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SOUTH AFRICA REVOLUTIONIZING FOREIGN INVESTMENT PROTECTION SYSTEM

By
Jennifer Reed*

I. INTRODUCTION

The South African Department of Trade and Industry (“DTI”) released a draft of the Promotion and Protection of Investment Bill (“PPI Bill”) for public comment on November 1, 2013.¹ DTI released the PPI Bill after conducting a review of South Africa’s bilateral investment treaties (“BITs”); following the review, the South African government began terminating many of its BITs.² The PPI Bill, if passed, will regulate investments in place of BITs.³

South Africa’s PPI Bill emerges amidst escalating tension between South Africa’s domestic policies and foreign investors. BITs between South Africa and foreign countries provide protection for foreign investors while constraining the South African government’s ability to pursue public policy initiatives, such as affirmative action initiatives. The PPI Bill provides less protection for foreign investors, especially concerning protections from government takings and recourse to international arbitration for resolution of state-investor conflicts. However, South Africa’s PPI Bill transforms the country’s foreign direct investment (FDI) regulation, reflecting a broader trend in the world of international investment for developing countries to assert their own interests in FDI relations and resist international arbitration.

II. CONTEXT FOR PPI BILL

A. *South Africa’s Post-Apartheid Approach to FDI*

The PPI Bill must be considered in the context of South Africa’s unique history and the larger ideological tension between its post-apartheid domestic policies and its obligations to foreign investors. In 1948, South Africa institutionalized apartheid,

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¹ Matthew Weiniger, Gitta Satryani, & Hannah Ambrose, *Dawn of a new era of investment protection in South Africa – draft investment law to replace protections offered under investment treaties published for public comment*, ARBITRATION NOTES, <http://hsfnotes.com/arbitration/2013/11/14/dawn-of-a-new-era-for-investment-protection-in-south-africa-draft-investment-law-to-replace-protections-offered-under-investment-treaties-published-for-public-comment> (DTI received comments on the PPI bill through January 31, 2014).

² Weiniger, *supra* note 1.

³ *Id.*

formally creating two disparate economies and societies within the state.⁴ In protest, the international community imposed trade sanctions and investment boycotts on South Africa beginning in the mid-1970s and continuing into the early 1990s.⁵ Since the end of apartheid in 1994, the South African government has sought to reverse the effects of the apartheid era on its citizens and its economy through legislative policies like Black Economic Empowerment (“BEE”) and expanding FDI.

1. Post-Apartheid Expansion of FDI

In the post-apartheid era, South Africa’s government sought to expand FDI.⁶ The era of apartheid resulted in international isolation and economic sanctions against South Africa, and the post-apartheid government sought to benefit from renewed FDI. FDI can benefit host states by creating new jobs and capital for investments, and by increasing access to technology, professional knowledge, and profitable export markets.⁷

One of the government’s principal means of promoting FDI was through BITs.⁸ In 1994, South Africa’s first post-apartheid government began entering into a number of BITs to promote FDI and mitigate domestic poverty and unemployment.⁹ Common features of South Africa’s BITs include an agreement to “encourage and create favourable conditions for investment,” fair and equitable treatment (“FET”) of investments, “full market value compensation for expropriated investments”, and “compulsory international arbitration for investor-state disputes”.¹⁰

⁴ Hunter R. Clark & Amy Bogran, *Foreign Direct Investment in South Africa*, 27 DENV. J. INT’L L. & POL’Y 337, 341 (1999).

⁵ Clark & Bogran, *supra* note 4, at 344.

⁶ Clark & Bogran, *supra* note 4, at 337.

⁷ *Id.*

⁸ See Matthew Coleman & Kevin Williams, *South Africa’s Bilateral Investment Treaties, Black Economic Empowerment and Mining: A Fragmented Meeting?*, 9 BUS. L. INT’L 56, 57-59 (2008) (discussing the ideological conflicts between international investment law and domestic human rights policies).

⁹ Peter Samuel Guy Leon & Webber Wentzel Bowens, *The Impact of Bilateral Investment Treaties on Mineral Law Reform in Resource-Based Developing Economies: A South African Case Study*, ROCKY MOUNTAIN MINERAL LAW FOUNDATION (2005) (listing BITs entered into by South Africa from 1994-2002).

