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FREE TRADE, THE WASHINGTON CONSENSUS,  
AND BILATERAL INVESTMENT TREATIES  
THE SOUTH AFRICAN JOURNEY: A RETHINK  
ON THE RULES ON FOREIGN INVESTMENT  
BY DEVELOPING COUNTRIES

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INTRODUCTION

The internationalization of business constitutes one of the dominant features of commerce today. Ever since World War II, the prevailing mantra of trade policy among western countries is free trade.<sup>1</sup> Countries in the developed world are expected to eliminate all restrictions on the free movement of goods across national borders. This is codified in the rules of

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1. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: FOREIGN INVESTMENT 22 (10th ed. 2009); *Free Trade Protection and Agreements* (last visited June 18, 2016), <http://www.referenceforbusiness.com/encyclopedia/For-Gol/Free-Trade-Protection-and-Agreements>.

the World Trade organization (“WTO”),<sup>2</sup> which entered into force in 1995 and the predecessor regime under the General Agreement of Trade and Tariffs (“GATT”) entered into in 1948.<sup>3</sup> Free trade is complemented by the rules of the International Monetary Fund (“IMF”), which requires countries, particularly those from the developed world, to remove currency restrictions.<sup>4</sup>

The developed world has relentlessly pushed other countries to embrace free trade, as most recently seen in the Washington Consensus.<sup>5</sup> This article considers the trade and monetary policies pursued by South Africa, Africa’s most developed if not largest economy in the post 1994 period. In the immediate aftermath of South Africa’s first democratic elections, the country embraced the Washington Consensus and the underlying notion of free trade. In addition, it entered into a number of Bilateral Investment Treaties (“BITs”) with several European countries.<sup>6</sup> These agreements have proved to be profoundly detrimental to South Africa as a developing country. It has undermined South Africa’s ability to nuance its economic policy choices to deal with the legacies of apartheid.

The developed world embraces free trade after it achieves a particular level of development. Countries in the developed world engaged in mutually beneficial free trade when their economies achieved similar levels of sophistication and development. Moreover, their populations function under superior standards of education and high material standards of living. South Africa adopted free trade under circumstances of extreme inequality and abject poverty.<sup>7</sup> Unlike most of the developed world, South Africa has a deficient education system, which suffers from severe impediments, due to decades of apartheid rule.<sup>8</sup> Parts of the economy are highly developed

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2. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 42 ILM 746 (2002) [hereinafter Doha Declaration].

3. FOLSOM, *supra* note 1, at 22–23; *What is the WTO?*, WTO (last visited June 18, 2016), [https://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm).

4. FOLSOM, *supra* note 1, at 21; *Factsheet*, IMF (Mar. 23, 2016), <http://www.imf.org/external/np/exr/facts/glance.htm>.

5. *Washington Consensus*, WHO (last visited June 18, 2016), <http://www.who.int/trade/glossary/story094/en/>.

6. Peter Leon, *Creeping Expropriations of Mining Investments: An African Perspective*, 27 J. ENERGY NAT. RESOURCES & ENVTL. L., 597, 601 (2009).

7. Andrew Friedman, *Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South*, 7 INT’L L. & MGMT. REV. 37, 40 (2010–2011).

8. Lucy Holborn, *Education in South Africa: Where Did it Go Wrong?*, GGA (Sept. 1, 2013), <http://gga.org/stories/editions/aif-15-off-the-mark/education-in-south-africa-where-did-it-go-wrong>; see also Julian Rademeyer, *Is SA Bottom of the Class in Maths and Science? WEF Ranking is Meaningless*, AFR. CHECK (Sept. 3, 2014, 5:54), <https://africacheck.org/reports/is-sa-bottom-of-the-class-in-maths-and-scienc>

with a minority that lives under “first world” conditions. South Africa assumed largely first world free trade obligations despite the reality of the majority of the population subsisting under conditions of poverty and rampant unemployment unlike any other countries that assumed similar obligations.<sup>9</sup>

The embrace of free trade resulted in the decimation of key sectors of the economy.<sup>10</sup> The liberalization policies also resulted in the movement of major corporate head offices and large amounts of currency out of South Africa. South Africa entered into a number of BITs with developed countries, which constrained its ability to adopt legislative and policy frameworks to advance the public interest.<sup>11</sup> In several instances, the BITs agreements contained provisions inconsistent with constitutional imperatives. It meant that as a sovereign, the country surrendered key aspects of its economic policy. South African representatives failed to appreciate the impact of these measures and its consequences on the ability of the state to fashion progressive policies for the benefit of the disadvantaged.

The difficulty of competing against other developing countries has been compounded by a Constitution and legal order, which guarantees socio-economic and labor rights to its population.<sup>12</sup> The progressive Constitution and the guarantees granted therein are something one expects in the developed world. When compared to other competitive markets in the developing world that do not provide similar legal guarantees, there is an increase in the cost of doing business in South Africa. This makes it difficult to compete with other developing countries that do not have a transparent, rights-based, and democratic constitution.

In hindsight, South Africa, like many developing countries, has soured on free trade and BITs.<sup>13</sup> The South African government has come to the realization that free trade with the developed world and an essentially passive government has adverse consequences for its development and

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e-why-ranking-is-meaningless/.

9. See Thabi Mbeki, Former President of South Africa, State of the Nation Speech (Feb. 14, 2003) (describing South Africa as a dual economy with an industrialized and underdeveloped part).

10. Lila J. Truett & Dale B. Truett, *New Challenges for the South African Textile and Apparel Industries in the Global Economy*, 35 J. ECON. DEV. 4 (2010).

11. Mohammed Mossallem, *Process Matters: South Africa's Experience Exiting its BITs*, GLOBAL ECON. GOVERNANCE PROGRAMME (2015).

12. See S. AFR. CONST., 1996 §§ 22–27 (containing a myriad of positive rights including: the right to freedom of trade, labour rights, housing, health care, food, water and social security).

13. David Schneiderman, *Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules*, 25 SAJHR 246, 249 (2009).

ability to create an environment that uplifts the material conditions of the majority.<sup>14</sup> There is an emerging consensus that free trade among similarly situated countries in the continent offers better opportunities for the developing world. Free trade with the developed world has not delivered a manufacturing base to most African countries leaving them dependent on the export of raw materials.<sup>15</sup> The BIT agreements, which complement free trade, served as a significant constraint on African governments' ability to shape their public policy.<sup>16</sup>

## II. EMBRACE OF FREE TRADE AND THE WASHINGTON CONSENSUS

The idea of free trade finds inspiration in the writings of various economists, such as Adam Smith.<sup>17</sup> After World War II, United States trade policy was shaped by the ideas of free trade.<sup>18</sup> Free trade proponents argued that parochial concerns among nations, favoring their own nationals to the exclusion of others, resulted in protectionism, which was one of the major contributing factors for the Great Depression.<sup>19</sup> Free trade is grounded in the concept of comparative advantage — the idea that consumers across nations will be better off if all restrictions on the sale of goods across national borders are removed.<sup>20</sup> By virtue of market forces, producers will specialize in the production of goods, which they are more efficient in producing.<sup>21</sup> This provides a greater variety and quantity of goods available at a cheaper price, which consumers across national borders will be able to purchase from sellers in other countries. Ultimately, countries will achieve the greatest aggregate wealth and quantitative income.<sup>22</sup> From a historical perspective, the developed countries used various forms of protection and interventions into their economy during the formative stages of their industrialization. These protections are now

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14. Jason Brickhill & Max Du Plessis, *Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration* (Piero Foresti v South Africa), 27 SAJHR 152, 157 (2011).

15. Rick Rowden, *Africa's Free Trade Hangover*, FOREIGN POL'Y (Aug. 7, 2014), <http://foreignpolicy.com/2014/08/07/africas-free-trade-hangover/>.

16. Jonathan Klaaren & David Schneiderman, Comment, *Investor-State Arbitration and SA's Bilateral Investment Treaty Policy Framework Review*, MANDELA INST. (Aug. 10, 2009).

17. *Free Trade*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (2008).

18. *Id.*

19. See generally FOLSOM, *supra* note 1.

20. *Free Trade*, *supra* note 17 ("The foremost theorist of comparative advantage is David Ricardo.").

