In theory, a BIT between a developing country and a wealthier, capital-exporting country brings benefits to both sides. For the capital-exporting country, a BIT is intended to protect the investments of that country's nationals from expropriation or political instability. In practice, it has also gone so far as to protect these investors from even good-faith regulation. For the capital-importing state, the BIT is supposed to stimulate the economy by attracting FDI from investors that otherwise would not be willing to invest there.[178] The cost for this increase in foreign investment, as the South African experience shows, is a significant loss in sovereignty—the freedom of a state to make policy within its own borders. Is this bargain worth

[177] SORNARAJAH, *supra* note 2, at 205 (explaining many states regret signing BITs).

[178] *See* Williams, *supra* note 82, at 3 (African countries pursue BITs because "they honestly believe that if they conclude BITs they will attract foreign investment.").

it? The question is only worth asking if it can be established that the benefit actually exists—that is, that developing countries actually do experience an increase in FDI in return for their loss in sovereignty. On that question, economists who have studied the issue differ and there has been no definitive answer.

Yet, if the trade-off is real, one would expect the reverse to be true as well: that terminating BITs with capital-exporting countries would lead to a steep decrease of FDI from those countries. In the five years since terminating the South Africa-EU BITs and enacting the PIA, South Africa has not yet suffered this fate. While FDI has increased some years and decreased others, it does not appear to be tied to South Africa's BIT policies.

1. BITs and FDI: The State of the Debate

Since the expansion of BITs in the 1990s, much ink has been spilled by economists attempting to figure out if the "grand bargain" of BITs really benefits developing countries. While some economists have found a small positive effect of BITs on FDI in developing countries, others have argued that the effect is nonexistent. Today, the debate remains unresolved.

Empirical studies have produced mixed results of the last two decades. There have been studies that have found a correlation between BITs and FDI. For example, one study, conducted in 2005, studied the effect of U.S. BITs on FDI in developing countries and found that, overall, a U.S. BIT is "more likely than not" to exert a positive effect on overall investment in a country.[179] Another 2005 study looked at 119 developing countries from 1970 to 2001 and found that "developing countries that signed more BITs with developed countries . . . received a higher share of FDI flowing to developing countries."[180] However, other empirical studies have found the opposite. A 1998 United Nations Conference on Trade and Development (UNCTAD) study found a small correlation of BITs with FDI, but concluded that "BITs appear to play a minor and secondary role in influencing FDI flows."[181] A study in 2009 attempted to replicate one of the studies mentioned above with a "slightly larger sample of years" and "found no evidence that BITs and FDI share the kind of conditional relationship theorized (and identified) by [other authors]."[182] A 2009 collection of the empirical research at that time (including the

[179] Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 111 (2005).

[180] Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS xxvii, lii (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

[181] U.N. Conference on Trade & Development, *Bilateral Investment Treaties in the Mid-1990s*, 122, U.N. Doc. UNCTAD/ITE/IIT/7 (1998).

[182] Jason Yackee, *Do BITs Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT

studies above) summarized: "Taken together, these analyses suggest that it is difficult to establish firmly the effect of BITs on FDI flows."[183] The picture has not become clearer since then. A 2015 report from the United Nations Economic Commission for Africa (UNECA) analyzed the evidence available (including, but not limited to, some of the studies above) and found:

> From the existing literature, we can draw tentative conclusions. First, empirical research has been unable to demonstrate consistently and reliably that developing countries signing BITs receive more FDI as a result. . . . Second, if the policy objective is to increase FDI, there are potentially more effective and less risky means than signing BITs, such as improving the business climate and infrastructure.[184]

An article in 2018 summarized the state of play thusly: "Some claim BITs have led to increased levels of FDI (at least into developing countries), while others say the link is indefensible. It remains fiercely contested whether IIAs actually deliver on their promise of greater investment flows."[185]

Returning to the bargain struck by developing countries when they agree to BITs—give up sovereignty, gain FDI—the benefit side of the scale appears mostly theoretical. The evidence does not disprove the benefits of BITs, but neither does it confirm them. While the South African negotiators in the 1990s may have believed they were giving up very little in return for a definite influx of much-needed FDI,[186] the reverse may largely be true; they gave up quite a bit in terms of sovereignty for a questionable increase in FDI.