¹⁰ Leon & Bowens, *supra* note 9.

2. *Black Economic Empowerment and the Mineral and Petroleum Resources Development Act*

The Mineral and Petroleum Resources Development Act (“MPRDA”), represents an important piece of South Africa’s post-apartheid public policies and effectively turns over all of the country’s mineral resources to the state.¹¹ The MPRDA is a key legislative act in the BEE strategy.¹² The MPRDA regulates South Africa’s mineral and oil wealth, one of the country’s most important industries and one of the most attractive investment opportunities for FDI. South Africa is a mineral rich nation that is a leading producer and exporter of gold, as well as coal, chrome, copper, diamonds, iron, manganese, nickel, silver, and uranium.¹³

In May 2004, the MPRDA established a new system of mineral regulation where mining companies hold a “limited real right in land;” this limited right allows mining companies to prospect or mine minerals subject to royalties.¹⁴ Mining companies must demonstrate in their applications for prospecting or mining rights how they will “further the expansion of opportunities for historically disadvantaged persons and promote social and economic welfare.”¹⁵ The MPRDA essentially terminated private mineral rights and gave custodianship of all of South Africa’s mineral resources in the state.¹⁶

B. Challenging South Africa’s Mineral and Petroleum Resources Development Act

When the MPRDA went into effect in 2004, private enterprises with previous holdings in mineral rights were allowed to apply for licenses. However, these licenses did not provide the full rights to private enterprises that had been available before the

¹¹ Matthew Coleman & Kevin Williams, *South Africa’s Bilateral Investment Treaties, Black Economic Empowerment and Mining: A Fragmented Meeting?*, 9 BUS. L. INT’L 56, 57-67 (2008):

Broad-based black economic empowerment’ is defined in section 1 of the Broad-Based Black Economic Empowerment Act No 53 of 2003 (the ‘BEE Act’) to mean:

‘[T]he economic empowerment of all black people [Africans, Coloureds and Indians] ... through diverse but integrated socio-economic strategies that include, but are not limited to--

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of the enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; . . .
- (e) preferential procurement . . .

¹² Coleman & Williams *supra* note 6, at 57.

¹³ Clark & Bogran, *supra* note 4, at 338.

¹⁴ Coleman & Williams, *supra* note 11, at 66-68.

¹⁵ Coleman & Williams, *supra* note 11, at 66.

¹⁶ Leon & Bowens, *supra* note 9.

MPRDA; for example, the MPRDA licenses were limited to five-year durations.¹⁷ In *Piero Foresti v. Republic of South Africa*, investors from Luxembourg and Italy filed a suit with the International Convention for the Settlement of Investment Disputes (ICSID), arguing that South Africa's MPRDA expropriated their mineral rights.¹⁸ The investors in *Piero* argued that the MPRDA violated the FET and national treatment provisions of the BIT with Belgium and Luxembourg (the "Benelux BIT") by treating foreign investors and investments less favorably than investments from Historically Disadvantaged South Africans (HDSA).¹⁹ The case settled outside of ICSID, but following the contentious dispute, South Africa terminated its Benelux BIT.²⁰

After the parties settled in *Piero Foresti*, the South African government began a review of its "first generation" BITs.²¹ The government had become concerned that BITs had the potential to limit its ability to carry out its "constitutional-based transformation agenda," and conducted the review in conjunction with a policy favoring termination.²² The South African government also terminated its BITs with Spain, Germany and

¹⁷ Andrew Friedman, *Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South*, 7 B.Y.U. INT'L. & MGMT. REV. 37, 42 (2010).

¹⁸ Nicholas Peacock & Hanna Ambrose, *South Africa terminates its bilateral investment treaty with Spain: Second BIT terminated, as part of South Africa's planned review of its investment treaties*, ARBITRATION NOTES (Aug. 21, 2013, 2:24 PM), <http://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties>; see also Marianne W. Chow, *Discriminatory Equality v. Nondiscriminatory Inequality: The Legitimacy of South Africa's Affirmative Action Policies Under International Law*, 24 CONN. J. INT'L L. 291, 292, 333 (2009) (South Africa never became a signatory to the ICSID Convention, and therefore the *Piero Foresti* case proceeded against South Africa under the Additional Facility Rules).

