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Luke Eric Peterson

South Africa's Bilateral Investment Treaties

Implications for Development
and Human Rights

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Dialogue on Globalization

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1. Preface

In last years' study "The Global Governance of Foreign Direct Investment: Madly Off in All Directions" (FES Dialogue on Globalization-Occasional Papers No.19/ May 2005) Luke Eric Peterson concluded: "As these treaties are seen to reach well-behind-the-border, and to apply to sensitive economic sectors and government measures, there is a need for governments to scrutinize their existing treaties so as to ensure that they provide adequate safeguards for the exercise of legitimate government activity. In many instances, the treaties appear to have been drafted with insufficient forethought, and without many safeguards, exceptions and limitations."

His present Occasional Paper on "South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights" commissioned by the FES Geneva Office for the South African Institute for International Affairs (SAIIA) looks into the investment treaties entered into by South Africa after the end of apartheid. Peterson's paper explores the potential and actual constraints imposed on government policy making, particularly in light of new policy directions embraced by the South African Government, including in relation to the Government's Black Economic Empowerment (BEE) policies. His paper investigates to what extent the treaties have been invoked by foreign investors in an effort to challenge certain legal or policy measures by Government, and how this litigation – and the threat thereof – may have implications for development and human rights policies pursued by the Government.

An early version of his paper was presented and discussed at a workshop organized by the South African Institute of International Affairs (SAIIA) and FES in Johannesburg on May 10th with more than 30 participants including diplomats, NGOs, academics and a number of government officials from a range of departments. Some of the participants were echoing the view that it is ironic that so much agonizing goes into any decision to conclude trade agreements, whilst investment treaties are signed without any debate, scrutiny, or reflection. Their contributions and further comments have been incorporated into the final version presented in this publication.

This study has value beyond being a case study on South Africa and its socio-economic policies in the post-Apartheid era. There are more general conclusions to be drawn as to the potential conflicting relationships between international investment treaties and domestic government policies – and the sometimes competing obligations flowing from other international law instruments in the area of human rights, social standards or environmental protection.

Dr. Erfried Adam
Director, Geneva Office
Friedrich-Ebert-Stiftung

2. Executive Summary

In the post-Apartheid period South Africa has negotiated more than 40 bilateral treaties designed to promote and protect foreign investment. While the negotiation of trade agreements has tended to attract a high degree of scrutiny and public discussion, South Africa's investment agreements were typically negotiated with little fanfare.

Recently, however, the prospect that foreign investors might invoke the protections contained in these investment treaties in an effort to challenge certain Black Economic Empowerment (BEE) policies in South Africa has galvanized interest in these heretofore obscure agreements. A survey of South Africa's bilateral investment treaties finds that approximately half are currently in force, including a number with major capital exporting countries in Europe.

These treaties provide foreign investors with the capacity to detour around the domestic court system of their host country, and to pursue international arbitration in case of the alleged breach by the host state of treaty protections. The protections contained in these agreements include duties to pay "market value" compensation in case of expropriation or nationalization; and to provide "full protection and security" and "fair and equitable treatment" to foreign investors and investments; and to treat foreign investors and foreign investments no less favourably than domestic investors and investments.

Questions arise as to whether these treaties may lead to successful claims by foreign investors for compensation greater than would be provided under SA law in case of expropriation or nationalization of property. Similarly, there is clear evidence that foreign investors may allege that they are "disadvantaged" contrary to the treaty obligations thanks to the operation of BEE or other affirmative action measures designed to provide preferences for Historically Disadvantaged South Africans (HDSAs).

Presently, there is considerable uncertainty surrounding the concrete demands which these treaties place on the South African Government, and the extent to which Government policies may conflict with the treaty obligations, thereby triggering financial liability. These uncertainties will be clarified only in the course of actual arbitration of disputes between foreign investors and their host government, as provided for under the treaties. However, thanks to the idiosyncrasies of these treaties, such disputes may be launched, arbitrated, and (ultimately) resolved out of public view.

The present study finds evidence that the RSA has already faced at least one arbitration by a foreign investor, which resulted in a financial award against the RSA. Other disputes appear likely to arise, particularly as foreign investors raise objections to BEE policies.

Recently, the RSA has embarked on an inter-departmental review of its investment treaty obligations. Among the changes which the RSA might consider are efforts to bring more transparency to bear on the resolution of disputes under these treaties; clarification as to the reach and import of certain treaty obligations; and the extent to which arbitral tribunals must be guided by human rights and development considerations when interpreting the meaning of these investment treaty obligations.

3. Introduction

With the signing of the first modern bilateral investment treaty (BIT) in 1959, the signatory governments, Pakistan and the United Kingdom, took a significant step in clarifying the rules which would apply to foreign investments flowing between the two countries. Foreign investments would be secured against nationalization without compensation, and offered other legal protections against certain forms of interference by the host government. In the intervening years, and in spite of occasional efforts at the multilateral level to conclude a more comprehensive international framework of rules governing foreign investment, no counterpart has emerged to rival the GATT/WTO system which governs world trade. Instead, more than four decades on, the detailed international rules governing foreign investment are still concluded primarily at the bilateral level.

In spite of efforts at the multilateral level to conclude an international framework of rules governing foreign investment, no counterpart has emerged to rival the GATT/WTO system. Instead, the international rules governing foreign investment are still concluded primarily at the bilateral level.

During the Apartheid period, the Republic of South Africa did not enter into such bilateral international treaties. However, post-Apartheid, the new Government would embark upon an ambitious round of treaty-making. An Agreement for the Promotion and Protection of Investment was signed with the United Kingdom on September 20, 1994. The UK treaty was the first of what would be a succession of investment agreements concluded during the early mandate of the new ANC Government. In 1995, seven agreements would be signed – with Canada, Cuba, France, Germany, Korea, the Netherlands and Switzerland – while additional negotiations were also pursued. As of June 2006, South Africa had signed at least 41 investment treaties, not all of which have entered into force (See Table 1).

The 1990s saw a sustained worldwide boom in the negotiation of such agreements.

The raft of investment treaties entered into over the past decade by South Africa represented an important element of a wider policy of opening the country to greater foreign investment, as part of the Growth, Employment and Redistribution strategy (GEAR).¹ Indeed, in the lead-up to the first multi-racial elections in 1994, there was a concerted effort by the ANC to assure foreign investors that they would not be subjected to expropriation or nationalization and that they would be free to repatriate profits and dividends.² While the new government was eager to assure foreign investors that their investments would be safe, South Africa's decision to conclude vast numbers of investment treaties was not particularly anomalous in a global sense. Indeed, the 1990s saw a sustained worldwide boom in the negotiation of such agreements; with the number of such treaties estimated to have been only 385 at the dawn of that decade, and 1,857 by decade's end.³

1 On GEAR, see Institute for Global Dialogue, International Investment Agreements in South Africa, Report of June 1, 2000 prepared for Centre for Research on Multinational Corporations, pp. 11-16

2 Marshall Loeb, "Mandela Reaches Out to Business", Fortune Magazine, July 12, 1993; "Mandela Pleads for Investment in South Africa", The Times (London), October 13, 1993

3 UNCTAD, "Bilateral Investment Treaties 1959-1999", UNCTAD/ITE/IIA/2, (2000), p.1

Table 1
South African Bilateral Investment Agreements as of June 2006

Country	Date of Signature	Date of Entry in to Force
Algeria	24-Sep-00	...
Angola	17-Feb-05	...
Argentina	23-Jul-98	1-Jan-01
Austria	28-Nov-96	1-Jan-98
Belgium and Luxembourg	14-Aug-98	14-Mar-03
Brunei Darussalam	14-Nov-00	...
Canada	27-Nov-95	...
Chile	12-Nov-98	...
China	30-Dec-97	1-Apr-98
Congo, Democratic Republic of	31-Aug-04	...
Cuba	8-Dec-95	7-Apr-97
Czech Republic	14-Dec-98	...
Denmark	22-Feb-96	23-Apr-97
Egypt	28-Oct-98	...
Equatorial Guinea	17-Feb-04	...
Finland	14-Sep-98	3-Oct-99
France	11-Oct-95	22-Jun-97
Germany	11-Sep-95	10-Apr-98
Ghana	9-Jul-98	...
Greece	19-Nov-98	5-Sep-01
Iran, Islamic Republic of	3-Nov-97	5-Mar-02
Israel	20-Oct-04	...
Italy	9-Jun-97	16-Mar-99
Korea, Republic of	7-Jul-95	28-Jun-97
Libya	14-Jun-02	
Mauritius	17-Feb-98	17-Feb-98
Mozambique	6-May-97	28-Jul-98
Netherlands	9-May-95	1-May-99
Qatar	21-Oct-03	...
Russian Federation	23-Nov-98	...
Rwanda	19-Oct-00	...
Senegal	5-Jun-98	...
Spain	30-Sep-98	23-Dec-99
Sweden	25-May-98	1-Jan-99
Switzerland	27-Jun-95	29-Nov-97
Tanzania	22-Sep-05	...
Tunisia	28-Feb-02	...
Turkey	23-Jun-00	...
Uganda	8-May-00	...
United Kingdom	20-Sep-94	27-May-98
Yemen	28-Jan-03	...

Source: South African Department of Foreign Affairs

At the same time as post-Apartheid South Africa has sought to reassure risk-averse foreign investors, South African businesses have been expanding their own cross-border investment activity. In 2004, the country's total inward FDI stocks stood at \$46.3 Billion (US), while outward FDI stocks were an equally significant \$28.8 Billion (US).⁴ A recent SAIIA report notes that "(i)n less than a decade, South Africa has become one of the top 10 investors in, and trading partner of, many African countries, displacing those companies from Europe (particularly in countries that are former colonial powers) and America, which have traditionally retained their economic links in Africa."⁵ This outward foreign investment is most concentrated in the Southern African region, with SA firms making their largest foreign investments in Zimbabwe and Mozambique. Meanwhile, such is the dominance of South African business in nearby Botswana, for example, that particular sensitivity has been necessary so as to not alienate local populations.⁶ Further afield, South Africa has also made significant investments in Morocco, Ghana, Mali, Nigeria and the Democratic Republic of Congo.⁷

Combined demands from the domestic constituency and European and other countries for South Africa to enter into investment protection treaties, help to understand why the RSA has managed to conclude so many treaties in such a short span of time.

With South African companies making such extensive investments outside of their own country, they have sometimes been demandeurs for investment protection agreements which would provide legal protection additional to that which might be available in destination-countries. For example, some SA firms have explicitly called for treaties to be put in place before they would consider new investments in Zimbabwe.⁸ When this domestic constituency for the negotiation of such agreements is combined with the earlier demands from European and other countries for South Africa to enter into investment protection treaties, it can be understood why the RSA has managed to conclude so many treaties in such a short span of time.

As this paper makes clear, South Africa's investment treaties are a double-edged sword, providing certainty to foreign investors, and security to outward-bound SA investors, at the same time as the application of these treaties may constrain government policy-making. Already, the South African government has been successfully sued by a foreign investor under one of the numerous investment protection treaties concluded by the RSA (See section 5.4). Moreover, potential claims have been mooted as foreign investors voice opposition to new policy directions embraced by the South African Government. As the following discussion makes clear, some of the most acute concerns arise in relation to the Government's Black Economic Empowerment (BEE) policies, and the specter of international arbitrations looms large over such policies as foreign investors and their home governments insist that facets of the BEE scheme conflict with guarantees provided in investment protection treaties. Accordingly, there is a need for policymakers and officials to examine the terms of these long-neglected treaties, so as to make a clear assessment of the compatibility of these instruments with broader government policies and ambitions.