21. *US Economy: Production of Goods and Services*, THEUSAONLINE.COM (last visited June 18, 2016), <http://www.theusaonline.com/economy/production.htm>.

22. *Free Trade*, *supra* note 17.

deemed contrary to the idea of the free market.<sup>23</sup>

The phrase “Washington Consensus” is viewed as the equivalent of “neoliberalism” and “globalization.”<sup>24</sup> The originator of the phrase, John Williamson, used the phrase in 1990 “to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989.”<sup>25</sup> The policies included:<sup>26</sup>

- Fiscal discipline — strict criteria for limiting budget deficits
- Public expenditure priorities — moving them away from subsidies and administration towards previously neglected fields with high economic returns
- Tax reform — broadening the tax base and cutting marginal tax rates
- Financial liberalization — interest rates should ideally be market-determined
- Exchange rates — should be managed to induce rapid growth in non-traditional exports
- Trade liberalization
- Increasing foreign direct investment (FDI)— by reducing barriers
- Privatization — state enterprises should be privatized
- Deregulation — abolition of regulations that impede the entry of new firms or restrict competition (except in the areas of safety, environment, and finance)
- Secure intellectual property rights (IPR) without excessive costs and available to the informal sector
- Reduced role for the state

The “Washington Consensus” has proved to be a point of contention and has emerged to reflect deep grievances among developing countries.

### III. SOUTH AFRICA AND FREE TRADE

South Africa embraced the Consensus in the aftermath of apartheid rule at a time when their objective realities were worse than anything posed by the global financial crisis of 2008 in the western world. Unemployment by conservative estimates was in excess of thirty percent of the population.<sup>27</sup> The majority of the population existed and continues to reside in conditions

23. Rowden, *supra* note 15.

24. *Washington Consensus*, GLOBAL TRADE NEGOT. (Apr. 2003), <http://www.cid.harvard.edu/cidtrade/issues/washington.html>.

25. *Id.*

26. John Williamson, *A Short History of the Washington Consensus*, FUNDACIÓN CIDOB (Sept. 24, 2004), <http://www.iie.com/publications/papers/williamson09042.pdf>; *Washington Consensus*, *supra* note 5.

27. *South Africa Economic Policy and Trade Practices*, U.S. DEP'T OF STATE (Feb. 1994), [http://dosfan.lib.uic.edu/ERC/economics/trade\\_reports/1993/SouthAfrica.html](http://dosfan.lib.uic.edu/ERC/economics/trade_reports/1993/SouthAfrica.html).

of abject poverty.<sup>28</sup> Many did not and still do not have access to basic sanitation, water, infrastructure, and education.<sup>29</sup> The economic challenges that the developed world experienced in 2008 are a perpetual and “normal” reality for many countries in the developing world. The solutions proposed in the Consensus were defenestrated by the developed world when it experienced the global crisis.<sup>30</sup> Whilst many developing countries suffer this perpetual crisis, they were called upon to embrace the framework of the Consensus.

Despite the economic reality that exceeds anything the developed world experienced in the financial crisis of 2008, South Africa, starting with the government of Nelson Mandela, embraced the Washington Consensus and expansive free trade. It entered into the GATT agreements, succeeded by the WTO, which undertook first world free trade commitments as a developed country.<sup>31</sup> It systematically eliminated tariffs on imported items.<sup>32</sup> South Africa’s reduction of tariffs exceeded that of what one may consider similarly situated economies, namely the BRICS countries.<sup>33</sup>

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28. Greg Nicholson, *South Africa: Where 12 million Live in Extreme Poverty*, DAILY MAVERICK (Feb. 3, 2015), <http://www.dailymaverick.co.za/article/2015-02-03-south-africa-where-12-million-live-in-extreme-poverty/#.VpOmARFUfw>.

29. See Friedman, *supra* note 7, at 40 (“The World Economic Forum ranks South Africa as 148 out of 148 countries in Math and Science in 2014.”); *South Africa Anger at ‘Worst Maths and Science’ Ranking*, BBC (June 3, 2014), <http://www.bbc.com/news/world-africa-27683189>; see also Julian Rademeyer, *Is SA Bottom of the Class in Maths and Science? WEF Ranking is Meaningless*, AFRICA CHECK (Sept. 3, 2014), <http://africacheck.org/reports/is-sa-bottom-of-the-class-in-maths-and-science-why-ranking-is-meaningless/>.

30. The Consensus among the developed world dissipated in the 2008–2009 global financial crisis. ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* 101, 102, 116–117 (2009). In the aftermath of the global financial crisis, we witnessed rigorous government intervention among many of the developed countries prompting Gordon Brown, the former British Prime Minister to declare, “the old Washington Consensus is over.” Abhijit, *Old Washington Consensus is Over: Gordon Brown*, Pressrun.net (Apr. 3, 2009). <http://www.pressrun.net/weblog/2009/04/old-washington-consensus-is-over-gordon-brown.html>.

31. See Faizel Ismail, *South Africa’s role in the Multilateral Trade System*, TULANE, <http://www.tulane.edu/~dnelson/PEBricsConf/Ismail%20SA.pdf>. (“Some argue that South Africa took its rightful place among the developing world.”).

32. ALEX BORAINÉ ET AL., *SOUTH AFRICA AND THE WORLD ECONOMY IN THE 1990s* 174, 175 (1993).

33. Vera Thorstensen ET AL., *BRICS in the WTO: In Search of a Positive Agenda*, in *BRICS IN THE WORLD TRADE ORGANIZATION: COMPARATIVE TRADE POLICIES BRAZIL, RUSSIA, INDIA, CHINA AND SOUTH AFRICA* 13, 75 (2014) (“average tariffs applied by the BRICS members are quite close, ranging from 7.7% in South Africa to 13.6% in Brazil. However, there is a significant difference in the average bound tariffs. China, due to its recent accession to the WTO, has no relevant margin between applied and bound tariffs: 0.4 percentage points (pp) between the averages of said tariffs. India has a difference of 35.6 pp. between the averages of the two tariffs. Brazil is the only BRICS country with an average tariff applied to agricultural goods that is lower than

Together with the elimination and reduction of tariffs, local content rules were eliminated.<sup>34</sup> Even though South Africa is Africa's largest economy, the experiences for the majority of the population remains that of an underdeveloped country.<sup>35</sup> The uncritical embrace of free trade resulted in the decimation of sectors of the economy, such as textiles.<sup>36</sup> These industries were important in providing employment and keeping people out of poverty.<sup>37</sup>

Not only did the GATT and WTO agreements mean tariffs in the textile and other industries had to be reduced, it further meant that South Africa, like other countries that assumed similar obligations, were legally circumscribed in subsidizing their industries. For South Africa, this meant that the historically disadvantaged population (saddled with decades of discrimination and attendant disabilities) could not be subsidized or given a leg up because this would invite charges of unfair trade practices.<sup>38</sup> With the decimation of key sectors of the economy, hundreds of thousands of people lost their jobs. The majority who fail to secure alternate jobs receive unemployment and welfare payments from the state.<sup>39</sup> This drain to the economy is profound. Free trade has moved large sections of the population from employment to welfare.

Apartheid shielded inefficient industries, which were largely controlled by the white minority population.<sup>40</sup> At the same time, apartheid also meant that the historically disadvantaged Black majority lived and continue to live in an underdeveloped reality. Apart from grave poverty, they suffered and continue to suffer grave impediments with respect to entrepreneurship and

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that which is applied to non-agricultural goods. The other members have higher agricultural tariffs and this is particularly so in the case of India, whose applied and bound averages in the sector are 32.2% and 113.1% respectively.”).

34. The Agreement on Trade-Related Investment Measures (TRIMs) agreed upon by members of the World Trade Organization in 1994 that became effective in 1995 banned local content requirements that promote the interests of domestic industries.

35. RASIGAN MAHARAJH, *OVERCOMING UNDERDEVELOPMENT IN SOUTH AFRICA'S SECOND ECONOMY* (2005).

36. Truett & Truett, *supra* note 10.

37. *See id.* (“Successive rounds of the GATT agreements including the Paraguay Round and the Doha agreements resulted in the elimination of tariffs for textiles. The consequence of this was the percentage of employees in the textile industry decreased dramatically.”).