¹⁹ Marianne W. Chow, *Discriminatory Equality v. Nondiscriminatory Inequality: The Legitimacy of South Africa's Affirmative Action Policies Under International Law*, 24 CONN. J. INT'L L. 291, 292, 300-301 (2009) (discussing historic principles of BITs; the national treatment principle requires a host country to treat foreign investors no less favorably than domestic investors); See also Friedman, *supra* note 17, at 41 (one of the most controversial provisions of the MPRDA mandates 26% ownership stake by HDSA in mineral exploitation).

²⁰ Nicholas Peacock & Hanna Ambrose, *South Africa terminates its bilateral investment treaty with Spain: Second BIT terminated, as part of South Africa's planned review of its investment treaties*, ARBITRATION NOTES (Aug. 21, 2013, 2:24 PM), <http://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties>; see also *Procedural Details: Piero Foresti, Laura de Carli and others v. Republic of South Africa*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C90&actionVal=viewCase> (for procedural history of the ICSID case filed by investors from Italy and Luxembourg against the government of South Africa).

²¹ Peacock & Ambrose, *supra* note 20 (First generation BITs refer to BITs entered into by the South African government shortly after apartheid ended).

²² Peacock & Ambrose, *supra* note 20.

Switzerland.²³ The government has indicated that it will terminate its remaining BITs with European states and will discuss termination regarding other BITs.²⁴

III. THE PPI BILL

The PPI Bill provides fewer protections for foreign investors by containing an ambiguous definition of “investment,” lacking an FET provision, narrowing the definition of expropriation, and excluding disputes from international arbitration.²⁵ Seeking to reconcile the two interests represented in *Piero Foresti*, the PPI Bill’s establishes FDI regulations “consistent with public interest and a balance between the rights and obligations of investors.”²⁶ The dispute in *Piero Foresti* arose because South Africa’s domestic legislation promoting the public interest in empowering HDSA conflicted with obligations to foreign investors by way of a BIT.

Despite the PPI Bill’s stated goal of balancing the public interest and investor rights, several provisions contained within the PPI Bill pose potential issues for the future of FDI in South Africa. First, the definition of “investment” is ambiguous.²⁷ The definition is qualified by the phrases, “relates to a material economic investment,” and “significant or underlying physical presence in the Republic, such as operational facilities.”²⁸ These phrases seem to indicate that the South African government has certain thresholds for the physicality or materiality of an economic investment, but nowhere are these thresholds further articulated.²⁹ Second, the PPI Bill does not contain an FET provision, which are standard in BITs. FET provisions typically allow investors to sue the governments of host states for government actions which discriminate against foreign investors.³⁰ Third, the PPI Bill contains a much narrower definition of

²³ Weiniger, Satryani, & Ambrose, *supra* note 1 (These BITs will remain in effect for sunset periods varying from 10 to 20 years following the South Africa’s notice of termination).

²⁴ Sean Woolfrey, *South Africa Overhauls its Investment Treaty Regime*, MADHYAM BRIEFING PAPER, 1 (2013).

²⁵ Weiniger, Satryani, & Ambrose, *supra* note 1 (discussing four key provisions: (1) Definition of an “investment”; (2) Absence of a fair and equitable treatment provision; (3) Definition of “expropriation” and new principles of compensation for expropriation; (4) Dispute resolution mechanism).

²⁶ DEPARTMENT OF TRADE AND INDUSTRY, PROMOTION AND PROTECTION OF INVESTMENT BILL (2013), available at <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf>.

²⁷ See Weiniger, Satryani, & Ambrose, *supra* note 1.

²⁸ See DEPARTMENT OF TRADE AND INDUSTRY, PROMOTION AND PROTECTION OF INVESTMENT BILL (2013), available at <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf>.

²⁹ Weiniger, Satryani, & Ambrose, *supra* note 1.