4 Figures are courtesy of UNCTAD World Investment Report 2005, see <http://www.unctad.org/wir>

5 Dianna Games, "The Experience of South African Firms in Doing Business in Africa: A Preliminary Survey and Analysis", South African Institute for International Affairs, Business in Africa Research Project, 2004, at pg.1-2

6 Neuma Grobbelaar and Kaemete Tsotetsi, "Africa's First Welfare State: The Experience of South African Firms Doing Business in Botswana", South African Institute for International Affairs, Business in Africa Research Project, 2005, at pg.4

7 Games, op.cit., pp.17-21

8 "Zimbabwe: Impala Platinum Seeks Zim Govt Protection", *Zimbabwe Standard*, September 5, 2004; "South Africa: DA Lashes Delayed SA-Harare Accord", *Business Day*, February 11, 2005

4. Features of South African BITs

South Africa's myriad investment treaties are designed to *protect* foreign investments. However, the agreements do not oblige the Republic to open new sectors to foreign investment or to *liberalize* or privatize certain industries or sectors. Under its BITs, the South African Government remains free to determine those sectors where foreign investment is permitted, and the terms under which that investment may be made.⁹ However, once foreign investments are made they are typically covered by the treaty, meaning that such investments are entitled to a number of basic protections.

In terms of the investors and investment covered under these treaties, both are defined broadly. For example, under the Netherlands-SA treaty, any Dutch national will enjoy the treaty protections when investing in South Africa.¹⁰ Likewise, any legal person which has been incorporated under Dutch law would enjoy treaty protections when investing into South Africa.¹¹ Accordingly, nationals of third countries could easily avail themselves of the protections found in the SA-Netherlands treaty, merely by virtue of creating a Dutch holding company for purposes of making SA-bound investments. Recently, an arbitral tribunal has confirmed that such broadly-drafted treaties operate not so much as *bilateral* treaties between the two signatories, but as “portals” through which investors from a multitude of different countries might wish to “route” their investments, so as to benefit from the treaty protections.¹² Thus, for example, US or Chinese investors might “route” their SA-bound investments, via a Netherlands subsidiary, so as to avail themselves of the treaty protections extended to Dutch companies in the Netherlands-SA investment treaty.

As to why investors might go to the trouble of restructuring their corporate ownership so as to travel under the passport of one of these treaties, one need only look at the treaties to ascertain that they offer substantial rights and privileges. The protections offered in typical SA investment treaties include a right to repatriate profits, dividends and other returns; a guarantee of compensation in cases of expropriation or nationalization; and promises of “fair and equitable treatment” and “full protection and security”. Additionally, the treaties typically guarantee treatment which is in line with treatment given by South Africa to its own investors, as well as to those hailing from third-countries, i.e. so-called National Treatment and Most-Favored Nation Treatment.

Such broadly-drafted treaties operate not so much as bilateral treaties between the two signatories, but as “portals” through which investors from different countries might wish to “route” their investments, so as to benefit from the treaty protections.

Protections offered in typical SA investment treaties include a right to repatriate profits, a guarantee of compensation in cases of expropriation or nationalization; and promises of “fair and equitable treatment” and “full protection and security”.

⁹ Of course, other international agreements may impose liberalization obligations, for example the General Agreement on Trade in Services (GATS)

¹⁰ Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of South Africa and the Kingdom of the Netherlands, Article 1 (b) i

¹¹ *Ibid.*, Article 1 (b) ii

¹² See *Aguas Del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, October 21, 2005, at paragraph 332, available on-line at: http://www.worldbank.org/icsid/cases/AdT_Decision-en.pdf

While most SA BITs provide these standard protections, there are differences of nuance from one agreement to the next. These differences may have a bearing upon the level of protection afforded in a given situation, but are difficult to parse in the abstract. It has been remarked by one well-known arbitration practitioner that investment treaties are characterized by their “ambiguity, open-endedness and need for substantial (unpredictable) interpretation of the treaty”.¹³ Often, it is only in the context of adjudication that the import of specific treaty provisions will become clear.

The emphasis of the treaties reflects the interests and concerns of the foreign investors, rather than those of the host state.

Nevertheless, these treaties reveal certain tendencies at a glance. Perhaps most notable is what cannot be found in the text of these agreements, namely provisions providing for “special and differential treatment”, or provisions which acknowledge the development exigencies of one or both treaty parties. Rather, most of the earliest treaties concluded between South Africa and its Western European economic partners appear to have been adopted more or less from the boilerplate favoured by the developed countries. As such, the emphasis of the treaties reflects the interests and concerns of the foreign investors, rather than those of the host state. Affirmations of a state’s right to development, its right to regulate in the public interest, or to pursue other social policy goals are absent from these early treaties. Even the preambles which affirm the purpose of these treaties, and which may be crucial for later interpretation of the treaty provisions in dispute settlement contexts, are largely bereft of explicit references to more ambitious social or developmental goals.

For example, the preamble to the 1995 SA-Netherlands treaty affirms the desire to strengthen traditional ties of friendship; intensify economic relations; and that protection of investments will stimulate capital and technology flows and lead to economic development.¹⁴ Similarly, the 1995 Republic of Korea agreement with South Africa affirms the desire to intensify economic cooperation; create favourable conditions for investments; and recognizing that greater investment protection stimulates business initiative.¹⁵

The values underlying South Africa’s democratic experiment are not referenced in the preambles of the economic treaties.

Although these South African agreements with the Netherlands and South Korea were concluded in early 1995 – a period when South Africa was undergoing a dramatic transformation, and undertaking to draft an inclusive and progressive national constitution – one finds none of the soaring aspirations which would be written into the preamble of the country’s Final Constitution of 1996. Whether it be the goal of healing divisions of the past; promoting democratic values, social justice and fundamental human rights; improving the quality of life of all citizens; or freeing the potential of each person, the values underlying South Africa’s democratic experiment are not referenced in the preambles of the economic treaties which were signed with foreign partners of the time. Foreign investment may have been sought by South Africa for reasons which went well beyond the intrinsic merits of stimulating business initiative or intensifying economic cooperation, but the treaties designed to create the legal framework for such foreign investments are silent as to what these more fundamental objectives may have been.

13 Thomas Walde with Stephen Dow, “Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment,” *Journal of World Trade* 34(2), 2000, at 45

14 Agreement on encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands, Preamble, treaty text available on-line at: http://www.unctad.org/sections/dite/ia/docs/bits/netherlands_southafrica.pdf

15 Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa on the Promotion and Protection of Investments, Preamble, treaty text available on-line at: http://www.unctad.org/sections/dite/ia/docs/bits/korea_southafrica.pdf

The lack of attention in these treaties to the wider policy goals of the signatory governments may have important policy consequences. When arbitration tribunals are given the opportunity to interpret the terms of these treaties, they may be inclined to resolve interpretive uncertainties in favour of foreign investors, with a consequent loss of policy latitude for governments. In several documented instances, tribunals have adopted investor-centric interpretations after having concluded that the object and purpose of the given investment treaty was to create favourable conditions for investments, rather than some broader purpose.¹⁶ Conversely, tribunals might adopt a more expressly “balanced” approach to interpretation, but with many treaties offering little in the way of explicit guidance, much falls to the composition and philosophical disposition of a given arbitration tribunal.¹⁷

Indeed, with the exception of some very recent treaties, most SA BITs are cast in a manner which is most favourable to investors, with little consideration given to the need for governments to regulate such foreign investment. Perhaps most remarkable, many of SA’s earliest investment treaties do not contain a provision which expressly shelters those government measures which are designed to promote the achievement of equality or to advance the interests of the previously disadvantaged. For e.g., many SA BITs do not contain a clause similar to the one found in Article 3 of the 1998 treaty between the Czech Republic and South Africa, which provides that guarantees of National Treatment and Most-Favoured Nation Treatment for foreign investors

“shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the Former Party by virtue of ... any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.”¹⁸

Treaties with a number of Western European Governments, including those with the United Kingdom, Belgium-Luxembourg, Italy and the Netherlands, lack provisions such as those contained in the aforementioned Czech BIT. The potential implications of this omission are the subject of more detailed scrutiny in Section 7.3 of this paper.

As a prelude to that discussion, however, it is important to draw attention to another important feature of these investment treaties: they provide foreign investors with the ability to take their host state to international arbitration, in the event that the investor alleges that the host has breached the terms of the treaty. By so doing, foreign investors may ensure that the protections guaranteed in the treaty are interpreted and adjudicated outside of the South African judicial system. At the global level, recourse to international arbitration pursuant to investment treaties – as well as the threat thereof – has exploded in popularity in recent years. The following section surveys these developments.

When arbitration tribunals are given the opportunity to interpret the terms of these treaties, they may lack guidance as the overall purpose of the treaty. As a result, some may be inclined to resolve interpretive uncertainties in favour of foreign investors with a consequent loss of policy latitude for governments.

¹⁶ Luke Eric Peterson, *Bilateral Investment Treaties and Development-Policymaking*, IISD, 2004, at pp.23-4

¹⁷ On the self-styled “balanced” approach see the tribunal’s reasoning in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, at paras 68-70

¹⁸ Article 3(3)(c), Czech-SA BIT

5. How have BITs been used in other countries?

Over the last decade, there has been a steady rise in the number of investor-state arbitrations pursuant to BITs.

Over the last decade – and especially during the last five years – there has been a steady rise in the number of investor-state arbitrations pursuant to BITs. Research conducted by the author for the United Nations Conference on Trade and Development found that, as of November 2005, at least 219 investment treaty arbitration claims had been lodged by foreign investors against more than 60 governments.¹⁹ Moreover, as a result of the confidentiality which is the default-setting under some arbitral rules, it is certain that more such international lawsuits have been launched without any public disclosure. Indeed, as will be discussed later, research for this paper unearthed an arbitration against the RSA which was initiated without publicity in 2001, and which had not been detected when the aforementioned 2005 UNCTAD survey was undertaken.

In terms of those arbitrations which have been documented as part of the UNCTAD study, there is clear evidence that their number is increasing over time. In 1995, only a single documented investment treaty arbitration was initiated by a foreign investor against a host government; by contrast, five years later, fourteen such arbitrations were recorded in 2000. By 2005, some forty-two such cases were lodged in that year.

As publicity surrounding these arbitration claims continues to grow – bolstered on occasion by the award of large sums of compensation to a mistreated foreign investor – most major law firms have expanded their work in this area, so as to provide clients with expertise on investment treaty protections and the prospects for arbitration pursuant to such treaties. However, the increase in arbitrations cannot be attributed only to the marketing savvy of international law firms; clearly the astonishing proliferation of investment protection treaties, particularly during the 1990s, has paved the way for more such claims to materialize.

Lawyers speak of the practice of sending so-called “triggering letters” to host governments, warning them of potential violations, triggering mandatory consultation periods, and urging some sort of change in government policy.

At the same time as there has been a steady increase in the number of formal arbitrations launched under bilateral investment treaties, there is anecdotal evidence to suggest that *informal* usage of the treaties is also increasingly commonplace. Lawyers who serve as counsel to foreign investors often speak of the practice of sending so-called “triggering letters” to host governments, warning them of potential violations under the treaty, triggering mandatory consultation periods, and urging some sort of change in government policy so as to avert an actual arbitration under the treaty. There are no comprehensive analyses of this practice, and due to the nature of such communications between lawyers and government officials, it is rare for such correspondence to come into the public

¹⁹ UNCTAD, “Latest Developments in Investor-State Dispute Settlement”, IIA Monitor, No.4, 2005, at pg. 2, available on-line at: http://www.unctad.org/en/docs/webiteit20052_en.pdf

domain. Nevertheless, anecdotal reports of such informal usage are widespread, in the author's experience as editor of a newsletter reporting on investment treaty arbitrations.²⁰

Where formal arbitrations have been launched by investors, they encompass a wide range of investments, economic sectors, and alleged government misdeeds. Some arbitrations are notorious, such as the series of claims brought against the Russian Federation by shareholders in the Yukos Corporation, who allege that they have lost tens of Billions of Dollars in a blatant expropriation of the Yukos company by the Russian Government.²¹

Similarly, the dozens of arbitrations brought against Argentina in the aftermath of that country's financial crisis have attracted extensive public notice, because they amount to many Billions of Dollars in damages claims.²²

While Argentina is far and away the country which has seen the largest number of these arbitration claims, other countries have experienced high volumes of investment treaty arbitrations. For instance, the Governments of Canada, Mexico and the United States have seen more than 30 claims between them, lodged under the investment chapter of the North American Free Trade Agreement.²³ Elsewhere, the Czech Republic has seen a high number of claims in recent years, thanks in no small measure to the considerable publicity which surrounded a successful arbitration against that country by a Dutch-based broadcasting enterprise against the Czech Government.²⁴

Apart from the sheer numbers of investment treaty arbitrations which are being launched as foreign investors discover their legal rights under these treaties, it is clear that these disputes may implicate investments in almost every economic sector or industry. Known arbitrations have arisen in relation to mining; oil and gas exploration, production and transportation; agriculture; food processing; financial services; public utilities (electricity, water, telecommunications); information services; broadcasting and media; construction; and transportation concessions (train, airport, ports).