38. Under the WTO rules, countries can impose countervailing duties against imports aided by subsidies. *Subsidies and Countervailing Measures Overview*, WTO (2016), [https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm).

39. Louise Ferreira, *Factsheet: Social Grants in South Africa — Separating Myths From Reality*, AFR. CHECK (Feb. 24, 2016), <https://africacheck.org/factsheets/separating-myth-from-reality-a-guide-to-social-grants-in-south-africa/>.

40. RUCHIR SHARA, *THE LIBERATION DIVIDEND* 64 (Haroon Borat ET AL. eds., 1993); BORRAINE, *supra* note 32, at 176.



acquisition of skills, which, prevents them from competing on an equal footing.<sup>41</sup> Undoubtedly, a lot of unskilled production, like the clothing industry, has migrated from the developed world to the developing world.<sup>42</sup> The superstructure of the economies of the developing world is not monolithic. At times, what on the surface might appear to be a developed economy, like South Africa, is not really developed at least from the perspective of the majority of the population. South Africa is more akin to a semi-industrialized industry with roots in both the developed and developing world.<sup>43</sup> The free trade policies were neither informed, nuanced, nor reflective of South Africa's unique realities. No other country with the level of unemployment and abject poverty like South Africa has assumed free trade obligations of a developed world country. The decision makers of South Africa adopted free trade in an uncritical manner. The free trade agreements commenced under the watch of Minister Trevor Manuel, democratic South Africa's first Trade and Industry Minister and later first Black Minister of Finance. Minister Manuel has been hailed by big business as an insightful visionary. If the truth were told, he was likely the most unqualified Minister occupying both portfolios because he had neither an economics, law, banking background or even a university degree.

The conventional orthodoxy of trade and comparative advantage has not resulted in benefits to the South African economy. South Africa, a country with relative political and economic stability, rich resources, a sophisticated infrastructure, and a well-functioning stock market has not acquired significant foreign direct investment.<sup>44</sup> South Africa has one of the most advanced constitutions and sophisticated legal framework operating under the rule of law and an independent judiciary. It has a free press and one of the strongest financial systems in the world. If we are to believe the Washington Consensus, this is an optimum legal regime. Herein lies one of the stark contradictions. The South African Constitution confers rights including civil and political rights, socio-economic rights, and labor rights to its citizens.<sup>45</sup> The social contract that ushered in the Constitution reflects a realization that the success and legitimacy of the constitutional order is

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41. Friedman, *supra* note 7.

42. Mike Morris ET AL., *Clothing and Textiles Paper: An Identification of strategic interventions at the Provincial Government level to secure the growth and development of the Western Cape Clothing and Textiles Industries* 6 (2005), [https://www.westerncape.gov.za/other/2005/10/final\\_paper\\_most\\_updated\\_printing\\_clothing\\_and\\_textiles.pdf](https://www.westerncape.gov.za/other/2005/10/final_paper_most_updated_printing_clothing_and_textiles.pdf).

43. JAMES J. HENTZ, SOUTH AFRICA AND THE LOGIC OF REGIONAL COOPERATION 181 (2005).

44. See Schneiderman, *supra* note 13, at 251 (asserting that foreign direct investment has plummeted as wealth disparities has worsened)

45. See S. AFR. CONST. 1996 ch. 2.

dependent on the realization of fundamental human rights, which includes not only civil and political rights, but also higher material standards of living for the entire population. In this regard, the Constitution confers a right to receive education, health care, water, and extensive rights to workers.<sup>46</sup>

The law provides workers a host of rights including the right to fair labor practices.<sup>47</sup> The extensive worker protection finds inspiration from the workers struggle against apartheid.<sup>48</sup> These protections are an unqualified good. The workers have used their power to clamor for the right to organize and achieve a living wage.<sup>49</sup> The granting of higher wages raises the cost of production and doing business in South Africa. The majority of developing countries do not provide for similar kind of rights and worker protections. The courts of South Africa have interpreted the obligations on socio-economic rights and employer obligations to workers in an expansive and enlightened manner.<sup>50</sup> An oft-repeated slogan of business is that labor laws in South Africa are highly regimented. From the perspective of countries with weak constitutions providing little citizen rights that might be correct. The South African Constitution emerged from a particular struggle reflecting an enlightenment that is unique to its history and unique in the annals of constitution making. Given that the objective realities of the South African economy is more like that of a developing country, the worker rights impose financial challenges, which can be

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46. *Id.* §§ 23, 26, 27.

47. *See id.* ch. 2 § 23 (providing the Codes of Good Practice on the Basic Condition of Employment, Employment Equity, Labour Relations, and Occupational Health and Safety, the South Africa Constitution); Manpower Training Act 56 of 1981 (S. Afr.); Occupational Health and Safety Act 85 of 1993 (S. Afr.); Compensation for Occupational Injuries and Diseases Act 130 of 1993 (S. Afr.); Labour Relations Act 66 of 1995 (S.Afr.); Basic Conditions of Employment Act 75 of 1997 (S. Afr.); Employment Equity Act 55 of 1998 (S. Afr.); Skills Development Act 97 of 1998 (S. Afr.); Skills Development Levies Act 9 of 1999 (S. Afr.); Unemployment Insurance Act 63 of 2001 (S. Afr.); Unemployment Insurance Contributions Act 4 of 2002 (S. Afr.); Employment Services Act 4 of 2014 (S. Afr.), as amended respectively, and read with the respective regulations and notices issued.

48. *See Workers' Rights*, CONST. CT. S. AFR. (last visited June 18, 2016), <http://www.constitutionalcourt.org.za/text/rights/know/workers.html#key>, for an overview of the historical journey of worker struggles.

49. The demand of workers has received a sympathetic hearing from the Constitutional Court. *See Nat'l Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) (S. Afr.).

50. *See South African National Defence Union v. Minister of Defence* 1999 (4) SA 469 (S. Afr.) (affirming the right to collectively organize as a right entrenched in the Constitution); *see also Nat'l Educ. Health & Allied Workers Union (NEHAWU) v. Univ. of Cape Town and Others* 2003 (3) SA 1 (CC) (S. Afr.), for a discussion where the Constitutional Court protected the rights of workers to continued employment in the event of transfer of the business.

avoided by moving production to countries that do not require these enlightened and costly obligations.<sup>51</sup>

From a comparative standpoint, western economies developed in particular stages. First, they were liberal — establishing the capitalistic system and solidifying the industrial base.<sup>52</sup> Britain, France, and many developed countries embraced free trade only after they achieved a certain level of economic prosperity, which filtered down to their population.<sup>53</sup> Otherwise, the argument went they could not compete on an equal footing. Second, they were later democratic in terms of extending the franchise to the entire population. Finally, the distributive function emerged when western countries began to cater to the less well off sectors of society in terms of addressing their material needs.<sup>54</sup> The United States, the most developed western country, only embarked on the distributive function during the 1930's under President Roosevelt's New Deal era.<sup>55</sup> A similar pattern of development is reflected in the economic growth of the Asian Tigers namely South Korea, Taiwan, Singapore, and Malaysia.

The Constitution of South Africa requires that the second and the third requirements be fulfilled concurrently. Democratic accountability and respect for the rights of workers is central in all decision making. There are financial costs incurred from the well-deserved worker rights when compared against other developing countries such as Bangladesh, Vietnam, and India or for that matter even more advanced economies like China. Many developing countries do not exercise political and economic power in a democratic and transparent manner. It is also difficult to compete with countries that have very lax labor laws and no constitutional obligations to provide basic needs to their populations. Given these differences, the cost of doing business in South Africa is elevated particularly with respect to low skilled manufacturing.

Given the high cost of manufacturing vis-a-vis other developing countries that lack an enlightened rights culture, there is an incentive for manufacturers to move their production out of South Africa or for traders

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51. See RICHARD N. DEAN ET AL., *DOING BUSINESS IN EMERGING MARKETS A TRANSACTIONAL COURSE 1* (2015) (explaining that the World Bank characterizes the BRICs countries as emerging markets, a characterization, which at a minimum should also be applied to South Africa).