³⁰ *Id.*

expropriation than the definitions typically contained in BITs.³¹ Furthermore, in the case of expropriation, the PPI Bill does not guarantee an investor full market value compensation.³²

Finally, the PPI Bill does not appear to allow investors recourse to international arbitration to resolve investment disputes.³³ According to the provisions of the bill, investors may seek resolution through Department of Trade and Industry (DTI)-facilitated mediation, the court system, or arbitration under South Africa's Arbitration Act of 1965.³⁴ The bill's language on the subject of state-investor disputes poses several ambiguities. It is unclear whether the bill is meant to replace only the rights guaranteed to investors through BITs or whether the bill also applies to rights guaranteed to investors through contract.³⁵ The PPI Bill also does not clarify an investor's right to commence arbitration against the government. In contrast, most BITs provide recourse to international arbitration for resolution for investor-state disputes.³⁶ Furthermore, the PPI Bill is unclear on whether arbitration will be limited to South Africa, and whether only South African courts may resolve investment disputes.³⁷ The South African government may address these ambiguities in the final draft of the bill. The government has stated, however, that the PPI Bill contains "more than enough clarity, transparency, and certainty around the domestic investment regime."³⁸

³¹ Weiniger, Satryani, & Ambrose, *supra* note 1; Black's Law Dictionary defines expropriation as "A governmental taking or modification of an individual's property rights, esp. by eminent domain."

³² Weiniger, Satryani, & Ambrose, *supra* note 1.

³³ See Jana Marais, *Diplomats Break Silence on Investment Bill*, BUSINESS DAY LIVE (March 9, 2014), <http://www.bdlive.co.za/business/2014/03/09/diplomats-break-silence-on-investment-bill>; see also Weiniger, Satryani, & Ambrose, *supra* note 1; Relevant section provides:

- (1) A foreign investor that has a dispute in respect of action taken by the Government of the Republic or any organ of State, which action affected an investment of such foreign investor, may request the Department or any other competent authority to facilitate the resolution of such dispute by appointing a mediator or other competent body.
- (2) The Minister must make regulations on the processes and procedures relating to the settlement of disputes contemplated in subsection (1).

³⁴ Weiniger, Satryani, & Ambrose, *supra* note 1.

³⁵ *Id.*

³⁶ See Mark Allix, *Investment Bill 'Adds to Uncertainty' in SA*, BUSINESS DAY LIVE (Feb. 18, 2014), <http://www.bdlive.co.za/business/trade/2014/02/18/investment-bill-adds-to-uncertainty-in-sa>.

³⁷ See Weiniger, Satryani, & Ambrose, *supra* note 1.

³⁸ See Natalie Greve, *Investment Bill Imposes No New Obligations on Investors – Davies*, ENGINEERING NEWS (Nov. 4, 2013), <http://www.engineeringnews.co.za/article/investment-bill-imposes-no-new-obligations-on-investors-davies-2013-11-04>.

IV. REACTIONS & RAMIFICATIONS

The PPI Bill has provoked strong reactions from investors and significant international actors. The legislation also represents current trends in FDI and international arbitration. Many critics are concerned that the PPI Bill does not provide levels of protection for foreign investors equal to the protections provided under South Africa's BITs.³⁹ The PPI Bill contains no FET provision, utilizes an ambiguous definition of "investment," narrows the definition of expropriation, and provides no recourse to international arbitration.⁴⁰

Investors value international arbitration for resolving investment disputes because they do not want to be limited to a host country's court system, which may be inefficient, non-transparent, and biased toward the host country.⁴¹ In contrast, international arbitration bodies are more likely to be biased toward investors' commercial interests.⁴² The PPI Bill does not address the provision in the Finance and Investment Protocol (FIP) of the Southern African Development Community which allows foreign investors who have invested in that region to resolve investment-related disputes through international arbitration.⁴³ The FIP, therefore, may allow foreign investors to take South Africa to international arbitration.⁴⁴

Critics also emphasize that termination of BITs makes South Africa a less attractive venue for FDI.⁴⁵ BITs are especially significant for small and medium-sized companies because of the protections they offer investors.⁴⁶ Furthermore, South Africa cannot afford to lose FDI, which dropped 24% in 2012 to \$4.6 billion, and now represents less than 1% of GDP.⁴⁷ South Africa's FDI trails behind comparable "emerging-market" states like Turkey, Chile and Malaysia.⁴⁸ The United Nations

³⁹ See Marais, *supra* note 33.