Recent claims have challenged the actions of media regulators, public utility regulators, gambling and gaming regulators, financial services supervisory agencies, or tax authorities. In some of the more well-publicized cases in the North American context, foreign investors have challenged bans on particular substances (gasoline additives) or on the cross-border trade of such substances; with these disputes attracting the wider scrutiny of the media and environmental groups.

Apart from the sheer numbers of investment treaty arbitrations, it is clear that these disputes may implicate investments in almost every economic sector or industry.

20 Investment Treaty News see: <http://www.iisd.org/investment/itn>

21 Catherine Belton, "Menatep Sues Russia for 28 Bln", The Moscow Times, February 9, 2005, www.themoscowtimes.com/stories/2005/02/09/001.html

22 Luke Eric Peterson, "Legal Tango", Foreign Direct Investment magazine, Financial Times Group, August-September 2005, available on-line at: http://www.fdimagazine.com/news/fullstory.php/aid/1336/Legal_tango.html

23 UNCTAD, "Latest Developments in Investor-State Dispute Settlement", IIA Monitor, No.4, 2005, at pg.4, available on-line at: http://www.unctad.org/en/docs/webiteit20052_en.pdf; see also:

Public Citizen, "NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005", February 2005, available on-line at: <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>

24 Luke Eric Peterson, "ANALYSIS: Tribunal distinguishes regulation from expropriation in latest Czech case", Investment Treaty News, March 29, 2005, http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf

More classical expropriation disputes – for e.g. alleged seizure of real property – continue to arise from time to time, including with respect to the contentious issue of land-ownership and land reform. In 2005, a BIT claim was filed against the Government of Venezuela, after the state Land Institute authorized the seizure of a number of landholdings, over which a UK investor claimed to enjoy title, and designated these lands for redistribution to landless Venezuelans.²⁵ In Zimbabwe, fifteen Dutch farmers filed a BIT claim against the Government in 2003, alleging that the authorities “by legislative acts and extra-legal means implemented a program to acquire land and improvements in Zimbabwe owned by Claimants and others for redistribution to certain of its citizens.”²⁶ The farmers accuse the Government of denying them “protection and security”, and they seek compensation for the “genuine value of the investment expropriated”, as required by the Netherlands-Zimbabwe BIT.²⁷ The latter case was registered in 2005, and a tribunal was in the process of being constituted at the time of this writing. It is likely that similar international claims have been – or will be filed – by other foreign land-owners in countries where land reform policies are being pursued. For instance, several German nationals have recently threatened to sue the Namibian Government, under the terms of the Germany-Namibia bilateral investment treaty, over proposed expropriations of their farms as part of Namibia’s land redistribution programme.²⁸

To date, tribunals have yet to wrestle with the thorny question as to how treaty protections should be reconciled with government policies designed to promote wider land-ownership amongst populations.

While the details of these Venezuelan, Zimbabwean and Namibian disputes may differ, they illustrate a common point: land reform policies pursued by governments may be challenged by foreign property-owners under international law, thanks to the terms of bilateral investment treaties. To date, tribunals have yet to wrestle with the thorny question as to how treaty protections should be reconciled with government policies designed to promote wider land-ownership amongst populations. However, it should be noted that international tribunals may be asked to make such sensitive policy determinations in the near future.

Having surveyed some of the uses to which bilateral investment treaties have been put, Section Six turns to an examination of how South African treaties may have been used to date.

25 Luke Eric Peterson, “UK farm group settles BIT claim over Venezuelan land seizures and invasions”, *Investment Treaty News*, April 11, 2006, available on-line at: http://www.iisd.org/pdf/2006/itm_april11_2006.pdf

26 Bernadus Henricus Funnekotter and others v. Republic of Zimbabwe, Request for Arbitration submitted to International Centre for Settlement of Investment Disputes, May 30, 2003, at pg.14 (on file with author).

27 *Ibid.*, at pg.15

28 “Absentee landlords to challenge Namibian Government over Expropriation”, *BBC Monitoring International Reports*, Dec. 2, 2005; “Namibian President to make landmark visit to Germany”, *Agence France Presse*, By Brigitte Weidlich, Nov. 26, 2005; “German Farmers Challenge Namibia Land Reform, International Arbitration Considered”, *Investment Treaty News*, May 31, 2006, available on-line at: http://www.iisd.org/pdf/2006/itm_may31_2006.pdf

6. How have South African BITs been used to date?

The use of South Africa's BITs is not well documented. The government provides no public records of claims brought against the RSA, nor is there any requirement for RSA investors to publicize the fact that they are bringing an arbitration claim against some other country. What is more, the treaties may be invoked in *informal* contexts, for example in private communications between foreign investors and government officials, in an effort to dissuade certain actions or proposed policies, without necessarily resorting to formal arbitration. Occasionally, such confrontations may be publicized; often they are not. The following sections document known usages of these treaties by investors, but it is clear from anecdotal evidence that other uses take place 'under the radar'. For example, a RSA government official interviewed for this paper intimated that one European company has referred to its investment treaty rights in the course of private discussions with government officials as to the application of South African anti-dumping laws. No further information about that dispute has been publicized.

6.1 Proposals for Ending Foreign Ownership in the Private Security Industry

In terms of information on the public record, it is known that investment treaties played a part in the political debate over foreign ownership in the private security industry. Following the terrorist attacks on the United States in September of 2001, and amidst growing concerns about foreign ownership in the SA security sector, a government-sponsored bill was presented to parliamentary committee which would have banned foreign ownership in the sector, and forced divestment of existing foreign shareholdings in SA-based security firms.²⁹ According to contemporaneous news reports, concerns were raised about the threat to national security posed by the private security industry (which, as a percentage of the economy, was reported to be the largest in the world), and which boasted more "people power and more weapons than the police force".³⁰

The proposed legislation encountered stiff opposition from foreign players in the security industry, as well as from the UK Government which warned the SA Government that the move would contravene the bilateral investment treaty between the two countries.³¹ Following a brief, but vigorous period of advocacy on the part of foreign owners and their home governments, the ANC government reversed course and announced that it would abandon plans to roll up foreign ownership in the sector.

Following a brief, but vigorous period of advocacy on the part of foreign owners and their home governments, the ANC government reversed course and announced that it would abandon plans to roll up foreign ownership in the sector.

29 Brendan Vickers, "Foreign Direct Investment (FDI) Regime in the Republic of South Africa", Paper for the CUTS Centre for International Trade, Economics and Environment, February 2002, at section 3.2; "South Africa: ANC Wants Foreigners Out of Security Industry", *Business Day*, September 27, 2001; Johnson R.W. and Filatova, Irina, "Analysis: Foreign Investors Threatened", *United Press International*, Durban, October 6, 2001

30 "South Africa: UK Upset by Security Ban", *Mail & Guardian*, October 5, 2001; "An industry hijacked", *The Economist*, October 6, 2001

31 "South Africa: UK Upset by Security Ban, *Mail & Guardian*, October 5, 2001; "South Africa: Foreign Investor Ban Dropped", *Business Day*, October 11, 2001

6.2 Land disputes

During research for this briefing paper, the author uncovered evidence that the RSA has faced at least one BIT arbitration, where a foreign investor successfully held the RSA liable for breach of the treaty guarantee to provide “protection and security”. In April of 2001, an unnamed Swiss national initiated arbitration proceedings under the UNCITRAL rules of arbitration, alleging breach of the Switzerland-RSA investment protection treaty.

The dispute – which is discussed more fully in section 7.4 below – centred on alleged failures by the South African authorities to provide adequate protection and security for an investment in a game farm and accompanying hotel and conference center. The Swiss investor prevailed in this arbitration with the SA government, with the presiding tribunal holding the RSA liable for breach of its international treaty obligations.

Apart from this case, there are no documented reports of SA treaties having been invoked by foreign investors in relation to land disputes; however there would seem to be ample scope for such treaties to be relevant to such disputes. For example, land reform initiatives undertaken by the South Africa Government might trigger the expropriation standards under SA BITs; a subject which is explored in section 7.2 below.

6.3 Black Economic Empowerment

In recent years, comprehensive efforts have been undertaken to promote Black Economic Empowerment (BEE) in South Africa, so as to transform the economy and overcome the socio-economic legacy of Apartheid. BEE measures include traditional affirmative action measures, such as employment equity and preferential procurement policies, as well as sector-specific charters which gauge the progress of companies in meeting specific indicators and targets, and in meeting targets for divestiture of minority equity stakes to BEE partners.³²

From an early stage, there have been rumblings from foreign investors and their home governments, that some elements of the BEE programme may run counter to SA's investment treaty obligations.

From an early stage, there have been rumblings from foreign investors, and their home governments, that some elements of the BEE programme may run counter to SA's investment treaty obligations. For example, a new mining law, the Minerals and Petroleum Resources Development Act (MPRDA), which converts existing mining rights into “new order” mining rights has been criticized; as have proposals for mining firms to acquire Black Empowerment partners and shareholders. Following outcry against the Government's early proposals in this realm – a requirement for 51% of mining assets to be transferred to black ownership – a more moderate goal was set. Under the terms of the MPRDA, 26% of mining assets are to be transferred to black owners over the next decade.³³

³² See the Department of Trade Industry's Strategy Document, “A Strategy for Broad-based Black Empowerment”, available on-line at: <http://www.dti.gov.za/bee/complete.pdf> (last viewed on March 22, 2006)

³³ Economist Intelligence Unit, “Country Commerce Report: South Africa”, February 2005, pg.10

During the debate over the MPRDA, the Executive Director of Anglo-American, Michael Spicer, told the present author that the mining industry were cognizant of their investment treaty rights, while alluding to political considerations which would gravitate against launching lawsuits under those treaties.³⁴ There is little documentation as to what role threats of investment treaty lawsuits may have played in the decision to moderate the Government's empowerment ambitions for the mining sector. However, South African law firms warned from an early stage that the draft Minerals and Petroleum Resources Development Bill might contravene SA's investment treaty obligations.³⁵ Notably, the potential for investment treaty arbitrations continues to be mooted in relation to the terms of the Final MPRDA which passed into law in 2002. In response to an October 2004 query alleging "expropriation of privately-owned common law mineral rights under the 2002 Act", UK Foreign Minister Jack Straw noted in a written Parliamentary statement that "under the provisions of the UK/South Africa Investment Promotion and Protection Agreement any dispute between a UK investor and the South African Government may be submitted to international arbitration."³⁶

More concretely, a group of European-based foreign investors are known to have served the South African Government with a notice of claim under the Italian and Belgium-Luxembourg investment treaties with South Africa – a preliminary step before a formal arbitration could be mounted. According to a little-noticed media report, the claim was first presented to the DME in December of 2004, and alleges expropriation of the foreign investors' mineral rights in three South African firms Red Graniti, Kelgrin, and Marlin. The investors also allege a failure by SA to provide for standards of National Treatment; specifically, the investors object to BEE rules which place allegedly more onerous requirements on foreign-owned firms, such as the requirement to meet ambitious quotas for the hiring of black managers.³⁷

The investors in question control most of the South African granite industry and also object to the impact of the MPDRA on this cyclical business:

The key issue for the Italians is understood to be maintaining control of unused mineral rights. The granite business is driven by market fashion with various types of granite going in and out favour. The business is also subject to swings in demand driven by the state of the international construction business.