52. ZIYAD MOTALA, *CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA A COMPARATIVE PERSPECTIVE* 98 (1994).

53. Toni Pierenkemper, *The Emergence of Free Trade in Europe*, in *FREE TRADE*, (2015).

54. MOTALA, *supra* note 52.

55. Robert Higgs, *The Mythology of Roosevelt and the New Deal*, *FOUND. FOR ECON. EDUC.* (Sept. 1, 1998), <http://fee.org/freeman/the-mythology-of-roosevelt-and-the-new-deal/>.

to purchase goods cheaper abroad. Free trade facilitates this incentive. The free trade policies favor consumers that have financial resources, which in South Africa is largely a minority. In the brutal conditions of the marketplace, the majority of the population are not merely consumers. They are also workers and producers.<sup>56</sup> As Montesquieu wrote “in countries where the people are actuated only by the spirit of commerce, they make a traffic of all humane, all the moral virtues; the most trifling things, those which humanity would demand are there done, or there given, only for money.”<sup>57</sup> Without jobs, ordinary people do not have the ability to purchase goods, whether foreign or domestic, regardless of how cheap or abundant the goods might be.<sup>58</sup>

In addition to free trade, South Africa also liberalized its currency controls and allowed major corporations to move their headquarters outside South Africa.<sup>59</sup> The conventional orthodoxy, disseminated by business, media, and many academics suggested it was a sound decision, which would allow these companies access to cheaper capital to be used in South Africa.<sup>60</sup> This was purely spinning of yarn and the latter has not materialized. The individual companies and their shareholders benefitted by moving their capital to more lucrative markets. The moving of South African companies offshore has brought no advantages to the South African economy.

Of late, the United States and other countries are facing the problem of inversion, where a company merges with a foreign entity and moves their corporate headquarters to the foreign country. In effect, this results in the transferring of the U.S. firm’s tax residence to a foreign jurisdiction without any actual changes to where and how the company transacts its business.<sup>61</sup> The merger is primarily motivated to lower the tax burden in

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56. We witness the tension between free trade and the interests of workers in the developed world as well seen in recent political strife in the United States. See Lawrence Summers, *What’s Behind the Revolt Against Global Integration?*, WASH. POST (Apr. 10, 2016), [https://www.washingtonpost.com/opinions/whats-behind-the-revolt-against-global-integration/2016/04/10/b4c09cb6-fdbb-11e5-80e4-c381214de1a3\\_story.html](https://www.washingtonpost.com/opinions/whats-behind-the-revolt-against-global-integration/2016/04/10/b4c09cb6-fdbb-11e5-80e4-c381214de1a3_story.html).

57. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 10 (7th ed. 2013).

58. BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW LXII (1991).

59. Shawn Hattingh, *BHP Billiton and SAB: Outward Capital Movement and the International Expansion of South African Corporate Giants* 11, TAX JUSTICE (2007), [http://www.taxjustice.net/cms/upload/pdf/llrig\\_0809\\_South\\_African\\_giants.pdf](http://www.taxjustice.net/cms/upload/pdf/llrig_0809_South_African_giants.pdf).

60. *Companies Going Offshore can only Benefit South Africa*, IOL (Nov. 11, 1998), <http://www.iol.co.za/business/personal-finance/financial-planning/investments/39-companies-going-offshore-can-only-benefit-south-africa-39-1.992562?ot=inmsa.ArticlePrintPageLayout.ot>.

61. Lori Montgomery, *Obama Hits at Companies Moving Overseas to Avoid Taxes*, WASH. POST (Sept. 22, 2014), [https://www.washingtonpost.com/business/economy/2014/09/22/e5294e0a-429d-11e4-b437-1a7368204804\\_story.html](https://www.washingtonpost.com/business/economy/2014/09/22/e5294e0a-429d-11e4-b437-1a7368204804_story.html).

the United States by shifting profits to the foreign jurisdiction, which has a lower tax base.<sup>62</sup> This has created a firestorm amongst the political branches and calls to punish such corporate behavior in the United States.<sup>63</sup> Although not identical to inversion, ultimately, the liberalization of currency controls allowed companies that were truly South African to move their primary listing abroad, which permitted these companies to repatriate their profits to foreign destinations as if they were foreign companies, even though they were not.<sup>64</sup> These companies represented the crown jewels of the South African economy. Crucially, prior to the liberalization in 1995, the companies had to invest their profits in South Africa to benefit South Africans.<sup>65</sup> Now they are permitted to repatriate their profits to foreign jurisdictions. These decisions were indulgent to the privileged sector and largely benefitted the business elite, who could move their capital out of South Africa and also reduce their tax rates to the detriment of the general welfare.

Liberal currency controls became a reality to many developed countries, such as Britain and France, only in the late 1970's and early 1980's.<sup>66</sup> Other Western European Countries within the European Union abolished exchange controls in the early 1990's. Before the abolishment of exchange controls, most foreign currency transactions required approval and were to be conducted through approved intermediaries.<sup>67</sup> When South Africa liberalized its currency controls, it was nowhere near the level of industrialization as Britain and France. This is another example of liberalization, reflecting choices rigged in favor of a few who were permitted to move their capital out of the country to maximize profits without being mindful of the needs of the majority in South Africa.

Despite decades of isolation, South Africa has much greater foreign trade than other BRICS countries.<sup>68</sup> Most of it constitutes imports. Foreign

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62. Pat Regnier, *Everything You Need to Know about Companies Leaving America for Taxes*, TIME (Sept. 23, 2014), <http://time.com/money/3378719/corporate-tax-inversions-leaving-america/>; Alan Pyke, *Corporate Tax Rates Aren't the Reason American Companies Flee to Tax Havens*, THINK PROGRESS (Feb. 9, 2015), <http://thinkprogress.org/economy/2015/02/09/3620741/inversion-mergers-not-about-tax-rate/>.

63. John D. McKinnon & Damian Paletta, *Obama Administration Issues New Rules to Combat Tax Inversions*, WALL ST. J. (Sept. 22, 2014), <http://www.wsj.com/articles/treasury-to-unveil-measures-to-combat-tax-inversions-1411421056>.

64. Hattingh, *supra* note 59.

65. SHARA, *supra* note 40, at 64.

66. ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* 711 (2d ed. 1991).

67. *Id.*

68. When one considers the degree of openness of the countries, Brazil has the lowest share of trade in relation to its GDP of all the BRICS countries. Between 2008

direct investments have not materialized to any significant degree. The standard claim by big business as to the lack of investment in South Africa is the high cost of labour. Similarly, those that control capital argue that the trade unions are too powerful and have the ability to win pay raises above the rate of inflation and productivity.<sup>69</sup> Economic justice gets scant attention in the debate over wages and free trade.

Developing countries like South Africa and Brazil are plagued by extreme inequality. The response of workers is that despite working hard, they do not receive affordable wages that they can live off. The debate about wages has to take cognizance of the high cost of living, which before the large deprecation in the South African currency over the past few years exceeded the cost of living in many developing countries. Food and basic staples in South Africa are produced locally and workers earn far less than their counterparts in developed countries. There are monopoly practices, cartels, and crony capitalism, which is endemic in many developing countries and contributes to the high cost of living. There has been high profile exposure of collusion among producers of goods acting in concert to maximize their profits.<sup>70</sup> These examples constitute the tip of the iceberg. These are matters, which need to be resolved within the domestic laws of South Africa and other developing countries. Cartels and crony capitalism have adverse effects on the poor.<sup>71</sup>

South Africans are subjected to regressive laws that provide exclusive licensing rights to privileged parties, which distorts competition and leads to higher prices. Ever since the Appellate Division (as it was then known) decision in the TDK case, parties with distribution licenses can prevent parallel importation of legitimate goods under copyright protection.<sup>72</sup> This

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and 2010, foreign trade accounted for twenty-four percent of Brazil's GDP, in comparison with fifty-two percent for Russia, forty-eight percent for India, fifty-five percent for China and sixty-one percent for South Africa. Thorstensen, *supra* note 33, at 75.