⁴⁰ Weiniger, Satryani, & Ambrose, *supra* note 1.

⁴¹ Woolfrey, *supra* note 24, at 3.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Jana Marais, *South Africa pays dearly after scrapping trade treaties*, BUSINESS DAY LIVE (July 21, 2013), <http://www.bdlive.co.za/business/trade/2013/07/21/south-africa-pays-dearly-after-scrapping-trade-treaties>.

⁴⁶ Nicholas Kotch and Razina Munshi, *Gordhan blames lawyers for 'unfounded' investor uncertainty*, BUSINESS DAY LIVE (Oct. 28, 2013), <http://www.bdlive.co.za/business/trade/2013/10/28/gordhan-blames-lawyers-for-unfounded-investment-uncertainty> (discussing how South Africa's goal of creating a "transparent and predictable investment environment" contrasts with private-sector lawyers' understanding of the PPI Bill).

⁴⁷ Marais, *supra* note 45.

⁴⁸ *Id.*

Conference on Trade and Development expects Nigeria's economy to surpass South Africa's as the biggest economy on the continent in the next two years.⁴⁹

The European Union has criticized South Africa's termination of its BITs with EU member states.⁵⁰ The EU is South Africa's largest trade and investment partner, and South Africa has 13 additional BITs with EU member states.⁵¹ The U.S. and the EU have become increasingly concerned as South Africa pursues closer relations with other BRICS (Brazil, Russia, India, China, South Africa) nations.⁵² The EU has attempted to pacify South Africa by relaxing major trade barriers for South African sugar and wine in European markets.⁵³

Proponents of the PPI bill emphasize the lack of evidence that BITs increase FDI and the government's legitimate concern that BITs inhibit its ability to enact positive public policy measures, especially measures related to public health, environmental protection, and social equality.⁵⁴ The PPI Bill allows the South African government broader powers to pass legislation in its national interest.⁵⁵ The BITs that will be replaced by the PPI bill frequently promote the interests and concerns of foreign investors over those of domestic investors and the South African government.⁵⁶ Proponents also point to the fact that there is little reliable evidence that BITs promote FDI or that corporations' decisions to invest in a state depend significantly on the availability of BIT protections.⁵⁷ Several countries including the US, Japan, Malaysia and India have invested considerable amounts in South Africa despite not benefitting from BITs protections.⁵⁸

⁴⁹ *Id.*

⁵⁰ Weiniger, Satryani, & Ambrose, *supra* note 1.

⁵¹ Mark Allix, *EU Steps Up to Have Treaties with SA Retained*, BUSINESS DAY LIVE (Nov. 12, 2013), <http://www.bdlive.co.za/business/trade/2013/11/12/eu-steps-up-fight-to-have-treaties-with-sa-retained>.

⁵² *Id.*; "BRICS" refers to Brazil, Russia, India, China and South Africa, emerging markets with exceptionally rapid growth. See *Emerging Economies: When Giants Slow Down*, THE ECONOMIST (July 27, 2013), <http://www.economist.com/news/briefing/21582257-most-dramatic-and-disruptive-period-emerging-market-growth-world-has-ever-seen> (discussing the rise of emerging markets in the twenty-first century).

⁵³ *Id.*

⁵⁴ Woolfrey, *supra* note 24, at 4 (discussing pending action by Phillip Morris against the Australian government under the Australia-Hong Kong BIT regarding Australia's plain-packaging regulations on the sale of cigarettes).

⁵⁵ *Id.*

⁵⁶ Luke Eric Peterson, *South Africa's Bilateral Investment Treaties*, DIALOGUE ON GLOBALIZATION 9-10 (2006), <http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf>.

⁵⁷ Woolfrey, *supra* note 24, at 5.

⁵⁸ Stef Terblanche, *Promotion and Protection of Investment Bill*, THE INTELLIGENCE BULLETIN (Nov. 8, 2013), <http://www.theintelligencebulletin.co.za/articles/Promotion-and-Protection-of-Investment-Bill-1330.html>.