Currently, the granite business is depressed and many of Marlin and Kelgran's quarries stand idle. Under the new legislation the companies could be forced to relinquish control of the mineral rights to these quarries.³⁸

34 Luke Eric Peterson, "South Africa's Plans for Black Economic Empowerment Confronting Foreign Investor Rights", Investment Law and Policy News Bulletin, May 9, 2003, available online at: http://www.iisd.org/pdf/2003/investment_investsd_may9_2003.pdf

35 See for e.g. a "Legal Update" published by the law firm Bell Dewar: "Memorandum on the Minerals and Petroleum Resources Development Bill, July 1, 2002, available on-line at: <http://www.belldewar.co.za/legal-update/documents/2002/20020701.htm>

36 Jack Straw, Hansard Written Answers for Oct 4, 2004, Column 1838W, available on-line at: <http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo041004/text/41004w19.htm>

37 Brendan Ryan, "Mining legislation. STATE BEGINS TO REALISE IT'S NOT JUST A MINER PROBLEM", Financial Mail (SA), September 30, 2005

38 Brendan Ryan, "Offshore investors may sue SA government", MiningMX, Sept. 15, 2005, <http://www.miningmx.com/empowerment/486932.htm>

The investors have warned that they will turn to international arbitration if discussions with the Government fail to reach a compromise.

Outside of the mining realm, BEE measures, including employment equity, mandatory divestments, and other policy tools, may give rise to other threats of international lawsuits by foreign investors under investment treaties. The potential legal, policy and financial implications of investment treaty challenges to BEE are explored in greater detail in subsequent sections of this paper.

6.4 Use of BITs by SA investors investing abroad

To date, there are no documented cases of South African investors invoking their treaty rights against other countries. While SA firms are major outward investors, particularly within parts of Africa, many of the BITs which have been negotiated with African trading partners had yet to enter into force at the time of this writing. As such, recourse to the investor-state mechanism available in those treaties would be unavailable. Of the various BITs concluded with African states, only those with Mauritius and Mozambique had entered into force at the time of this writing. Whereas, SA companies are notable investors in Mozambique, the Mauritius-SA treaty would more likely be used by foreign investors investing *into* SA, in the event that their own home government lacked a BIT with the RSA.³⁹

6.5 Summary

Based upon available evidence, as well as the experience of other countries, there would appear to be broad scope for South Africa's various investment treaties to generate international claims by foreign investors alleging that policies, measures (or even omissions or failures to act) may have had the effect of breaching treaty guarantees. In addition, investment treaties may provide foreign investors with an important bargaining chip when it comes to lobbying governments over new policies or initiatives under consideration. In this way, SA's international treaties may exert a strong influence on domestic policymaking in a wide spectrum of areas, particularly as investment treaty lawsuits are entering the legal mainstream. Accordingly, it is important to look at the provisions of these treaties in greater detail, in order to understand some of the key obligations found in these treaties. The following sections examine several policy implications of these agreements, with an eye to assessing some of the potential implications for development and human rights.

SA's international treaties may exert a strong influence on domestic policymaking in a wide spectrum of areas, particularly as investment treaty lawsuits are entering the legal mainstream.

³⁹ By the same token, US multinationals investing into India, have undertaken their investments via Mauritius so as to compensate for the lack of a US-India investment protection treaty. See for e.g. discussion of the arbitrations mounted by Bechtel and General Electric against India, in Luke Eric Peterson, "UK Bilateral Investment Treaty Programme and Sustainable Development", Chatham House, Energy Environment and Development Programme, February 2004, No. 10

7

Emerging policy implications

7.1 Detouring around local courts, in favor of international arbitration

Investment treaties provide foreign investors with the ability to detour around local courts in many circumstances, and to pursue claims before international arbitration tribunals. This major innovation is not found in most other international treaties. International human rights treaties, for example, will not always provide victims with international forms of dispute settlement, and when they do, these avenues are only accessible after the claimant has exhausted all domestic legal remedies. By contrast, the arbitration process provided under South Africa's investment treaties offers foreign nationals and companies the ability to dispense with the South African legal system in many circumstances, and to convene a purpose-built *international* tribunal to arbitrate claims.⁴⁰

While access to international arbitration is clearly advantageous for foreign investors, this process has certain *disadvantages* from the perspective of the public interest. First, there are no uniform requirements for disputants to publicly disclose the existence of their claim.⁴¹ The upshot of this is that governments often confront arbitration claims – and demands for compensation – which are not a matter of public record, and which may be adjudicated with little or no public disclosure. Indeed, as is discussed in more detail below, the RSA has faced at least one of these investment treaty arbitrations already; this claim, brought by a Swiss national, was arbitrated without any publicity and led to a binding award against the RSA.

Even where the existence of an arbitration is a matter of public record, the rules of procedure leave it to the parties to determine whether the arbitration hearings will be opened to the public. As a consequence, it may be impossible to know what legal arguments have been made in a given arbitration – and what government actions may be under scrutiny. Foreign investors might allege that they are victims of government corruption and malfeasance; or they might be seeking to challenge highly sensitive public policies related to taxation, public health, or social justice. In either case, the details may not be exposed to public light.

⁴⁰ Certain treaty-based claims, for example denial of justice, could require that claimants first pursue their claim in the local courts. Similarly, allegations centering on alleged contractual breaches (which are argued to constitute further treaty breaches) might need to be presented to local courts in the first instance, depending upon the circumstances. See for example, the discussion in *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award of April 30, 2004, at para 116

⁴¹ Aaron Cosbey, Howard Mann, Luke Eric Peterson and Konrad von Moltke, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements*, IISD, 2004, pp.4-5, available on-line at: <http://www.iisd.org/publications/pub.aspx?id=627>

The arbitration process may be less than ideal for adjudicating particularly sensitive matters implicating public policy.

At any rate, the arbitration process may be less than ideal for adjudicating particularly sensitive matters implicating public policy. The composition of arbitral tribunals is not without its problems. Each party nominates an arbitrator, with the third or presiding arbitrator to be chosen by consensus. Asymmetries of information can be significant in this context. Foreign investors or governments with representation from major international law firms specializing in such disputes will be expected to select an arbitrator who is schooled in international investment law; is sympathetic with the interpretations espoused by the foreign investor; and who, may in fact, serve at other times as an advocate on behalf of foreign investors in other similar arbitrations. Parties may put themselves at a disadvantage if they do not undertake due diligence in their selection of their own nominee to the tribunal. At times, parties have selected individuals who are merely specialists in commercial law, without any special knowledge of investment treaties, much less of wider public international law. This may have important repercussions for how disputes are resolved by the tribunal. It will be important for parties to engage expert international counsel, provided they can afford to do so.

Conflicts between the domestic legal order and international law may be resolved in favour of the latter.

Even where an appropriate arbitrator is selected, there are broader policy questions about the suitability of arbitration as a dispute resolution method. The law applicable to the dispute will be primarily international law, encompassing the investment treaty, as well as other applicable rules of international law. Measures which may be perfectly consonant with domestic law and the host country's constitutional order may attract scrutiny before international arbitration tribunals. Moreover, conflicts between the domestic legal order and international law may be resolved in favour of the latter.

In the South African context, it is notable that when one of the earliest bilateral investment treaties came before the SA Parliament's Trade and Industry Committee for scrutiny in 1998, it appears to have been characterized in rather benign terms. A news account of that time, reports that a DTI official told Parliamentarians that "the agreement did not place British investors in SA in a better position than local residents because the agreement stated that SA law would apply."⁴² Such a reading of the treaty is a puzzling one. While SA law may be applicable to disputes under the agreement, it is also the case that the provisions of the treaty may override domestic law where the two are in conflict. Furthermore, it seems indisputable that the investment treaty does "place British investors in SA in a better position than local residents" insofar as the treaty offers British investors (but not SA investors) the ability to avoid local court adjudication, and to bring claims before specially-convened international arbitration tribunals where the investors may invoke treaty protections which are not available to local South Africans.

Viewed with hindsight, it is clear that the investment treaties entered into by South Africa during the past decade may harbour profound implications in terms of the *process* by which disputes with foreign investors are to be adjudicated. Indeed, according to one blunt analysis of how investment treaty disciplines impact on domestic sovereignty, a pair of arbitration lawyers have recently observed that countries face a stark choice: live up to the disciplines contained in the treaties or run the

⁴² "Parliamentary Committee approves investment agreement with UK", BBC Monitoring Service: Africa, March 3, 1998

risk that legal issues are litigated far away from the place where the conflict originated, adjudicated by rules they were able to shape only to a limited extent, and decided by people sometimes not fully aware of the local situation. In a nutshell, they risk marginalizing their own legal order, which, in general, should be able to best accommodate the country's specificities.⁴³

In a nutshell, countries risk marginalizing their own legal order, which, in general, should be able to best accommodate the country's specificities.

Where the local courts are inadequate for the impartial resolution of business disputes, investment treaties may well be a necessary tool for foreign investor protection. However, questions might be asked as to whether these treaties are *sufficient* for broader good governance in the host state. Lately, there has been a debate amongst social scientists as to whether the offer of international arbitration to foreign investors may detract from efforts to improve domestic legal institutions. For example, several authors have raised concerns that increasing recourse to *international* arbitration on the part of foreigners could provide a disincentive for foreign multinationals to add their voice to the chorus of actors seeking improvements to *domestic* governance and institutions.⁴⁴ There is no definitive answer as to whether investment treaty arbitration detracts from domestic good governance, and further research is clearly necessary, particularly as the incidence of international arbitration under investment treaties is quickening in recent years. However, governments pursuing these treaties should consider the wider policy impacts of these agreements, including the prospect that disputes will be resolved outside of the domestic court system.

The following sections turn to an overview of some of the *substantive* legal obligations which may flow from South Africa's investment treaties.

7.2. Expropriation and amount of compensation owed to foreign investors

A core concern of investment treaties is to ensure compensation to foreign investors in the event of nationalization or expropriation. However, what constitutes an expropriation remains a deeply contentious issue.⁴⁵ What is clear is that treaty standards may differ from standards under domestic law. Under South Africa's Constitution, Section 25 offers two distinct protections for property. First, deprivations of property may occur only pursuant to laws of general application; thus, "arbitrary" deprivations are prohibited. Second, property may be expropriated only by laws of general application; in furtherance of "a public purpose or in the public interest"; and subject to the payment of compensation to the affected owner. The purpose underlying the two-part protection found in Section 25 appears to have been a desire to protect Government's power to regulate

43 Max Gutbrod and Steffen Hindelang, "Externalization of Effective Legal Protection against Indirect Expropriation: Can the Legal Order of Developing Countries Live up to the Standards Required by International Investment Agreements? A Disenchanted Comparative Analysis", 7 *Journal of World Investment and Trade*, No.1, February 2006, at pg. 83

44 Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", *International Review of Law and Economics* 25 (2005) 107-123; and Susan-Rose Ackerman and Jennifer Tobin, "Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties", Yale Law & Economics Research Paper No. 293, on file with author

45 L. Yves Fortier, "Caveat Investor: The Meaning of 'Expropriation'; and the Protection afforded Investors Under NAFTA", *News From ICSID*, Vol.20, No.1, Summer 2003, at pg.1

property rights, without having to compensate owners whose property rights are limited by regulations, while still guaranteeing a right to compensation in cases where expropriation (rather than mere deprivation) has occurred.⁴⁶

International treaties concluded by SA may have extended protection for (foreign-owned) property against government interference and incursion, without benefit of any meaningful public debate or scrutiny of such a move.

By contrast, most international investment treaties, including all of those which have been concluded by South Africa, do not take pains to draw this crucial distinction between (compensable) expropriations and (non-compensable) regulations. In the South African context, there is a certain irony here, given the extensive controversy which had been occasioned by the decision to entrench any form of property rights in the South African Constitution.⁴⁷ International treaties concluded by South Africa with dozens of Governments, may have extended even greater protection for (foreign-owned) property against government interference and incursion, and without benefit of any meaningful public debate or scrutiny of such a move.

7.2.1 Do SA BITs provide for greater property protection than the SA Constitution?

By dint of their failure to distinguish between regulation and expropriation, the treaties leave open the prospect that legitimate government regulation will be deemed to constitute a form of “indirect” expropriation, thus triggering the treaty requirements for compensation.