69. SHARA, *supra* note 40, at 64.

70. The collusion has been pervasive, extending to the pharmaceutical, bread, and construction industries. See, e.g., Tembinkosi Bonakele, Commissioner, Presentation to the Portfolio Committee on Economic Development on 15 Years of Competition Enforcement (Mar. 10, 2015); *In the matter between The Competition Commission and Pioneer Foods (Pty) Ltd* (2010) 15/CR/Feb07 50/CR/May08 (S. Afr); *South African Tribunal Imposes Maximum Fines in Bread Cartel Case*, MONCKTON CHAMBERS (Feb. 3 2010), <http://www.monckton.com/south-african-tribunal-imposes-maximum-fines-bread-cartel-case/>; DAVID LEWIS, THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT: A PERSONAL ACCOUNT (2012) (discussing the monopoly practices and abuse of dominant sectors).

71. *The Impact of Cartels on the Poor*, U.N. Conference Trade and Development (July 24, 2013), [http://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf).

72. *Frank & Hirsch (Pty) Ltd. V. A Roopanand Brothers (Pty) Ltd.* 1993 (580/91)

results in the holder of the copyright being able to exclude other legitimate items and charging higher prices for the goods for which it has an exclusive copyright. The US approach, applies the “doctrine of first sale” which means a legal copy can be sold to anyone.<sup>73</sup> Once you have a lawfully made product, whether purchased locally or from a foreign source from a common origin, there can be no limitation on selling that product because of an exclusive license. In Japan, the exclusive right of the copyright owner does not extend to genuine or licensed goods, which have been sold to a third party outside Japan.<sup>74</sup> The EU through the “doctrine of exhaustion” has increased the scope of competition within member countries.<sup>75</sup> The South African approach to copyright protection protects the profit margins of businesses, distorts competition, and leads to higher prices for many goods that retail for much cheaper in the developed world.

Extreme inequality is inimical to liberty and counterproductive for long-term political stability.<sup>76</sup> The revolutionary writers including Jean Jacques Rousseau and Baron de La Brede Montesquieu, who influenced Thomas Jefferson, wrote about the challenges to democracy where there are wide disparities in wealth.<sup>77</sup> Democracy cannot function where beggars and millionaires live side by side. Similarly, Jefferson wrote that democracy would be undermined if one group had large amounts of property whereas others had very little.<sup>78</sup> South Africa has the largest Gini coefficient, which is used to measure inequality. It is astounding that many basic staples and services cost more in South Africa and other developing countries than in advanced developed countries where individual earnings are multifold more. These inequalities resulted in the wave of uprisings in North Africa during the “Arab Spring” over low wages and the high cost of living.

Over the past five years, South Africa has suffered labor unrest culminating in the tragedy at the British owned Lonmin platinum mines.<sup>79</sup> The basic clamor of the workers, working under the most difficult conditions, was to demand an affordable wage. South Africa has seen a

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ZASCA 90 (S. Afr.).

73. See *Quality King Distrib. v. L'Anza Research Int'l*, 523 U.S. 135 (1998); *K Mart Corp. v. Cartier*, 486 U.S. 281 (1988).

74. FOLSOM, *supra* note 1, at 989.

75. Case No. C-355/96, *Silhouette Int'l v. Hartlauer*, 1998 E.C.R. (July 16, 1998).

76. MOTALA, *supra* note 52, at 20.

77. ERNST BARKER, *THE SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* 190 (2d ed. 1952); STONE, *supra* note 57, at 10.

78. STONE, *supra* note 57, at 9-10.

79. Maeve McClenaghan & David Smith, *South Africa: Killing of 34 Marikana Mine Strikers — The Role of British Company Lonmin*, GLOBAL RESEARCH (Nov. 24, 2013), <http://www.globalresearch.ca/south-africa-killing-of-34-marikana-mine-strikers-the-role-of-british-company-lonmin/5359728>.

wave of uprisings over the past few years.<sup>80</sup> Continued inequality compounded with a large underprivileged population politicized by activism, creates a combustible situation.

#### IV. A RETHINK ON UNRESTRICTED FREE TRADE

The economic development of the Asian Tigers such as Taiwan, Malaysia, Korea, and Singapore occurred as a result of investment in their own people, their education,<sup>81</sup> and their economy.<sup>82</sup> This is also what happened in Germany and Japan after World War II.<sup>83</sup> These examples reflect the facilitation of economic growth through investment in their own population and the government guiding the process instead of ceding this power to the private sector.<sup>84</sup> The example of South Korea is particularly instructive. South Korea's per capita income was about the same as Ghana in 1960 when Ghana achieved independence but below that of a number of Sub-Saharan African countries.<sup>85</sup> For a number of decades, it followed inward policies and achieved unprecedented growth rates. Today, South Korea is the eighth largest exporting nation.<sup>86</sup> It has been integrated into the WTO and is now firmly in the free trade camp. South Korea's and the other Asian Tigers' path to development provides valuable lessons to policy makers in developing countries. After almost three decades of the unchallenged mantra of free trade and monetary policy determined by the International Monetary Fund, governments in many developing countries are pushing back. For some like South Africa, it may not be possible to put the genie back in the bottle and make a hundred and eighty degree turn with respect to each and every unwise and misinformed choice. The challenge for decision makers is to make strategic adjustments to level the playing field and create better opportunities.

The starting point is to realize that free trade and foreign direct investment by multi-nationals has not delivered African countries from

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80. Michael Kaplan, *South Africa Labor Strikes Costs Economy \$500M per Year as Nation Struggles with Slow Economic Growth*, IBT (Sept. 18, 2015, 9:23 AM), <http://www.ibtimes.com/south-africa-labor-strikes-cost-economy-500m-year-nation-struggles-slow-economic-2103563>.

81. South African government policy in education has been an abject failure. The education system, beginning with Minister Sibusu Bhengu retiring the best of our teachers, Minister Kader Asmal's outcome based education curriculum and closing down of teacher training colleges are epic scandals.

82. See DEAN, *supra* note 51, at 2.

83. Volker Stanzel, *Germany and Japan: A Comeback Story*, GLOBALIST (Mar. 7, 2015), <http://www.theglobalist.com/germany-and-japan-a-comeback-story/>.

84. BARKER, *supra* note 77, at 189.

85. DEAN, *supra* note 51, at 2.

86. *Id.*



poverty. From Nigeria to South Africa to Uganda, decision makers are recognizing the benefits of trade protection, public development banks, and more expansionary monetary policies — all heresies under the Washington Consensus.<sup>87</sup> There are many examples where the developed world talks free trade, but then rigs the rules of the game by using a host of non-tariff barriers, such as supposed quality controls, which keep out goods.<sup>88</sup> African countries operating individually, given their market size, have not been successful in using the same tactics. China and Brazil have been more effective in using the same tools against western countries.<sup>89</sup> South Africa has attempted to unscramble the egg. They have tried to play hardball with the United States with respect to the African Growth Opportunity and Investment Act (“AGOA”).

South Africa imposed high tariffs on the importation of American chicken. It resisted lowering the tariffs, arguing that American chicken farmers are aided by government subsidies and the poultry are afflicted with diseases like bird flu.<sup>90</sup> The South Africans were further concerned that chicken exports from the United States would hurt small scale emerging black farmers. The United States argues that South Africa is a rich and mature country that does not need a leg up.<sup>91</sup> That description is inaccurate, at least in terms of the reality of the Black majority. South Africa was placed with a dilemma — does it focus on developing its own capacity or lose the prospect of being denied exports to the United States under AGOA, which would also result in the loss of jobs? The United States President personally stepped in with an ultimatum — unless South Africa removes the restrictions on chicken exports, the United States would remove South Africa’s preferential access to US markets under AGOA.<sup>92</sup> South Africa was unsuccessful in pushing back using non-tariff trade barriers. South Africa ultimately relented and now allows the importation of US chicken, beef, and pork.<sup>93</sup> The developing countries do not have the

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87. Rowden, *supra* note 15.

88. Yepoka Yeebo, *EU Trade Deal Will Likely Crush Industry in West Africa*, QUARTZ (Oct. 3, 2014), <http://qz.com/274597/eu-trade-deal-will-likely-crush-industry-in-west-africa/>.