2. Has South Africa Experienced a Drop in FDI Due to Its BIT Policy?

If signing BITs brings FDI to developing countries, then the reverse should also be true: terminating BITs leads to a decrease in FDI as investors from those countries no longer receive the protections provided. It has been over five years since South Africa took the step of terminating the South Africa-EU BITs. Thus far, foreign investment inflows seem to be determined more by other economic factors than BITs. FDI has increased some years and decreased others, but there is no reason to believe that the BIT terminations were a deciding factor in the fluctuations.

Like the overall data in FDI that economists have been unable to link to BITs over the last few decades, the FDI data on South Africa is noisy. South Africa saw a rise in total FDI in 2013, after the terminations of the South Africa-EU BITs had

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INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 379, 391 (Karl P. Sauvant and & Lisa E. Sachs eds., 2009).

[183] Sachs & Sauvant, *supra* note 180, at liv.

[184] U.N. ECON. COMM'N FOR AFR., INVESTMENT POLICIES AND BILATERAL INVESTMENT TREATIES IN AFRICA: IMPLICATIONS FOR REGIONAL INTEGRATION 11–12 (2016).

[185] Zara Shafruddin, *Investor-State Dispute Settlement Between Developed Countries: Why One Size Does Not Fit All*, 29 AM. REV. INT'L ARB. 429, 433 (2018).

[186] Williams, *supra* note 82, at 2.

begun[187] and future terminations had been signaled. According to the UNCTAD World Investment report, "infrastructure was the main attraction" for the increase that year.[188] On the other hand, 2015 saw a drop in FDI inflow across Sub-Saharan Africa due to weak commodity prices, particularly in South Africa, "owing to factors such as lacklust[er] economic performance, lower commodity prices and higher electricity costs."[189] In neither the peak years nor the drop-offs was the existence, or lack thereof, of a BIT considered an important factor by UNCTAD. In 2018, FDI inflows to South Africa more than doubled compared to 2017, representing a recovery for investment in South Africa.[190]

For the countries specifically affected by the BIT terminations, there is also no clear sign that investors fled South Africa due to a lack of BIT protection. Using the South African Reserve Bank figures for total foreign investment by country for each year from 2009 to 2018, the average direct investment from each country for the six years before the termination was complete (2009–2014) and the five years after (2014–2018), the change in FDI can be calculated.[191] Of the countries that had BITs terminated, the United Kingdom, Switzerland, and Luxembourg showed a decrease, while Germany, France, Belgium, the Netherlands, and Austria showed an increase.[192] Investment from the Netherlands showed a large increase from 2014 to 2015,[193] and Belgium showed an increase from 2016 to 2017.[194] Since both increases occurred after the termination of the respective countries' BITs, the new investments represented by those increases will not be protected by BITs but instead by either the PIA or South African general law (for those investments made after BIT termination but before enactment of the PIA).

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[187] BITs with the Belgium-Luxembourg Economic Union and Spain were terminated in 2013. *See* UNCTAD South Africa Database, *supra* note 6 (click on the respective short titles to see termination dates).

[188] U.N. Conference on Trade & Development, *World Investment Report 2014: Investing in the SDGs: An Action Plan*, 39, U.N. Doc. UNCTAD/WIR/2014 (June 24, 2014).

[189] U.N. Conference on Trade & Development, *World Investment Report 2016: Investor Nationality: Policy Challenges*, 41, U.N. Doc. UNCTAD/WIR/2016 (June 22, 2016).