As a rule, South Africa’s investment treaties warrant against uncompensated expropriation, nationalization or government measures having an equivalent effect. The wording of the treaties may differ on occasion, but the import is the same across most of these agreements. David Schneiderman in a prescient legal analysis of the Canada-SA BIT was of the opinion that the (then untested) “constraints concerning expropriation and nationalization in the BIT are clearly more onerous than those found in the text of the (South African) constitution.”⁴⁸ The concern is that, by dint of their failure to distinguish between regulation and expropriation, the treaties leave open the prospect that legitimate government regulation will be deemed to constitute a form of “indirect” expropriation, thus triggering the treaty requirements for compensation.

The concern is not theoretical, and was heightened by an early NAFTA Chapter 11 investment arbitration, *Metalclad v. Mexico*, where an arbitral tribunal ruled that expropriation could be defined broadly, so as to include not only literal seizure or destruction of property, but also “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property...”⁴⁹

In the ruling, the tribunal gave short shrift to the purpose underlying the government interference, instead setting forth a test which focused upon the *degree of interference* suffered by the investor. A deprivation “in whole or significant part”, would constitute an expropriation contrary to the treaty, no matter the purpose underlying that deprivation.

46 A.J. van der Walt and G.J. Piennar, *Introduction to the Law of Property*, 4th ed., Juta & Co. Ltd, 2002, pp. 347-350; see also Matthew Chaskalson’s account of the debate over the property clause during negotiation of the Interim Constitution of 1993, Matthew Chaskalson, “Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution”, 11 *South African Journal on Human Rights*, 1995, at pp. 234-236

47 A.J. van der Walt and G.J. Piennar, *Introduction to the Law of Property*, 4th ed., Juta & Co. Ltd, 2002, at pg.343

48 David Schneiderman, “Investment Rules and the New Constitutionalism”, 25 *Law and Social Inquiry*, 2002, at 778; SA’s BIT with Canada has not yet entered into force.

49 *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of the Tribunal, Aug.30, 2000, at para 103

While this reasoning was seized on by foreign investors, and used in subsequent arbitrations under investment treaties, the reasoning was ruled by governments, as well as those non-governmental organizations, concerned that investment treaty claims might stifle efforts by government to regulate the activities of foreign investors in the public interest.⁵⁰

Following the Metalclad ruling, and amidst concerns over other foreign investor claims, the governments of Canada and the United States concluded that it could be dangerous to leave it to arbitrators to draw the line between legitimate government regulation and (compensable) expropriations. In recent years, both governments have taken steps to minimize the risk of tribunals rendering overly broad readings of expropriation clauses, by introducing clarificatory language into any new treaties. The Government of Canada issued a new investment treaty negotiating template in 2004 which clarified that it would be rare for good faith non-discriminatory measures ... that are designed and applied to protect legitimate public welfare objectives, such as health, safety and environment” to be construed as an “indirect” form of expropriation for purposes of the treaty.⁵¹

By contrast, the treaties concluded to date by the South African Government do not take steps similar to those taken by the United States and Canada. South African treaties do not give additional guidance to arbitrators as to which interferences will be classified as expropriations for which compensation must be paid to foreign investors. By leaving arbitration tribunals to draw such lines, it is particularly important to take note of recent developments in the arbitration of expropriation disputes. Recently, two arbitral rulings on expropriation have drawn a contrast with the aforementioned approach in the *Metalclad v. Mexico* arbitration.

In a March 2005 arbitration ruling under the Dutch-Czech BIT, in the case of *Saluka v. Czech Republic*, the presiding arbitral tribunal reasoned that states will not have committed an expropriation “when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.”⁵² That ruling followed closely on the heels of another arbitral award rendered in a dispute under the North American Free Trade Agreement, between the Canadian-based Methanex Corporation and the United States, where the tribunal held:

a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating the investment that the government would refrain from such regulation.⁵³

50 See for example, Aaron Cosbey, Howard Mann, Luke Eric Peterson and Konrad von Moltke, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements*, IISD, 2004, at page 14, available on-line at: <http://www.iisd.org/publications/pub.aspx?id=627>

51 See Annex B.13(1)(c) of the Canada Model Foreign Investment Promotion and Protection Agreement at: <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf>

52 *Saluka Investments BV (Netherlands) v. Czech Republic*, Partial Award of March 17, 2006, at para 255

53 *Methanex Corporation v. United States*, Award, Part IV, Chapter D, Page 4, Para. 7

Canada and the United States have taken steps to minimize the risk of tribunals rendering overly broad readings of expropriation clauses, by introducing clarificatory language into any new treaties.

Together, these rulings buttress the argument, often made by governments, that BIT provisions on expropriation must not prejudice a government's power to regulate the economy in a good-faith and non-discriminatory manner, even if such regulation may have the effect of damaging (but not extinguishing) the economic prospects of a foreign investor.

Yet, there are no guarantees that future tribunals will follow such reasoning. Indeed, lawyers who represent foreign investors have criticized the reasoning adopted by the tribunal in one of the more recent cases.⁵⁴ In subsequent arbitrations, foreign investors are putting forward legal arguments which disavow the two aforementioned arbitral rulings, and which maintain that BIT provisions provide less policy latitude for government regulation of foreign investment.⁵⁵ And in one recent arbitration, a tribunal has adopted a different approach to this thorny issue. In the case of *Azurix v. Argentina*, the tribunal began by acknowledging that arbitral tribunals have adopted different views as to whether the "purpose" of a measure comes into consideration in deciding whether that measure constitutes an expropriation.⁵⁶ The tribunal then went on to hold that, while the "purpose" of a measure might be relevant, even if the purpose of that measure was "legitimate" and pursued some "public policy function", it still might be the case that a measure was "disproportionate" given its effect upon a foreign investor.⁵⁷ In contrast with the above-mentioned rulings in the *Saluka* and *Methanex* cases, the tribunal in the *Azurix* case appears to take the view that bona fide regulations will not be immune from being held to constitute expropriations for which compensation might need to be paid to foreign investors; the tribunal will consider the degree of impact of those regulations on the foreign investor, and whether such an impact is proportionate to the motive cited for such regulations.

Arbitral tribunals have adopted different views as to whether the "purpose" of a measure comes into consideration in deciding whether that measure constitutes an expropriation.

Tribunals continue to adopt divergent interpretations of expropriation. The concrete policy implications of this are that there remains some uncertainty as to what types of regulatory measures might be deemed to constitute an expropriation.

From all of this, it should be apparent that tribunals continue to adopt divergent interpretations of expropriation. The concrete policy implications of this are that there remains some uncertainty as to what types of regulatory measures might be deemed to constitute an expropriation. While it is difficult to envision circumstances where a tribunal would not take seriously government regulations such as those on Black Economic Empowerment, it remains unclear whether a given tribunal would insulate bona fide regulations from being viewed as an expropriation, or whether it would subject such regulations to a review which attempts to weigh their intention against the impact absorbed by the foreign investors.

This much is certain: in the absence of clearer treaty drafting – a course adopted by the Governments of Canada and the United States – it may fall to arbitration tribunals to make such determinations without clearer guidance. In the absence of express guidance in a treaty, BIT provisions on expropriation might be interpreted so as to provide for wider protection against expropriation without com-

⁵⁴ See for example, Todd Weiler, "Methanex v. USA: Turning the Page on NAFTA Chapter Eleven?", 6 *Journal of World Investment & Trade*, No. 6, pp.918-920

⁵⁵ See for example, Memorial of Claimant Glamis Gold Ltd., in the NAFTA arbitration between Glamis Gold Ltd. and United States of America, May 5, 2006, at para. 509, available at: <http://www.state.gov/documents/organization/67645.pdf>

⁵⁶ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of July 14, 2006, Para 309

⁵⁷ *Azurix Corp. v. Argentine Republic* Award, Paras 310-312

pensation than is provided under the SA Constitution and domestic law. It is only in the crucible of actual arbitration of disputes with foreign investors that the meaning to be affixed to treaty provisions will be elucidated.

7.2.2 Do SA BITs Provide for Enhanced Compensation in case of Expropriation?

While there is some uncertainty as to whether BIT standards on expropriation would hold governments liable for actions (including regulatory or other measures) which are in compliance with the SA Constitution's Article 25, a second potential divergence between standard BITs and the South African Constitution can be seen in the differing *amounts* of compensation which may be owing in cases where an expropriation has indeed occurred.

Section 25 of the SA Constitution provides that compensation be "just and equitable, reflecting an equitable balance between the public interest and the interests of those affected". A number of considerations will be relevant to such a determination, including the purpose of the expropriation, as well as the public interest, which "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources". While jurisprudence on Section 25 of the South African Constitution has been limited to date, there appears to be substantial agreement that "less than market value" compensation may be awarded to affected claimants, particularly in circumstances where compelling public interest purposes lie behind a given expropriation of property, for example in the service of land reform or to pursue racial redress.⁵⁸ In contrast, the provisions of SA BITs typically provide that, expropriations "shall be accompanied by prompt, adequate and effective compensation."⁵⁹ This standard is often defined further as amounting to "the market value"⁶⁰, "the fair market value"⁶¹, or "at least equal to the market value"⁶².

Any potential divergence in compensation standards between the SA Constitution and SA's international treaties could have financial implications where a given government policy or measure for e.g. expropriation of landholdings affects foreign owners. While domestic law might prescribe compensation at less than market value, foreign property owners could attempt to arbitrate against the RSA, and to claim full market value compensation for any losses. Indeed, the prospect of treaty-based actions by foreign property-owners could be a factor underlying political calculations in relation to property acquisition or redistribution. For example, foreign investors in the mining sector view their international treaty rights, including the right to full-market-value compensation, as a potential means

While domestic law might prescribe compensation at less than market value, foreign property owners could attempt to arbitrate against the RSA, and to claim full market value compensation.

58 See Gregory Alexander, *The Global Debate over Constitutional Property*, (University of Chicago Press, 2006), at pp42-42; Hanri Mostart, *The constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany*, Springer, Berlin, 2002, pp.344-348; Matthew Chaskalson expresses surprise that the (then governing) National Party conceded this point so readily in the context of the multi-party negotiations over the Interim Constitution, See Chaskalson, "Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution", 11 *South African Journal on Human Rights*, 1995, at pg. 232

59 See for example the terms of the following SA BITs with Angola, Tanzania, Israel, Finland, Turkey, Canada, Libya, Iran, Tunisia, Czech Republic, and Korea

60 See SA-Turkey BIT Art III (1) (2); SA-Israel BIT Art 6(1); SA-Korea BIT Art 5(1)

61 See SA-Finland BIT Art 5(1) (2)

62 See SA-Tanzania BIT Art 6(1)(2); SA-Libya BIT Art 5(1)(2); SA-Tunisia BIT Art 5(1)

of challenging the terms of the Minerals and Petroleum Resources Development Act (2004) which vests all mineral and petroleum rights with the SA Government. Under the new MPRDA framework, businesses must apply to the South African Government – within a given time frame – for a right to convert their former holdings into “new-order” rights. Conversion is not preordained, and the Department of Mining and Energy will take into account the goal of redressing historical, social and economic inequalities – and the progress of applicant companies in meeting targeted social, labour and development objectives set out in a broad-based socio-economic empowerment mining Charter. Among these obligations are employment equity targets (discussed in more detail in a later section) and targets for “Historically Disadvantaged South Africans” (HDSA) participation in ownership (for e.g. through joint-ventures or minority shareholdings).

Critics of the MPRDA argue that the Act’s socio-economic obligations are onerous, and that the new law serves to expropriate common law mineral rights, thus raising the question of legal recourse for affected rights-holders. The Government has received a flood of notices from potentially affected rights-holders who have reserved the right to mount claims for compensation *under South African law*.⁶³ However, a second avenue lies open, at least, for the sizable number of foreign investors with a stake in the SA mining sector. In a 2005 presentation to a Johannesburg mining conference, one lawyer observed that “Foreign investors in mining companies may be entitled to market value compensation” (emphasis added), rather than the “less than *market value compensation*” contemplated under South African law.⁶⁴ This lawyer added that “Contravention of the BITs could create a significant (potentially unquantifiable) liability for the South African government under investor-state arbitration.”⁶⁵

Foreign shareholders could circumvent the South African courts, and seek to avoid the compensation standards prescribed under SA law.