89. Thorstensen, *supra* note 33, at 81.

90. Witney Schneidman, *An end to the never-ending South African Poultry Dispute*, BROOKINGS (Jan. 19, 2016) <http://www.brookings.edu/blogs/africa-in-focus/posts/2016/01/19-south-african-poultry-dispute-schneidman>.

91. *South Africa Spurns Free Trade to Protect its Meat Market*, ECONOMIST (Nov. 17, 2015), <http://www.economist.com/news/middle-east-and-africa/21678672-america-and-south-africa-are-beating-drumsticks-trade-war-playing-chicken>.

92. *Id.*

93. *South Africa and US Resolve Agricultural Products Trade Dispute*, FIN. TIMES (Jan. 7, 2016), <http://www.ft.com/cms/s/0/55babca6-b559-11e5-8358-9a82b43f6b2f.html#axzz45WtHNRVC>.

same leverage in the war of non-tariff trade barriers. South Africa stood to lose hundreds of millions of dollars and thousands of jobs if the United States refused to allow South African exports of fruit products and wine.

Whilst they unsuccessfully resist the developed countries in the specific skirmishes, the developing world is pursuing a strategy to fight what is perceived as strong-arm tactics, if not outright bullying from the developed world. Increasingly, there is a realization that governments have an important role to play in the development of the economy, which cannot be left to the marketplace.<sup>94</sup> The adoption of rabid free trade stymies developing countries from resorting to government intervention or adopting policies “such as trade protection, subsidized commercial credit, tax incentives, and public support for research and development” to build up domestic industries over time.<sup>95</sup> In a sense, they are forced to relinquish their policy space to adopt industrial policies, which develop their economy.<sup>96</sup>

Former United Nations Secretary General Kofi Annan recently called on West African countries to proceed cautiously on free trade, which, in the context of the EU’s deal with West Africa, he and others argued would crush what little industry West African countries have and exacerbate the massive unemployment in the region.<sup>97</sup> Apart from raw materials, it is not as if European countries have an overwhelming demand for goods from African countries. Ultimately, the free trade results in the stuttering of what little African businesses exist, which are replaced by imports from European countries.

#### V. FREE TRADE AMONG THE DEVELOPING WORLD

Together with taking back the initiative in setting their own policies to address their unique problems, including investment and development in their own people and economies, it is increasingly being recognized that developing countries can gain more through trade from regional integration within the continent or with similarly situated economies<sup>98</sup> than integration

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94. The executive secretary of the Economic Commission for Africa, Carlos Lopes, has called on African countries to not blindly follow IMF’s priority of very low inflation. He has suggested that the central banks consider more expansionary policies for higher public investment, particularly for supporting their manufacturing industry. See Rowden, *supra* note 15.

95. *Id.*

96. *Id.*

97. Yeebo, *supra* note 88; see also Rowden, *supra* note 15 (explaining that the deal was finally consummated with enormous pressure being exerted by the EU who threatened to cut off access to European markets for African goods).

98. Annan *Discusses Free Trade at U.N. Forum*, INST. FOR AGRIC. & TRADE POL’Y

with the developed world. At the WTO, African countries and the BRICS nations have a common cause to push back against further free trade negotiations with the developed world.<sup>99</sup>

The most ambitious initiative on the African continent is The Tripartite Free Trade Area (“TFTA”) agreed to by African countries in June of 2015 in Egypt.<sup>100</sup> The initiative seeks to create a free trade zone across the entire African continent.<sup>101</sup> It envisions bringing together all three of Africa’s regional trading blocs to create what would be the largest trading bloc in terms of population.<sup>102</sup> Africans trade more with one another in manufactured goods than they do with the developed world.<sup>103</sup> The full potential of the deal is dependent on the development of proper physical and institutional infrastructure in many parts of the continent.<sup>104</sup> As in any trade agreement, there is the potential problem of smaller economies in Africa having to compete against large economies. The converse is also true; namely that some countries have better rights protections for workers, which increases the costs of doing business. These and other problems including the technical details of the agreement are being worked out and are anticipated to be completed by 2017.

## VII. RETHINK ON BITS

Now that many developing countries have realized that foreign direct investment either does not materialize or is not always what it is projected to be, they are evaluating and abrogating BITS, which undermines their regulatory authority.<sup>105</sup> Developing countries soured on being compelled

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(June 15, 2004), <http://iatp.org/news/annan-discusses-free-trade-at-un-forum>.

99. Thorstensen, *supra* note 33, at 37–42.

100. *Tripartite Free Trade Area: An Opportunity Not a Threat*, COMESA, (Apr. 28, 2016), [http://www.comesa.int/index.php?option=com\\_content&view=article&id=974:tripartite-free-trade-area-an-opportunity-not-a-threat&catid=26:other-news&Itemid=48](http://www.comesa.int/index.php?option=com_content&view=article&id=974:tripartite-free-trade-area-an-opportunity-not-a-threat&catid=26:other-news&Itemid=48).

101. *Africa Creates TFTA — Cape to Cairo Free-Trade Zone*, BBC NEWS (June 10, 2015), <http://www.bbc.com/news/world-africa-33076917>

102. David Luke & Zodwa Mabuza, *The Tripartite Free Trade Agreement: A Milestone for Africa’s Regional Integration Process*, INT’L CTR. TRADE & SUSTAINABLE DEV. (June 23, 2015), <http://www.ictsd.org/bridges-news/bridges-africa/news/the-tripartite-free-trade-area-agreement-a-milestone-for-africa>.

103. *Sector Report Manufacturing in Africa*, KPMG (2014), <https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/General-Industries-Publications/Documents/Manufacturing%20in%20Africa.pdf>.

104. Soamiely Andriamanajara, *Understanding the Importance of the Tripartite Free Trade Area*, BROOKINGS (June 17, 2015), <http://www.brookings.edu/blogs/africa-in-focus/posts/2015/06/17-tripartite-free-trade-area-andriamanajara>.

105. Leon E. Trakman & Kunal Sharma, *Why is Indonesia Terminating its Bilateral Investment Treaties*, EAST ASIA F. (Sept. 20, 2014), <http://www.eastasiaforum.org/2014/09/20/why-is-indonesia-terminating-its-bilateral-investment-treaties/>.

to relinquish their sovereignty or compromise their national prerogatives. In this regard, they have determined that it is important to have disputes adjudicated before their own courts as opposed to private international tribunals.<sup>106</sup> Over the past few years, South Africa like a number of developing countries, has terminated or announced its intention to terminate BITs with several European countries.<sup>107</sup> South Africa argues that these BITs are inimical to the country's social and economic goals of black economic empowerment. Moreover, the continued existence of many BITs prevent the government from adapting the laws to bring the obligations of foreign investors in line with the imperatives of their Constitution.<sup>108</sup> Apart from the constitutional obligations, it is problematic when a country cannot adopt legitimate regulatory laws to advance public interest because the corporate profits of a foreign entity would be depleted.<sup>109</sup> Furthermore, it is untenable that a domestic entity would be bound by the regulatory regime advanced to promote public welfare, but a foreign entity that originates from a jurisdiction with which South Africa has BITs would escape such obligations.

Since 1994, South Africa has signed forty BITs.<sup>110</sup> The BITs allow foreign entities to challenge regulatory frameworks to advance the public good, which undermined the social and policy objectives of the

106. South Africa, Venezuela, Bolivia, Ecuador, India and Indonesia have all announced cancellation of their BITs agreements. See Martin Khor, *Investor Treaties in Trouble*, IPS NEWS (May 12, 2014), <http://www.ipsnews.net/2014/05/investor-treaties-trouble/>; Jeffrey Kron & Matthew Clark, *South Africa Changing Approach to Investment Protection—What does it mean for Investors?*, NORTON ROSE FULBRIGHT (2015), <http://www.nortonrosefulbright.com/files/south-africas-changing-approach-to-investment-protection-127893.pdf>; Ben Bland & Shawn Donnan, *Indonesia to Terminate more than 60 Bilateral Investment Treaties*, FIN. TIMES (Mar. 26, 2014), <http://www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3t7HFI5zd>.