[190] U.N. Conference on Trade & Development, *World Investment Report 2019: Special Economic Zones*, 3–4, 213, U.N. Doc. UNCTAD/WIR/2019 (June 12, 2019).

[191] Figure 1 was calculated with data from Quarterly Bulletins for the years 2010, 2012, 2013, 2014, 2015, 2016, 2017, and 2018, available at *Quarterly Bulletin*, S. AFR. RSRV. BANK, https://www.resbank.co.za/en/home/publications/quarterly-bulletin1 (last visited Dec. 27, 2021) (for each respective year, open attachment entitled "Statistical Tables International Economic Relations" and navigate to section entitled "Foreign Liabilities of South Africa by Selected Countries"). Data for the year 2011 was not available.

[192] *See* Figure 1.

[193] *Id.*

[194] *Id.*

Country	Average FDI: 2010–2014	Average FDI: 2015–2018	Change
United Kingdom	660,848.25	631,997.75	-28,850.50
Germany	70,234.00	89,370.00	+19,136.00
Switzerland	25,139.25	19,940.00	-5199.25
Luxembourg	28,533.00	19,940.00	-8593.00
France	13,449.75	15,488.00	+2038.25
Belgium	5916.50	123,101.25	+117,184.80
Netherlands	243,087.75	428,072.25	+184,984.50
Austria	8145.25	12,277.00	+4131.75

Figure 1. Average FDI in South Africa by Certain European Countries (in South African Rands)

Foreign investors have expressed concerns in recent years over conditions in South Africa, but they are not generally based on the country's termination of BITs. Increasing numbers of strikes and other labor issues have investors worried about the labor costs of their South African investments, especially in the critically important mining sector.[195] Also, unreliable infrastructure, especially the failure of South Africa's state-owned electrical utility company to provide consistent power, presents a risk of higher costs.[196] Finally, there are concerns that the government will move forward with land confiscation and redistribution. The current government, under President Cyril Ramaphosa, has taken small steps toward land reform, but has not yet engaged in large scale land confiscation,[197] as some in South African politics have called for.[198] This is one area where the lack of a BIT might worry

[195] *See, e.g.*, Filip Warwick, *South African Gold Loses Its Shine*, S&P GLOBAL PLATTS: INSIGHT, Sept. 2019, at 26, 28, https://www.spglobal.com/_media/documents/pl-appec-insight.pdf (listing "high labor costs, regular strikes, and escalating prices for electricity" as reasons for the decline in South African gold production).

[196] *Id.*

[197] *See South Africa Takes a Step Closer to Land Expropriation – But Opponents Say It Can't Afford It, After the Coronavirus*, BUSINESSTECH (July 1, 2020), https://businesstech.co.za/news/property/412357/south-africa-takes-a-step-closer-to-land-expropriation-but-opponents-say-it-cant-afford-it-after-the-coronavirus/.

[198] *See, e.g.*, *South Africa Presidential Panel Backs Limited Land Seizures*, BBC (July 28, 2019), https://www.bbc.com/news/world-africa-49145347 (noting "pressure from opposition parties" to move forward with land expropriation).

investors, because the BITs that were cancelled would have protected foreign-owned property from expropriation.[199]

However, these investor concerns are probably better addressed by domestic policy than by renewed BITs. Labor cost concerns would not be addressed by maintaining traditional BIT protections, and can only be solved by addressing the concerns of labor groups through domestic policies. Infrastructure problems similarly must be addressed at the domestic level, including by anti-corruption measures. The land issue would be addressed by traditional BITs, but BITs are not the only way to reassure investors. The cautious approach of the Ramaphosa government does not envision large-scale nationalization of foreign property,[200] and the government has been able to attract new FDI despite land reform concerns.[201] Furthermore, even if the government does eventually decide on a policy of full-scale land confiscation (for example, nationalization of foreign-owned mines), it may decide that the loss of FDI is a cost worth paying to address centuries-old disparities. The freedom to make that choice—to accept that trade-off—is in some ways exactly what South Africa hopes to achieve by terminating the BITs. Absent those agreements, it has the policy space to consider such a drastic choice and face the consequences, without having to answer to an international arbitration panel.