In other words, by invoking their rights to international arbitration found in SA BITs, foreign shareholders or foreign owners of South African mining interests could circumvent the South African courts, and seek to avoid the compensation standards prescribed under SA law. The latter point is emphasized in a memorandum prepared by an SA law firm which represents foreign investor interests:

“In the international law of treaties, the most fundamental principle is that every treaty in force is binding on and must be observed by the parties, notwithstanding conflicts between the provisions of the treaty and the domestic law of a party to the treaty.”⁶⁶

On such a view, it would be left to international arbitrators to determine the precise level of compensation to be paid to affected foreigners, irrespective of the state of SA law. Certainly, the prospect that such international claims may materialize appears to be significant. As was noted earlier in section 6.3, at least one

63 Nicol Degli Innocenti and John Reed, *The Financial Times*, “Foreign mining groups set to sue SAfrica for expropriation”, October 30, 2004

64 Peter Leon, “Expropriation issues under domestic and international law arising from the implementation of the MPRDA”, powerpoint presentation to 2nd Annual Converting Old Order Rights to New Order Rights in Mining Conference, August 29, 2005, Johannesburg, at slide # 16 *ibid.* slides 13-15

65 Peter Leon, “Expropriation issues under domestic and international law arising from the implementation of the MPRDA”, Powerpoint presentation to 2nd Annual Converting Old Order Rights to New Order Rights in Mining Conference, August 29, 2005, Johannesburg, at slide # 24

66 Memorandum prepared by Webber Wentzel Bowers for SA Department of Minerals and Energy. 15/4/2005, on file with author

group of European-based foreign investors has notified the SA Government that it may bring a potential investment treaty claim in relation to the MPRDA. It is unknown if other foreign investors may have notified the Government of similar claims, however there are anecdotal suggestions that foreign investors are aware of their ability to pursue international arbitration.

7.3 National Treatment and Discrimination

A standard guarantee offered in South Africa's BITs is to provide foreign investments treatment which is as favourable as that enjoyed by local (South African-owned) businesses. The promise of National Treatment for foreign investors and/or their investments will minimize the likelihood that foreigners will suffer from discrimination on the basis of their nationality. Beyond this, however, there are concerns that the concept of National Treatment might entitle foreigners to special incentives, treatment or perquisites which have been earmarked exclusively for local business actors. Similarly, there is a possibility that foreign investors might argue that certain obligations – such as those prescribed under the Mining Charter – discriminate against foreigners. One particular concern is that affirmative action measures reserved for historically disadvantaged persons, and which are in accord with the SA Constitution, might be construed by foreign investors as breaching the treaty guarantee of National Treatment for foreign investors.

The concern is that affirmative action measures reserved for historically disadvantaged persons, and which are in accord with the SA Constitution, might be construed by foreign investors as breaching the treaty guarantee of National Treatment for foreign investors.

7.3.1 Affirmative Action measures

As was alluded to in the earlier discussion of the MPRDA, various Black Economic Empowerment obligations have been introduced – or are in the process of being introduced - across the South African economy. These efforts are impelled by a desire to bring about so-called broad-based black economic empowerment, through substantial increases in black participation and ownership in the economy. A variety of policy tools are contemplated as part of this effort, including targets for black ownership, employment equity and human resources development, as well as the use of preferential governmental policies in the areas of procurement, granting of licenses and concessions, sale of state enterprises, and public-private partnerships.

For instance, in the mining sector, a so-called Scorecard which governs implementation of the mining Charter, sets forth a detailed check-list of targets for mining companies. Among the goals are a target for Historically Disadvantaged South Africans (HDSA) participation of 40% in management within five years, and a further target of 10% participation by women in mining within five years.

On their face, such initiatives appear in harmony with the SA Constitution which expressly provides that so-called affirmative action measures, designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken so as to promote the achievement of equality.⁶⁷ Indeed, the

⁶⁷ See Section 9(2) of the Constitution (1996); this is not to comment on which particular measures will or will not pass muster under Article 9(2) of the Constitution.

The implementation of BEE measures could implicate SA's international investment treaty commitments, particularly where such obligations place foreign-owned businesses operating in South Africa at a perceived disadvantage to locals.

preamble to the Broad-Based Black Empowerment Act (2003) stipulates that one of the two objectives of the Act is to “promote the achievement of the constitutional right to equality”. However, the MPRDA and associated regulations have not been the subject of a Constitutional challenge in South Africa, so their compliance with the SA Constitution has yet to be determined. Meanwhile, the implementation of BEE measures could implicate SA's international investment treaty commitments, particularly where such obligations place foreign-owned businesses operating in South Africa at a perceived disadvantage to locals.

Such concerns are not hypothetical. In March of 2005, Minerals and Energy Minister Phumzile Mlambo-Ngcuka confirmed to the SA Parliament that the RSA has received a “position paper” from the Italian Embassy which raised concerns about the “expropriation of mineral rights” and the MPRDA.⁶⁸ A copy of that August 2004 Aide Memoire has been seen by the author. In this memo, the Italian Government warns that South Africa may be in breach of various BIT obligations. Of particular note is the concern expressed about the RSA's extension of more favourable treatment to “HDSAs, and, by extension, South African investors as a group”.⁶⁹ This argument is not further elaborated, as such it is difficult to grasp the nuance of the argument being made by the Italian Government.⁷⁰ However, on its face, the Italian Government appears to insist that more favourable treatment – even if reserved for a historically disadvantaged person or group – runs contrary to the obligation for South Africa to treat investors of the European country on an equal footing to South African nationals.

This Aide Memoire offers a blunt warning that conduct which might pass muster under South African law – and which is consonant with the country's Constitution – might be construed by foreign investors and their home governments as being in breach of international economic treaties entered into by the SA Government. For example, foreign-owned firms might argue that obligations to hire 40% black managers over a five year period or the obligation to acquire BEE equity partners, serve to discriminate against foreign-owned businesses, on a *de-facto* basis, because black-owned firms would have met such obligations already.

To date, international investment arbitration tribunals are not known to have grappled with the thorny question of how the National Treatment obligation is to be interpreted in circumstances such as those outlined above. Nevertheless, it appears likely that tribunals could be asked to resolve such delicate issues, should foreign investors follow through on threats to take the SA Government to arbitration over BEE policies or measures.

68 Linda Ensor, “State in talks with Italian miners on new rights”, *Business Day(South Africa)*, March 23, 2005

69 The term HDSA refers to Historically Disadvantaged South Africans, and is defined in the 2002 Mining Charter as follows: “The term ... refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No.200 of 1993) came into operation.”

70 On September 1, 2006, the author forwarded a query to the Italian Embassy in Pretoria, inquiring as to any jurisprudence or authoritative interpretation that might support Italy's legal positions as articulated in the aide memoire. This query also asked whether the position of the Italian Government has shifted in any way during the period since the above-mentioned representations were made to the RSA in 2005. In a reply received on Sept.6, 2006, an official with the Italian Embassy did not answer these questions directly. This official confirmed, however, that the Embassy “has been involved in trying to facilitate negotiations between some Italian companies involved in mining activities (granite) in South Africa and the competent Governmental departments with respect to the implementation of the MPRDA, and some of its aspects which are deemed to be in conflict with the bilateral agreement on promotion and protection of investments between Italy and South Africa.” The official noted that no official reply to the Aide Memoire had been received from the South African authorities, but that negotiations in pursuit of an amicable solution continue.

Any tribunal reviewing a claim for breach of National Treatment would assess the challenged government measures in light of the provisions of the governing treaty, and the law applicable to investor-state disputes. Yet, as can be seen from Figure 1, the provisions of SA treaties, differ markedly in terms of their National Treatment commitments.

Figure 1

National Treatment Guarantees for Foreign Investors/Investments

SA-Netherlands BIT Article 3(2):

“Each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.”

SA-Israel BIT Article Articles 3(1), (2), and (3):

“Neither Party shall, in its territory, subject investments or returns of investments of investors of the other Party, to treatment less favourable than that which it accords to investments or returns of investments of its own investors or to investments or returns of investments of an investor of any third state.”

“Neither Party shall, in its territory, subject investors of the other Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third state.”

“The provisions of sub-articles (1) and (2), shall not preclude a differential treatment in the domestic legislation of a Party or in the exercising of the powers conferred by that legislation, regarding rights or privileges granted to its own investors, or to investments or returns of investments of its own investors. Notwithstanding, neither Party shall derogate from the provisions of Articles 4 to 6 of this Agreement.”

SA-Tanzania BIT Articles 3 (2), (3), and (4)

“Each Party shall in its territory accord to investments and returns of investors of the other Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.”

“Each Party shall in its territory accord to investors of the other Party treatment not less favourable than that which it accords to its own investors or to investors of any third State.”

“The provisions to sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from ... “any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.”

From Figure 1, it is clear that some SA treaties place a formidable hurdle in the path of any claim that affirmative action measures violate a BIT guarantee of National Treatment: an explicit provision affirming the right of the state to provide preferential treatment to locals.⁷¹ When asked to interpret a provision similar to those in the Israel or Tanzania treaties, a tribunal would seem duty-bound to provide shelter for affirmative action measures (even if there might be some debate as to whether there are any limits placed on the discretion enjoyed by the South African Government in this regard).

A number of treaties concluded by SA with Western European Governments lack any express language which would safeguard affirmative action measures.

However, it is much less clear how a tribunal would adjudicate a claim based on a treaty which is drafted in the manner of the Netherlands-SA BIT which does not include any reference to the right of governments to accord preferential treatment to locals in certain circumstances. The prevailing uncertainty should be of acute concern to the SA Government, however, given that a number of treaties concluded by SA with Western European Governments are drafted in a manner similar to that between SA and the Netherlands, and lack any express language which would safeguard affirmative action measures.⁷² While a detailed analysis of this issue is beyond the scope of this paper – and is rendered more difficult by the absence of a concrete fact-pattern to examine – several key considerations can be identified.

The SA Government might seek to invoke its obligations under international human rights law and urge the tribunal to seek a harmonious interpretation of the different legal obligations as per the Vienna Convention on the Law of Treaties.

First, and as a general matter, the SA Government might seek to invoke its obligations under international human rights law, in an effort to argue that its BEE measures are consonant with those wider obligations, and to urge the tribunal to seek a harmonious interpretation of the different legal obligations as per the Vienna Convention on the Law of Treaties.⁷³ Arguments about the host state's broader international law obligations might be particularly relevant where a tribunal is asked to determine whether the treaty parties could have intended to foreclose their ability to treat disadvantaged persons in a preferential manner. For example, it seems relevant for the tribunal to examine what, if any, international human rights law obligations that state may have undertaken at the same time as it was acceding to its investment treaties.

During the mid-1990s when the new ANC Government was negotiating a flurry of bilateral investment treaties with Western European Governments, it was also moving towards ratification of the International Covenant on Civil and Political Rights (ICCPR). South Africa signed this Covenant on October 3rd 1994, and

71 Other governments have, from time to time, entered similar language in investment treaties or the investment provisions of free trade agreements. For example, in the US-Chile Free Trade Agreement, Chile stipulates that the National Treatment obligation will not preclude Chile's "right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities." See Annex 2, Page 6, of the US-Chile FTA, available on-line at: http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file635_4025.pdf

72 See for example, the terms of treaties with Italy, Belgium-Luxembourg, Finland, Switzerland, Greece, France, Sweden, and the United Kingdom

73 For an argument as to the applicability of international human rights law to investment treaty arbitration see: Luke Eric Peterson with Kevin R. Gray, "International Human rights in Bilateral Investment Treaties and in Investment Treaty Arbitration", International Institute for Sustainable Development, 2003, at: <http://www.iisd.org/publications/publication.asp?pno=577>; See also Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations in International Investment Law", draft paper prepared for International Law Association Committee on International Law of Foreign Investment, March 31, 2006, available on-line at: <http://www.ila-hq.org/pdf/Foreign%20Investment/Hirsch%20Interactions.pdf>

ratified it on Human Rights Day, December 10th, 1998. Thus, it might be argued by the South African Government that the proper interpretation of its National Treatment obligations under international investment treaties will be one which strives for harmony with the country's other international obligations – including under human rights treaties which were concluded contemporaneously with these investment treaties.