107. Robert Hunter, *South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland*, INT'L ARB. & INV. L., <http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/>.

108. For example, the BIT's rules on compensation vary with what the Constitution requires. There are also constitutional mandates on equity embodied in legislation, which the BIT's are at variance with. Jonathan Lang & Bowman Gilfillan, *Bilateral Investment Treaties – a shield or a sword?*, BOWMAN GILFILLAN (Nov. 1, 2013), <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>.

109. Friedman, *supra* note 7, at 37–38; *Still Not Loving ISDS: 10 Reasons to Oppose Investors' Super-rights in EU Trade Deals*, CORP. EUR. (Apr. 16, 2014), <http://corporateeurope.org/international-trade/2014/04/still-not-loving-ids-10-reasons-oppose-investors-super-rights-eu-trade>.

110. *Anglo American South Africa Limited, Submissions to the Portfolio Committee on Trade and Industry on The Promotion and Protection of Investment Bill, 2015* ANGLo AM. (Sept. 15, 2015) <https://www.thedti.gov.za/parliament/2015/AASA15Sept2015.pdf>.

government. From the perspective of the government, canceling of BITs would allow for a recalibrating of the rights and responsibilities of investors and the state. The BITs with Britain concluded prior to the adoption of the democratic Constitution, even though it came into effect after the Constitution was adopted.<sup>111</sup> The question is how does one explain the existence of the post-1994 BITs? What is highly disturbing is the lack of foresight when these BITs were entered into.<sup>112</sup> Starting from the very top namely Minister Manual, the first Minister of Trade and Industry after the 1994 elections, all the way to the bureaucrats that negotiated these treaties, there was a profound lack of knowledge of the legal and technical expertise of international law.<sup>113</sup> It is disconcerting that there are no minutes of cabinet meetings or any sort of empirical findings to show the consequences or benefits that these agreements would bring.<sup>114</sup> An informed analysis would have revealed that many of the provisions in the BITs were inimical to the constitutional imperatives and constituted a surrender of the state's law and policy control. Under some of the BITs, the imperative of local, particularly Black economic empowerment was circumscribed by the national treatment and other clauses.<sup>115</sup>

The Constitution makes a distinction between expropriation and deprivation of property.<sup>116</sup> In the seminal case of *Agri South Africa*, the Constitutional Court of South Africa held that there is "no expropriation in circumstances where deprivation does not result in property being acquired by the state."<sup>117</sup> The court majority held that private property rights cannot be over emphasized at the expense of the state's social responsibilities to ensure that all South Africans can benefit from the mineral resources of the country.<sup>118</sup> Where the state takes custodianship of mineral rights and grants it to others, its actions do not constitute expropriation, which warrant compensation. It is a deprivation in furtherance of other constitutional imperatives namely affording opportunities to the historically disadvantaged.<sup>119</sup> The South African government felt that the constitutional mandate could not be effected in relation to foreign firms where you have an existing BIT, which does not

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111. Leon, *supra* note 6, at 601.

112. *See id.* at 599–600 (explaining there was a lack of understanding of the legal and economic implications of these agreements).

113. Mossallem, *supra* note 11, at 7.

114. *Id.*

115. *Id.* at 7–8.

116. S. AFR. CONST. § 25 (1996).

117. *Agri South Africa v. Afriforum*, Case 2013 CCT 51/12 at ¶ 59 (S. Afr).

118. *Id.* at ¶ 62.

119. *Id.* at ¶ 68–69, 73.

distinguish between a deprivation and expropriation.<sup>120</sup>

The incompatibility between the existing BITs and the constitutional imperatives came to a head in the *Foresti* Case.<sup>121</sup> The South African legislature passed the Minerals and Petroleum Resources Development Act (“MPRDA”),<sup>122</sup> which came into effect in 2004. The MPRDA required companies that had private mineral rights to apply for a license from the state to continue mining for minerals. The license would be granted subject to the company meeting certain conditions of black economic empowerment.<sup>123</sup> This is designed to afford blacks a more meaningful participation in the economy.<sup>124</sup> The rights to mine under the new licenses were more restrictive than under the previous licensing system.<sup>125</sup> In the *Foresti* case, the Italian and Luxembourg petitioners claimed that the applicable Mineral Law that extinguished their mining rights and further required them in terms of the Mining Charter of 2004 to transfer a percentage of their shares to historically disadvantaged South Africans, which amounted to an expropriation without compensation in violation of exiting BITs with Italy and Luxembourg.<sup>126</sup> *Foresti* filed for arbitration with the International Center for the Settlement of Investment Disputes (“ICSID”) alleging that the South African government’s conduct amounted to expropriation. The parties ultimately settled the matter.<sup>127</sup> As discussed above, the Constitutional Court of South Africa in the *Agri South Africa* case subsequently validated the MPRD. The court recognized the context and the importance of the measure in a “progressive Constitution, high unemployment rate and a yawning gap between the rich and the poor which could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources, to boost economic growth.”<sup>128</sup> The dispute brought out in sharp focus, the conflict between obligations under

120. Klaaren, *supra* note 16.

121. *In re Piero Foresti v. Republic of South Africa*, ICSID Case No ARB(AF)/07/1 (2010).

122. *The Minerals and Petroleum Resources Development Act*, REPUBLIC OF S. AFR. (2002) <http://www.dmr.gov.za/publications/summary/109-mineral-and-petroleum-resources-development-act-2002/225-mineraland-petroleum-resources-development-act-mprda.html>.

123. Leon, *supra* note 6, at 619.

124. Friedman, *supra* note 7, at 41. Originally, it was envisaged that companies were supposed to grant a fifty-one percent stake to Black owners. It was subsequently reduced to twenty-six percent.

125. For example under MPRDA, there was a five-year limit on licenses. Companies were permitted to reapply for additional terms.

126. Brickhill, *supra* note 14, at 155.

127. See Brickhill, *supra* note 14, at 163–164 (overviewing of the salient terms of the settlement.).

128. *Agri South Africa v. Afriforum* Case, 2013 CCT 51/12 at ¶ 2 (S. Afr).

the BITs and domestic constitutional imperatives.

An additional problem was the question of compensation. The traditional principle under the BITs requires “prompt, adequate and effective compensation” in terms of market value.<sup>129</sup> The Constitution of South Africa in addition to mentioning market value contain a number of additional factors, which need to be considered, including the history of acquisition and the purpose behind the expropriation to determine compensation.<sup>130</sup> In calibrating the various factors, the Constitution permits less than market value in determining compensation. The constrains on the government’s policy making power and the perception that the BITs conflicted with key constitutional imperatives precipitated the review of South African BITs ultimately leading to the decision to terminate BITs. The BITs were perceived as one-sided favoring the investor to the detriment of public policy.<sup>131</sup>

#### VII. NEW INVESTMENT LAW

After the *Foresti* debacle, South Africa announced that it was formulating a new investment law that will protect foreign investments

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129. See Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve that Compensation*, L. & VALUATION (2001) <http://users.wfu.edu/palmitar/Law&Valuation/Papers/2001/Smith.htm> (emphasizing the United States and many western countries expect compensation that is “prompt, adequate and effective.”). This was the standard clause in the BIT’s entered into by South Africa. See Leon, *supra* note 6, at 601–602.

130. S. AFR. CONST. § 25(3):

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

- a) the current use of the property;
  - b) the history of the acquisition and use of the property;
  - c) the market value of the property;  
the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - d) the purpose of the expropriation.
- 4) For the purposes of this section  
the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
- a) property is not limited to land.
  - b)

131. See Schneiderman, *supra* note 13, at 247 (asserting that international investment agreements by their very nature are meant to constrain policy options on the part of governments).

subject to the mandates under its Constitution and its right to set policy goals.<sup>132</sup> The bill went through various revisions culminating in the adoption of the Protection of Investment Act.<sup>133</sup> The Act in the first provision in the preamble affirms the country's obligation "to protect and promote the rights enshrined in the Constitution." In other parts of the preamble, it specifies the government's right to regulate in the public interest. This obligation includes "measures to protect or advance persons, or categories of person, historically disadvantaged in the Republic due to discrimination . . . ." The obligation to advance the purposes of the Constitution is affirmed in section 3 and section 4 of the Investment Act.<sup>134</sup> Existing BITs will continue to be respected as per the period stipulated in the treaties.<sup>135</sup> It is unclear how the provisions in existing BITS, which are incompatible with the government's obligations under the Constitution, will be handled.