Overall, the experience of South Africa seems to confirm the conclusion of UNECA, that "from an evidence-based policy perspective, BITs cannot be recommended as an instrument to attract FDI," and "there are potentially more effective and less risky means [of attracting FDI] than signing BITs, such as improving the business climate and infrastructure."[202] Other factors, such as infrastructure, political stability, and global macroeconomic trends, such as commodity prices, seem to have a stronger effect on South Africa's ability to attract investment than the operation or termination of BITs.

B. Is South Africa Different than Other Developing Countries?

If other countries wish to use the South African experience as a model, they

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[199] *See supra* notes 132–40 and accompanying text.

[200] A government panel proposed expropriation of four categories of land: "land held purely for speculative purposes, land already occupied and used by tenants and former tenants, land that has been abandoned, [and] inner city buildings with absentee landlords." *South Africa Presidential Panel Backs Limited Land Seizures*, *supra* note 198. The panel also recommended that land acquired since the end of apartheid be treated differently than land inherited from the apartheid era. *Id.*

[201] *South Africa: Foreign Investment*, SANTANDER TRADE MKTS., https://santandertrade.com/en/portal/establish-overseas/south-africa/foreign-investment/ (Aug. 2021) (listing "Beijing Automotive Industry holding, BMW, Nissan and Mainstream Renewable Energy" as large investors in recent years, as part of the government's push for $100 billion in FDI by 2023).

[202] U.N. ECON. COMM'N FOR AFR., *supra* note 184, at 11–12.

must ask whether there is something special about South Africa that makes its path easier when it comes to rejecting the conventional wisdom on BITs. Assuming that a more advanced economy and stable political climate attracts FDI, South Africa does have some advantages over its developing peers in terms of government, economy, and resources. However, South Africa does face many problems that are endemic in the developing world; it is still very much in the camp of developing, capital-importing countries and not in the camp of wealthy, advanced economies such as the United States and Western Europe. Furthermore, it is unclear what, if any, connection exists between South Africa's advantages or disadvantages in terms of development and its ability to attract FDI without BITs. After all, some studies of BIT and FDI correlation found that BITs *only* work if the country's institutions are already competent.[203]

In terms of economic development, South Africa sits in the global middle class—its economy is stronger than what the United Nations calls the "least developed countries," or LDCs,[204] but it is not among the world's wealthier countries. The World Bank lists South Africa as an "upper middle income" country, along with fellow African states Botswana, Gabon, Libya, and Namibia.[205] Other countries in this group include Mexico, Iraq, and Kazakhstan.[206] South Africa also has abundant natural resources, especially minerals—as discussed above, the country's vast mineral reserves have served an important role in the country's history.[207] However, South Africa is highly unequal; its Gini coefficient (a measurement of economic inequality) is the worst in the world according to the World Bank.[208] Whether foreign investors are more or less likely to invest in a country based on its economic inequality is hard to say.

Investors might prefer to invest in countries that are politically stable, or rely on a BIT to provide stability in unstable climates. South Africa does have a fairly strong democracy. Freedom House, a nonprofit that measures democracy across the world,[209] gives South Africa a score of 79 out of 100, and categorizes it as "free."[210] Ghana sits three points ahead, and South Africa's neighbor, Namibia, is two points

[203] *See* Sachs & Sauvant, *supra* note 180, at liii.

[204] U.N. Dep't. of Econ. & Soc. Aff., *Least Developed Countries (LDCs)*, https://www.un.org/development/desa/dpad/least-developed-country-category.html (last visited Dec. 27, 2021).

[205] *Upper Middle Income*, WORLD BANK: DATA, https://data.worldbank.org/income-level/upper-middle-income (last visited Nov. 6, 2021).