For example, international human rights law may expressly contemplate certain affirmative action measures when such measures are in furtherance of the right to equality. The UN Human Rights Committee, the body which monitors the ICCPR has observed that:

“... the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions, which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”⁷⁴

Second, any foreign investor arguing that they have been denied national treatment, may need to demonstrate that they are “in like circumstances” to South African nationals – a test which will require that the tribunal identify the appropriate “domestic comparators”.

The SA Government might argue that the appropriate domestic comparators, for purposes of measuring the treatment meted out to foreign-owned investments, will be other local investments owned by South Africans who do not hail from historically-disadvantaged groups. In other words, the argument would be that foreign owners are not “in like circumstances” with HDSA business owners, but are more appropriately compared to *non*-HDSA South African business owners.

In an early arbitration under the North American Free Trade Agreement, the presiding tribunal allowed that “(t)he assessment of ‘like circumstances’ must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.”⁷⁵ To this end, the South African Government might adduce specific arguments to buttress its view that HDSAs and foreigners cannot be viewed as being in similar circumstances; this analysis might include reference to peculiar challenges which HDSAs have faced historically, and those which they may continue to face in engaging in business activity (for e.g. greater difficulty in accessing credit, lingering discrimination in the marketplace, etc.).

It might be argued by SA that the proper interpretation of its National Treatment obligations will be one which strives for harmony with the country's other international obligations – including under human rights treaties.

Foreign-owners are not “in like circumstances” with HDSA business owners, but are more appropriately compared to *non*-HDSA South African business owners.

⁷⁴ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), at para. 10.

⁷⁵ S.D. Myers Inc. v. Government of Canada, UNCITRAL Arbitration, Partial Award of Nov.13, 2000, at Para 250, available on-line at: <http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>

Ultimately, however, it must be reiterated that no arbitral tribunal is known to have grappled with the question as to how to reconcile a state's affirmative action policies with its investment treaty obligations – even if there is a strong likelihood that such a claim will arise in the South African context. While the above discussion identifies some key considerations, a complete analysis of this issue is beyond the scope of this paper – particularly as no detailed dispute fact-pattern has yet come to light.⁷⁶

7.3.2 Preferences for local industries

Apart from concerns about the compatibility of BEE measures with the National Treatment obligation, other preferential governmental policies or schemes might find themselves in the crosshairs of foreign investors. For instance, preferential subsidies, grants or other forms of special treatment provided to local cultural industries, such as film or television production, might be construed by foreign-owned enterprises as providing more favourable treatment to locals, contrary to SA's investment treaty obligations.

Recently, South Africa's film industry has boasted several notable international successes, including an Academy Award-winning production, and one which garnered the Grand Prize at the Berlin Film Festival.⁷⁷ Yet, efforts by the state to nurture its film sector or other cultural industries, through special policies, incentives or quotas, could encounter opposition from foreign-owned players operating in South Africa. For example, the US Government, at the behest of the powerful Motion Picture Association of America (MPAA), has targeted government-imposed quotas requiring the screening of a certain percentage of indigenous films in local cinemas. Such domestic-content quotas are used in many jurisdictions so as to ensure cultural diversity in television, radio or cinema programming.⁷⁸

Lest policy tools such as subsidies, incentives or quotas be construed as violating the National Treatment undertaking in investment treaties, some governments expressly exempt certain of these policy tools from the disciplines of their investment treaties.

Lest policy tools such as subsidies, incentives or quotas be construed as violating the National Treatment undertaking in investment treaties, some governments expressly exempt certain of these policy tools from the disciplines of their investment treaties.⁷⁹ In so doing, they preserve the ability of government to provide more favourable treatment to emerging local industries – be they cultural industries or other infant industries. At least one government has carved all cultural industries (film, television, music, radio, and publishing) out of its investment treaties, so as to preserve the ability of the state to maintain preferential cultural policies and programmes.⁸⁰ The South African Government, however, has not made it a practice to address such issues in its investment treaties, a decision which could have policy repercussions if foreign companies were to allege that they have received less favourable treatment than locals.

⁷⁶ The present author is developing a separate manuscript which treats this scenario in greater detail.

⁷⁷ "More Recognition for local films", *Business Day*, April 8, 2006; "The Challenges Facing African Filmmakers", By Vinita Bharadwaj, *Gulf News*, Dec.29, 2005; "South Africa makes its mark on the big screen", Florence Panoussian, *Agence France Presse*, Feb.26, 2005

⁷⁸ Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World*, Douglas & McIntyre, 2004, at pp. 195-196

⁷⁹ Such exceptions may differ in their specifics and scope. Under the UK investment treaty with Morocco, the national treatment obligation does not apply to „any government aids reserved for its own nationals in the context of national development programmes and activities.“ The UK treaty with Jamaica permits the use of so-called special incentives to stimulate the creation of local industries, provided that they do not significantly affect investments by foreigners.

⁸⁰ As a rule Canada, exempts cultural industries from its investment treaties. See for example, Article VI (3) of the Canada-SA BIT which has never entered into force. Available on-line at: http://www.unctad.org/sections/dite/ia/docs/bits/canada_southafrica.pdf

7.4 “Full Protection and Security” and “Fair and Equitable Treatment”

In addition to *relative* standards of treatment (such as national treatment or most favored national treatment) which are measured against treatment provided to locals, investment treaties also provide so-called *absolute* standards of treatment, such as those found in Article 3 of the SA-Netherlands investment treaty. That article sets forth certain minimum obligations to provide “fair and equitable treatment” as well as “full physical security and protection”. In addition, the SA-Netherlands treaty prohibits governments from impairing the operation or enjoyment of investments through unreasonable or discriminatory measures.

While the “fair and equitable treatment” obligation holds the host state to standards of fairness and equity, these are not defined further in the treaty. What is clear is that the standards are not rooted in the domestic standards of the host state, but rather in international law. In recent years, a number of tribunals have offered interpretations of this treaty standard, thereby identifying various meanings which might be given to the standard; these include: requirements to provide due process, transparency, good faith, and an obligation of vigilance or due diligence in protecting foreign investments.⁸¹ The last of these concepts is closely intertwined with the aforementioned obligation to provide protection and security to foreign investments.⁸²

In practice, many investment treaty arbitrations are hinging upon claims that host governments have breached the “fair and equitable treatment” standard – making it one of the most important obligations contained in these treaties. For example, in a number of cases where tribunals have ruled that government measures do not amount to an expropriation of a foreign investment, they have found, nevertheless, that the same measures may breach the “fair and equitable treatment” obligation, thus triggering liability under the international treaty and a duty to pay compensation.

In particular, it should be noted that the earlier-discussed concerns raised by the Italian Government, in relation to BEE obligations in the mining sector, included arguments that certain BEE measures might violate the terms of the Italy-SA investment treaty. In an Aide Memoire seen by the author, the Italian Embassy warned the RSA that “Under Article 2(3), the (MPRDA) does not ensure ‘just and fair’ treatment of the investments of Italian investors in South Africa, as a result of the Act’s preference, through its social upliftment objectives and the mining charter, of ownership of mining investments by historically disadvantaged individuals (‘HDSAs’)”. This argument is not elaborated further, but it highlights another treaty provision which might be expected to come to the fore in any future arbitrations against the RSA.

In practice, many investment treaty arbitrations are hinging upon claims that host governments have breached the “fair and equitable treatment” standard – making it one of the most important obligations contained in these treaties.

⁸¹ OECD, “Fair and Equitable Standard in International Investment Law”, Working Papers on International Investment, Number 2004/3, September 2004, p.26

⁸² *Ibid.*, pp.26-28

Governments would need to ensure that their own instrumentalities do not breach the security of an investment, and that, furthermore, private citizens do not interfere with the property rights of foreign investors.

As for the companion obligation to provide “full protection and security”, arbitrations to date, have not illuminated the full demands placed on host states by this obligation. However, current rulings do highlight the potential for states to be found in violation of the obligation where they fail to act with sufficient vigor, including to curtail interference against a foreign investor by government regulators, administrative authorities, or security forces.⁸³ Furthermore, the obligation appears to extend to “private as well as public action”, with one author commenting that the clause “requires that the host country should exercise reasonable care to protect investment against injury by private parties.”⁸⁴ In practical terms, governments would need to ensure that their own instrumentalities do not breach the security of an investment, and that, furthermore, private citizens do not interfere with the property rights of foreign investors (for e.g. vandalism, land invasion, etc.).

Ultimately, it remains for tribunals to determine on the facts of a given dispute whether the host government has lived up to these obligations to provide “fair and equitable treatment” or “full protection and security”. A question which looms particularly large is whether tribunals will consider the *level* of development of the host state when interpreting the meaning of these absolute treaty standards. In a preliminary answer to this question, arbitration lawyer Nick Gallus suggests that “(a) series of recent arbitral decisions interpreting investment treaties have come to conflicting conclusions on the effect of the level of development of the host country on the standard of protection that foreign investors can expect.”⁸⁵ Gallus writes that a number of tribunals have taken into account the status and circumstances of the host governments, in giving meaning to such treaty obligations. At the same time, however, at least one arbitral tribunal has expressly cautioned against lowering treaty standards where less-developed governments are concerned.⁸⁶

On the latter reading, treaty provisions such as full protection and security could impose sizable obligations on poorer countries when it comes to living up to the open-ended treaty language. For example, treaty obligations to provide police protection and security to foreign investments may necessitate significant financial and budgetary commitments on the part of host governments. In a context where public finances are strained by myriad demands, including those relating to health, housing, education, prevention of crime, and other social priorities, questions might be asked about the decision to accord high levels of police protections to the property of foreign investors. Even in a context where foreign investment is desired – and forms a key part of a Government’s economic strategy – there is no clear evidence to suggest whether foreign investment would be deterred by a decision on the part of SA to commit to lower standards of treaty protection (for e.g. ones which are more in harmony with those provided to local citizens for their

83 Asian Agricultural Property Ltd v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award of June 27, 1990; American Manufacturing & Trading v. Republic of Zaire, ICSID Case No. ARB/93/1, Award of February 21, 1997; CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL arbitration proceedings, Partial Award of Sept. 13, 2001

84 UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, UN, Geneva and New York, 1998, at pg. 55

85 Gallus pg. 712

86 As quoted in Gallus at pg. 721

persons and property). Indeed, economists differ even as to whether investment treaties bring enhanced FDI flows to the governments which conclude them.⁸⁷

Uncertainty as to the practical and financial implications of treaty undertakings to provide fair and equitable treatment and full protection and security, are not merely of hypothetical concern. During research for this briefing paper, the author uncovered evidence that the RSA has already faced at least one BIT arbitration, where a foreign investor successfully held the RSA liable for breach of the treaty guarantee to provide “protection and security”. As was alluded to earlier, this arbitration was mounted in April of 2001, by an unnamed Swiss national who alleged breaches of the Switzerland-RSA investment protection treaty. Most intriguing, there are unconfirmed reports that the presiding tribunal did interpret South Africa’s treaty obligations in light of the country’s *level* of development. However, the tribunal’s award – and hence its detailed reasoning – have yet to be released to the public. (See Figure 2)

Figure 2

South Africa’s First (Known) Arbitration Experience Under an Investment Treaty

A Swiss private citizen launched an arbitration claim against South Africa in 2001 under the terms of the Switzerland-RSA investment treaty.

During the Apartheid period, the Swiss investor had acquired a private game lodge and farm in Northeastern South Africa.

The investor made improvements to the property, however the property was allegedly plagued by vandalism, theft and poaching.

Following the alleged total destruction of the property in the late 1990s, the claimants turned to international arbitration under the Swiss-South African treaty.

In 2003, the presiding tribunal rendered an award on liability, holding the RSA to have breached the treaty obligation to provide “protection and security” to Swiss investors.