With respect to dispute resolution, after the government's experience in *Foresti*, there was no appetite to compel arbitration.<sup>136</sup> The Act envisages disputes should be addressed in the first instance through mediation that is appointed through agreement between the government and the foreign investor.<sup>137</sup> An investor is not precluded from seeking recourse to a binding decision. The Investment Act requires that disputes must be resolved before the courts of the country or any other tribunal or statutory body created for this purpose.<sup>138</sup> There is no longer any binding

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132. Jonathan Klaaren & Fola Adeleke, *SA on the Right Path with New Foreign Investment Law* (Sept. 25, 2015), <http://www.bdlive.co.za/opinion/2015/09/25/sa-on-the-right-path-with-new-foreign-investment-law>; see also Trade and Industry on The Promotion and Protection of Investment Bill, *supra* note 110; see *id.* at 4–5 (praising the bill for bringing South Africa's investment laws in line with the Constitution). Cf. *The Banking Association South Africa*, MEDIA RELEASE (July 28, 2015), <http://www.banking.org.za/docs/default-source/press-releases/the-banking-association-south-africa-n-balanced-expropriation-bill-media-release-final.pdf?sfvrsn=2> (arguing that the bill will have a negative impact on foreign investment because it offers investors less protection than under the BITS.).

133. Protection of Investment Act, 22 of 2015 (S. Afr.) [hereinafter Investment Act].

134. The Act is to be interpreted in a manner consistent with the Bill of Rights. Investment Act § 3(b)(i). It also requires a calibration of the public interest and the rights and obligations of the investor. *Id.* at § 4(a). Section 4(b) affirms the country has the right to regulate investment in the public interest. *Id.* at § 4(b). The Bill of Rights and all other laws are applicable to foreign investors. *Id.* at § 4(c).

135. *Id.* at § 15(1). See Report of the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill [B18–2015] 5426, (Nov. 4, 2015) [hereinafter Investment Bill], <https://pmg.org.za/taled-committee-report/2597/>.

136. The dispute resolution is regulated in Article 13 of the Investment Act.

137. Investment Act. § 13(1)–13(2).

138. *Id.* at § 13(4); Jackwell Feris & Cliffe Dekker Hofmayr, *South Africa's New Investment Bill: What are the Implications for Foreign Investors* AFRICAN LAW &



arbitration. In an address to Parliament, the Minister of Trade and Industry, Rob Davies suggested that arbitration decisions apart from favoring narrow commercial interests and undermining important government policies also produce inconsistent and unpredictable outcomes inimical to the rule of law.<sup>139</sup> However, the government can consent to arbitration if it so wishes.<sup>140</sup>

The issue of expropriation, compensation, public interest and national treatment<sup>141</sup> is aligned with the Constitution.<sup>142</sup> The Investment Act will be complemented by legislation on expropriation.<sup>143</sup> Foreign investors and their investors cannot be treated less favorably than South African investors in “like circumstances”.<sup>144</sup> The word “like circumstances” appears to be a flexible and contextual standard.<sup>145</sup> Foreign investors do not enjoy any benefits with respect to government procurement.<sup>146</sup> In the drafting process, it was clear that the policy makers moved away from the position that all foreign investment is good towards a model of “investment for sustainable development model” which stipulates that investment must positively contribute to the country’s sustainable development objectives.<sup>147</sup> The Act provides that there is no “right for a foreign investor

BUSINESS (Aug. 19, 2015), <http://www.africanlawbusiness.com/news/5765-south-africa-new-investment-bill>.

139. Minister Rob Davies, Minister of Trade & Indus., Debate on the Protection of Investment Bill (Nov. 17, 2015).

140. Investment Act § 13(5).

141. National treatment stands for the proposition that foreigners must be treated the same way as national of the country. This impedes the opportunity to promote the advancement of historically disadvantaged sectors of the population through Black Economic advancement (“BEE”). National treatment is a key component of the WTO, GATT and TRIPS agreements. See *Understanding the WTO – Principles of the Trading System* WTO (2016), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fac\\_t2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fac_t2_e.htm).

142. See Investment Act § 7 (dealing with national treatment); *id.* § 10 (making property rights subject to the provisions of the Constitution); *id.* § 4 (affirming the government’s right to regulate and make policy choices).

143. See Report of the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill [B18–2015] 5426, (Nov. 4, 2015), available at <https://pmg.org.za/tables-committee-report/2597/>. In May of 2016, Parliament passed an Expropriation Bill, Bill 4B–2015. The Bill awaits the assent of the President in which case it will become binding and be referred to as the Expropriation Act, 2016, as per section 32 of the Bill.

144. Investment Act § 8(1).

145. See Investment Act § 8(2)(a)–(g) (assessing a host of factors, including (a) the effect of the investment; (b) the sector of the foreign investment, aim of any measure relating to foreign investment; (d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned; (e) effect on third persons and the local community; (f) effect on employment; and (g) effect on the environment).

146. Investment Act § 8(4)(b).

147. Mossallem *supra* note 11, at 4.

or prospective foreign investor to establish an investment in the Republic.”<sup>148</sup> These developments signify a rejection of the framework for investment put forth by the developed countries.<sup>149</sup> They also mark a realization that there are no automatic benefits, which accrue from free trade and foreign direct investment.<sup>150</sup> BITs often lead to constraints, which limit the ability of developing countries to adopt policies that advance the well being of its citizens.

#### CONCLUSION

Despite tensions between labor and business, policy makers in the developed world still sing the praise of free trade. They decry the repudiation of BITs by developing countries. South Africa’s embrace of free trade, liberal monetary policies, and constraining BITs was done in an uninformed manner without thinking through the implications. It was also adopted in a historical manner. The executive secretary of the Economic Commission for Africa, Carlos Lopes, recently stated, “[i]t’s not a matter of choosing between state and market as if these were two opposites. That discussion is over. Everybody agrees now that there is a role for the state and there is a role for the market. There are regulations that are necessary. The U.S., Europe, and Japan have done it. The moment they get in crisis, what do they do? They intervene in the banks and so on.”<sup>151</sup> The developing world, particularly African countries have finally caught on to this indispensable reality. They have a right to develop just as the developed countries have. Rabid free trade with the developed world is not always free and often comes with adverse consequences for development. The BITs have proved inimical to developing countries ability to fashion their domestic policy choices and advancing broad public policy. Trade policies and economic choices need critical repositioning otherwise South Africa, like many developing countries will face an existential crisis. South

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148. Investment Act § 7(2).

149. From the perspective of the developed countries, the canceling of BITS will deter foreign direct investment. However, South Africa has received foreign direct investment from countries with whom it has not had BITS and little foreign direct investment from some countries with which, it has a BITS in place. *See Davies, supra* note 139.

150. *Cf.* EU Chamber of Commerce and Industry in Southern Africa, *The Promotion and Protection of Investment Bill 2013: Submission by the EU Chamber of Commerce and Industry in Southern Africa* (Aug. 2015), [http://suedafrika.ahk.de/fileadmin/ahk\\_suedafrika/Dokumente/Chamber\\_Press\\_Releases/EU\\_Chamber\\_of\\_Comerce\\_Parliamentary\\_Submission\\_Investment\\_Bill\\_Aug2015\\_Falsepdf](http://suedafrika.ahk.de/fileadmin/ahk_suedafrika/Dokumente/Chamber_Press_Releases/EU_Chamber_of_Comerce_Parliamentary_Submission_Investment_Bill_Aug2015_Falsepdf). The Chamber argues that the canceling of BITS with EU member states sent a negative message to the business community by lessening the protection of investors. *Id.* at 2–5. The Chamber voiced its concern about less than full market value compensation. *Id.* at 9.

151. Rowden, *supra* note 15.

Africa's new Investment Act is a significant effort to recalibrate its investment regime.