[206] *Id.*

[207] *See* text *supra* note 61 and accompanying text.

[208] *Gini Index (World Bank Estimate)*, WORLD BANK: DATA, https://data.worldbank.org/indicator/SI.POV.GINI?most_recent_value_desc=true (last visited Dec. 27, 2021).

[209] *About Us*, FREEDOM HOUSE, https://freedomhouse.org/about-us (last visited Dec. 27, 2021).

[210] *Countries and Territories*, FREEDOM HOUSE, https://freedomhouse.org/countries/freedom-world/scores (last visited Dec. 27, 2021).

behind.[211] The United States, by contrast, has a score of 83.[212] In terms of stability, however, there are reasons for investor concern: according to the World Bank, South Africa is only in the 40th percentile of countries for "political stability and absence of violence/terrorism."[213] The same data puts South Africa in the 50th percentile for "rule of law."[214]

Also, one might guess that a BIT would be more necessary for investors if corruption is higher in the country, and that a country would have an easier time without BITs if it were less corrupt. On these measures, South Africa sits in about the same middle class as measures of economy and stability. According to Transparency International, the country is tied with Suriname, Romania, and Hungary for 70th in the world (44 points out of 100) in perceptions of corruption.[215] One point better, and tied for 66th, are Senegal, Montenegro, Belarus, and Argentina.[216] One point worse, tied for 74th, are Tunisia, Jamaica, and Bulgaria.[217] According to the World Bank, South Africa is in the 59th percentile for "control of corruption," which correlates to about the same ranking.[218]

Finally, South Africa is rich with natural resources that foreign investors are eager to exploit. While South Africa no longer dominates the world's gold production the way it did in the 1970s,[219] South Africa's unmined gold reserves are still the second largest in the world.[220] South Africa is also the world's largest producer of

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[211] *Id.*

[212] *Id.*

[213] *Worldwide Governance Indicators*, WORLD BANK: DATABANK, https://databank.worldbank.org/source/worldwide-governance-indicators (last visited Dec. 27, 2021) (under "Country" drop-down menu, check "South Africa"; then under "Series" drop-down menu, check "Political Stability and Absence of Violence/Terrorism: Percentile Rank"; then under "Time" drop-down menu, check "2020"; finally, click "Apply Changes").

[214] *Id.* (under "Country" drop-down menu, check "South Africa"; then under "Series" drop-down menu, check "Rule of Law: Percentile Rank"; then under "Time" drop-down menu, check "2020"; finally, click "Apply Changes").

[215] *Corruption Perceptions Index 2019*, TRANSPARENCY INT'L, https://www.transparency.org/en/cpi/2019/index/zaf (last visited Dec. 27, 2021).

[216] *Id.*

[217] *Id.*

[218] *Worldwide Governance Indicators*, *supra* note 213 (under "Country" drop-down menu, check "South Africa"; then under "Series" drop-down menu, check "Control of Corruption: Percentile Rank"; under "Time" drop-down menu, check "2020"; finally, click "Apply Changes").

[219] Krishan Gopaul, *South African Production: Important but No Longer Globally Significant*, WORLD GOLD COUNCIL: GOLDHUB BLOG (June 18, 2019, 9:00 AM), https://www.gold.org/goldhub/gold-focus/2019/06/south-african-production-important-no-longer-globally-significant.

[220] U.S. GEOLOGICAL SURV., U.S. DEP'T INTERIOR, MINERAL COMMODITY SUMMARIES 2019, at 71 (2019).

chromium,[221] and the largest by far of platinum.[222] In addition to these and other minerals, such as diamonds and uranium, South Africa has abundant supplies of coal, iron ore, and natural gas.[223] Presumably, this natural wealth gives South Africa some leverage in its dealings with foreign investors, as investors might be more willing to invest under less-ideal conditions in order to exploit profitable natural resources. However, many developing countries are rich with natural resources. For example, of the 51 countries identified as "resource-rich" in a 2012 International Monetary Fund report, 27 were classified as either low or lower-middle income countries.[224] Only eight were high-income countries (consisting mostly of small Middle East oil-producing states).[225] Therefore, while an abundance of exploitable natural resources may be an advantage for South Africa, it is one that is shared by many of its developing peers.