Unconfirmed reports indicate that the tribunal took into account the state of development in South Africa, in the course of determining what *level* of “protection and security” was owed to foreign investors.

The RSA reportedly executed the terms of the award in early 2005, but has yet to publicize the existence of this arbitration proceeding; nor has the arbitral award in the case been released to public scrutiny. As such, information about the case remains

⁸⁷ See Aaron Cosby’s review of the various studies which have looked at this question, in *International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals*, IISD, Winnipeg, 2005, at pp.8-10

In particular, greater clarity is needed as to the *level* of protection owed to foreign investors, and to what extent South Africa's *level* of development and resources will be taken into account by tribunals.

Given that SA's treaty obligations clearly harbour binding legal and financial consequences, there is a need for more clarity as to the concrete obligations which flow from these treaties, and to assess whether the SA Government is in a position to meet such obligations vis a vis foreign investors – and at what cost and consequence for government spending and financial resource allocation. In particular, greater clarity is needed as to the *level* of protection owed to foreign investors, and to what extent South Africa's *level* of development and resources will be taken into account by tribunals called upon to arbitrate alleged treaty breaches. While there are unconfirmed reports that the above-mentioned arbitration between the unnamed Swiss national and the RSA considered the state of development of South Africa in the course of interpreting what obligations were owed by South Africa in the realm of “protection and security”, detailed information about this arbitration has yet to be made public. As such the tribunal's approach is not open to scrutiny.

8 Policy Options

Having canvassed several of the procedural and substantive features of SA's investment treaties, it is clear that these *international* agreements have the potential to reach behind the border, and to impact upon *domestic* policy. At the same time, the agreements may catapult adjudication of disputes outside of the domestic legal system. These impacts are not unique to South Africa. As noted, most governments have concluded large numbers of these treaties, and are learning that the treaties may have significant policy implications. Some governments have had occasion to reflect upon the nature and extent of their treaty obligations (many of which may have been negotiated by earlier governments) and to question whether these agreements provide an appropriate framework for governing foreign investments, or whether changes and revisions may be desirable.

Governments, including Canada and the United States, have sought to revise negotiating templates for investment treaties, so as to ensure that new agreements provide narrower protections for investors – thus ensuring greater freedom for governments to regulate in certain circumstances, without fear of investment treaty lawsuit.⁸⁸ While the treaties pursued by these governments continue to offer high levels of protection, they have been tightened in key respects, including through the insertion of express language which safeguards the right of governments to regulate for public welfare reasons (including health, environment, etc.).

For its part, South Africa faces a similar learning curve in the months and years to come. The legal and business community are increasingly aware of the protections available under investment treaties, and increasingly inclined to invoke those rights in the face of undesirable government initiatives or proposals. Accordingly, the Republic of South Africa may wish to review its stance towards investment treaties, so as to ensure that they are in harmony with the country's broader social and economic priorities. In particular, further legal analysis is necessary to determine the extent of the Republic's vulnerability to successful claims for breach of its treaty obligations.

8.1 Playing Effective Defence

At the same time as the SA Government should give greater scrutiny to its treaty liabilities, there is a second series of actions which might be pursued. These are largely defensive in nature, and relate to the inevitable need to defend against

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⁸⁸ The 2004 US Model BIT is available here: <http://www.state.gov/documents/organization/38710.pdf>; the 2004 Canadian Model BIT is available here: <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf>

arbitration claims which are lodged under existing treaties. At present, the Government does not appear to disclose information about claims which are put to arbitration. A number of governments appear to follow such a practice, believing that publicity surrounding such claims will merely encourage “imitation” claims by others, and contribute to the perception that the country is unfriendly to foreign investment. However, these perceptions are misplaced.

The reality is that the legal community is increasingly well versed in investment treaty litigation, and it is increasingly common for the arbitration bar to counsel the use of such agreements by foreign investors wherever possible.⁸⁹

Regardless of efforts by governments to keep a lid on the existence of investment arbitration claims, there may be rumours within the legal community about such cases, and law firms representing foreign investors will be cognizant of the opportunities presented by these treaties. In addition, the perception that a country’s reputation will suffer as a result of its facing such arbitrations, is an antedated one. At last count, more than 60 Governments in the developed and developing world had faced at least one such case, and it is entirely likely that a much larger number will face such arbitrations in the coming years.⁹⁰ As this form of international litigation increases in popularity, no longer is the mere existence of a foreign investor lawsuit against a host government to be interpreted as a warning sign. It will be much more relevant to know what is at the root of a given legal dispute. A capricious seizure or destruction of property without compensation may reflect negatively on a government’s reputation, while investor lawsuits against public welfare laws or measures may reflect more poorly on the claimant, than upon the respondent.

On occasion, foreign investors have abandoned particularly controversial investment arbitrations against developing countries, due to withering public and media scrutiny.

Indeed, there may be strategic benefits from greater transparency by governments in this realm. On occasion, foreign investors have abandoned particularly controversial investment arbitrations against developing countries, thanks to withering public and media scrutiny.⁹¹ Furthermore, governments who are forthcoming about investment disputes which are being arbitrated may contribute to greater global understanding of what may be at stake in this emerging area of international law. Such information is valuable not only to researchers, academics and practitioners, but also to other governments facing similar challenges.

At times, greater transparency has led to efforts by non-parties to intervene as *amicus curiae* (friends of the court) in arbitrations which deal with important issues of public policy. In a recent arbitration between the multinational water services company Suez and the Argentine Republic, the presiding tribunal ruled that *amicus curiae* interventions by NGOs and legal experts might be permitted, so as to furnish the tribunal with arguments and perspectives which might not be presented by the two parties to the arbitration. In so doing, the tribunal acknowledged that the dispute related to the water and sewage systems used by

⁸⁹ See for example publicity materials prepared by the law firm Freshfields for education of foreign investors in Venezuela and Argentina at: <http://www.freshfields.com/practice/finance/publications/pdfs/11587.pdf> and <http://www.freshfields.com/practice/corporate/publications/pdfs/2431.pdf>

⁹⁰ UNCTAD, “Latest Developments in Investor-State Dispute Settlement”, IIA Monitor, No.4, 2005, at pg. 3, available on-line at: http://www.unctad.org/en/docs/webiteit20052_en.pdf

⁹¹ See for example, Nick Mathiason, „Big Food Does Big U-Turn“, The Observer (London), March 23, 2003

hundreds of thousands of Argentines, “and as a result may raise a variety of complex public and international law questions, including human rights considerations.”⁹²

In choosing how to defend against such claims, it is also important for governments to retain relevant legal expertise, both in terms of representation, and in terms of those who are put forward to sit on the arbitral tribunal. If a dispute implicates matters of human rights or developmental issues, a government should seek out relevant expertise rather than leave such disputes in the hands of primarily-commercial practitioners.

8.2 Minimizing Future Liabilities

Demands for the conclusion of additional treaty-based investment rules are unlikely to recede. Indeed, demandeurs include not only foreign governments, but SA’s own business community, who seek protection for their outward-bound investments, particularly those in other African countries. In addition, SA is under pressure to make further investment commitments as part of trade negotiations with key partners. Acceptance of treaty-based investment rules may be a negotiating quid pro quo in return for enhanced market access for South African exports, in negotiations with the US, China, India or other markets.

Ultimately, some level of international investor protection may be unavoidable – as a supplement to protections found in domestic law – however, there is a concomitant need to make a clear-eyed assessment of the costs and benefits of such international commitments. To this end, South Africa should review its investment treaty negotiating practices, with an eye to developing a template which is consonant with its development needs, and consistent with its human rights obligations. Early agreements which follow the OECD negotiating template display few of the exceptions and safeguards which may be necessary to take a more balanced approach to investor protection and state regulatory power. Indeed, an internal SA government working group has been launched to discuss such issues. Already, several of the most recent treaties concluded by South Africa display signs of an evolving negotiating approach. For example, the SA-Israel BIT includes the following features:

- Allows governments to derogate temporarily from the requirement to permit free transfer of investment-related funds in the case of Balance-of-Payments difficulties.
- Limits use of the investor-state dispute settlement mechanism to cases involving the alleged breach of the treaty protections, rather than to broader types of investment disputes (e.g. pure contractual disputes) which may arise between a foreigner and a government.

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⁹² Order in Response to a Petition for Participation as Amicus Curiae, in the proceedings between Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.v. The Argentine Republic, ICSID Case No. ARB/03/17, March 17, 2006, at para 18, available on-line at: <http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf>

- Decrees that most-favored nation treatment does not entitle foreign investors to reach into other treaties signed by South Africa prior to June 2003 in search of more favorable treaty rights. This prevents investors from circumventing treaty reforms by laying claim to more favorable protections contained in older (unrevised) investment treaties signed by SA.
- Includes a provision which allows for differential treatment under domestic legislation, without limiting such differential treatment to instances where governments are providing special treatment to previously disadvantaged persons.

In addition to the innovations found in the SA-Israel BIT, other changes might be explored. These may include:

- Changes to treaty preambles so as to clarify that the parties wish to protect foreign property rights not for their own sake – and on a pedestal above all other human rights – but rather to accord protection to foreign investment because it can serve other fundamental goals of South African society (including economic development and social transformation). Where governments clarify the “object and purpose” of a treaty, arbitral tribunals might be less likely to adopt a narrow property-rights-focused approach to treaty interpretation in cases of dispute over interpretation.
- Clarification as to the standing of other international law obligations, including international human rights law obligations; a statement as to governments’ duty to respect and fulfil those obligations; and some clarification as to what legal tests might be used to reconcile competing international obligations of a state.⁹³
- Language which clarifies what constitutes “full protection and security” or “fair and equitable treatment” in the context of a developing state which faces many important public policy and financial challenges.
- Greater transparency, both with respect to disclosure of claims which are submitted to arbitration, and in the conduct of the arbitral proceedings themselves.
- Exemptions for sensitive or emerging industries, such as cultural industries, so that the state retains the prerogative to offer special incentives or privileges to nurture such industries, according to its development objectives.

In addition to changes to the negotiating template, the Republic of South Africa should explore whether greater domestic scrutiny of new treaties can be brought to bear so as to ensure the compatibility of treaty obligations with SA law and other international obligations.⁹⁴ This scrutiny might come through greater Parliamentary oversight or through the tri-partite National Economic Development & Labour Council (NEDLAC) which facilitates social dialogue on economic issues. Meanwhile, at the international level, the SA Government might draw upon the growing expertise of other governments which have had more experience in dealing with investment treaty arbitrations.

⁹³ See the exploration of some of these challenges in Moshe Hirsch, *op.cit.*, 2006

⁹⁴ Presently, BITs are evaluated by the SA Departments of Justice and Foreign Affairs, for conformity with constitutional and international obligations respectively, however this review does not appear to be an extensive one, encompassing an analysis of the emerging case-law on investment treaty arbitration, and the policy consequences which may flow therefrom.

For decades, investment treaties were concluded with little discussion or scrutiny. At a May 2006 workshop convened in Pretoria to discuss a draft of this paper, one of the main themes of the ensuing discussion was a sense that governments have tended to give desultory attention to the terms of *investment treaties* – viewing them as largely political or technical documents – at the same time that they have agonized over decisions to enter into international *trade* agreements.

However, over the last several years lawsuits under such investment treaties have proliferated at the global level. Similarly, there are increasingly sophisticated efforts to “route” investments via third-countries so as to ensure that FDI flows enjoy the highest possible level of legal protection. In such an era, it behooves every government which has concluded such agreements (including those governments whose outward investors stand to benefit from higher levels of protection) to acquaint themselves with the terms of these long-neglected treaties, and to anticipate the legal and policy implications which such agreements may harbour for internal policy-making.

Investment treaties can be a double-edged sword, providing protection for a country’s outward investors, but also impacting on that country in its role as host to (other) foreign investors. In a context where such treaties are proliferating at the international level, and in increasing demand by multinational investors, the policy challenge for governments is to forge a sword which is sharp enough to provide some baseline protection for foreign investment, while ensuring that the instrument is delicate enough so as not to impact negatively upon important government prerogatives such as human rights policies or public welfare measures.

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