Overall, South Africa is in a better position to attract investors than many states in Africa, but hardly exceptional—either on the continent or in the developing world more broadly. South Africa is in a roughly similar position in terms of economy, stability, corruption, and natural resources as many developing countries in Africa, Latin America, the Middle East, and post-Soviet Eastern Europe. It is possible to take from these measures that South Africa might be a poor model for the states that are in a consistently worse position on these metrics, such as the 46 countries on the United Nations' "least developed countries" list, but it is unclear that BITs would help those countries anyway. After all, of the studies that showed a positive correlation between BITs and FDI, several concluded that a BIT is only helpful if a country already has strong institutions.[226] Thus, there is not much reason to argue that South Africa possesses some special advantages that would prevent other countries from following its model.

CONCLUSION

South Africa's story may be unique in some ways, such as the extreme brutality of its racist apartheid regime and the relative newness of its democracy, but in many others, it is typical of developing countries in Africa and elsewhere. South Africa was born out of colonialism, as Europeans conquered the land, established its borders,

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[221] *Id.* at 47.

[222] *Id.* at 125.

[223] *Field Listing—Natural Resources*, CIA WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/field/natural-resources/ (last visited Dec. 27, 2021).

[224] IMF, *Macroeconomic Policy Frameworks for Resource-Rich Developing Countries* 48 (Aug. 24, 2012).

[225] *Id.* at 50.

[226] Sachs & Sauvant, *supra* note 180, at lii–liii (some studies have found BITs more effective for countries with weak institutions, while other studies have found BITs more effective when a country already has strong institutions).

and set up a brutally racist and extractive regime. It was battered by the winds of anti-colonialism and great power rivalry, as the long struggle against apartheid was caught up in the greater Cold War. Finally, having achieved independence and democracy, it was induced, for better or worse, to follow the Washington Consensus path of market liberalization and neoliberal economic policies. Now, looking back on its first decades of democracy, it has found, as other countries have, that its commitments made during the BIT boom of the 1990s hinder its ability to address the wounds of its past, and to build the future for which so many South Africans fought and died. Its response to this state of affairs has been to terminate the treaties that covered a large portion of foreign investment in the country and replace them with a domestic legal regime that protects its policy space. Is this a path that its peer nations could follow?

This Comment has shown that the answer so far is a qualified yes. Putting together the data, it seems that at least those countries in a similar economic and political situation as South Africa (in other words, within the broad global middle class), with policy goals that are hindered by traditional BITs (not only racial redistribution, such as in South Africa, but also, for example, environmental protection or advancement of local communities), should consider extricating themselves from the BIT system and replacing the treaties with a domestic legal regime. At the very least, South Africa's experience shows that, contrary to the conventional wisdom of the 1990s, BITs are not necessary to attract much-needed FDI. The cost of BITs in sovereignty is high, as South Africa's experience with arbitration over BEE laws has shown; the benefits are marginal at best. As South Africa's Protection of Investment Act shows, it is possible to offer foreign investors some protections while reserving crucial policy space to address national goals.

While the future is uncertain, and foreign investors could yet abandon South Africa if it takes certain measures going forward, they have not yet abandoned the country merely for leaving the BIT game. This fact is an important one for other countries reconsidering their own role in that game. At the very least, developing countries should know that they have more bargaining power than might have been assumed under the Washington Consensus. They can refuse BITs or insist on better terms from wealthy countries with some confidence that their FDI will not collapse, as long as they take other steps to attract it. South Africa's experience, while not definitively shutting the door on the usefulness of BITs, offers countries an alternate path, one that other countries should definitely consider.