The PPI Bill also reflects the current trend away from BITs and international arbitration by developing countries. International arbitration suits can be prohibitively expensive for developing countries and consume valuable government time and resources.⁵⁹ Venezuela, Bolivia and Ecuador have all withdrawn from ICSID citing clashes with domestic objectives and an alleged bias for commercial investors.⁶⁰ In 2012, the Australian government stated that future trade agreements would not contain investor-state arbitration clauses.⁶¹

Proponents also point out that BITs typically include recourse to international arbitration for disputes with a host state even though international arbitration disadvantages host states in several ways. First, international arbitration is rarely a matter of public record.⁶² While confidentiality benefits continued business relations between disputing parties, a confidential process may not be the most just method for adjudicating matters which implicate broader public policy, including matters like human rights.⁶³ Second, where the dispute deals with conflicts between international law and domestic policy, the international arbitral body will likely favor the former.⁶⁴ Third, commentators point out that access to international arbitration for foreign investors may detract from efforts to improve the domestic legal order.⁶⁵ Foreign investors are advantaged over domestic investors by having recourse to international arbitral bodies which will consider different international approaches to investment policy rather than domestic public policy.

The PPI Bill is consistent with broad changes to the face of international investment. South Africa has recently begun preferential business arrangements with its BRICS partners, replacing traditional trade and investment partners, such as Western European investors.⁶⁶ The BRICS states, as well as other African and South and Central American states, are redefining relationships with FDI partners and seeking to regulate FDI on their own terms through local venues for dispute resolution and promotion of domestic agendas over foreign ones. Some of South Africa's more recent BITs

⁵⁹ Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 21-22 (2005) (discussing a U.K. supermarket chain's suit against the Republic of Guyana for a debt of £12 million, despite the fact that the supermarket chain produces a yearly profit more than double the GDP of Guyana).

⁶⁰ C. Ryan Reetz & Pedro J. Martinez-Fraga, *Is it Still Safe to Invest in Latin America?*, THE PALM BEACH DAILY BUS. REV., Oct. 2, 2013, at A12.

⁶¹ Terblanche, *supra* note 56.

⁶² Hamilton & Rochwerger, *supra* note 59, at 24.

⁶³ *Id.*

⁶⁴ Luke Eric Peterson, *supra* note 56 at 20.

⁶⁵ *Id.* at 21.

⁶⁶ Allix, *supra* note 51.

demonstrate the state's desire to have its own interests represented in FDI relations. These agreements include provisions favorable to South Africa's domestic policies and economic goals.⁶⁷

Regardless of one's preference for protections of domestic public policy or foreign investment, the PPI Bill will result in a complicated situation for both domestic governing bodies and foreign investors. Investors will encounter two separate systems simultaneously regulating foreign investment. Those who invested prior to BIT termination will be protected by the BIT during varying sunset periods of ten to twenty years, while new investors will be governed according to the PPI Bill.⁶⁸ Therefore, for the next ten to twenty years, foreign investors from the same industries and same native countries will be subject to starkly different FDI regulations. This variation in regulation represents a possible barrier to new or continued investment.

V. CONCLUSION

South Africa's PPI Bill demonstrates the tension between domestic policies addressing South Africa's unique challenge of overcoming its apartheid legacy and foreign policies aimed at increasing FDI. South Africa's decision to eradicate its BITs and impose a legislative framework to protect FDI may be a radical approach to these tensions, but it seeks to strike a compromise between domestic and foreign interests. Although the PPI Bill enlarges the state's power to regulate FDI, the bill does not seek to eliminate FDI, but to provide protections for both foreign investors and citizens.

The PPI Bill also represents a current trend in FDI and international arbitration. Developing countries are increasingly asserting their own interests in relationships with foreign investors and trade partners. They are also rejecting traditional trade partners and international arbitration as a venue for investor-state dispute resolution. The PPI Bill takes this trend to a whole new level by systematically eliminating BITs and their accompanying FDI protections.

The full ramifications for South Africa's PPI Bill depend on whether the bill undergoes substantial revisions before it goes into effect. The bill will affect foreign investors' ability to seek redress for expropriation and take claims to international tribunals. South Africa's decision to replace its BITs with a legislative framework may have been a radical policy choice, but it will provide a fascinating case study for the effect of BIT protections on foreign investors' ability to resolve state-investor disputes in a domestic court system.

⁶⁷ Chow, *supra* note 19, at 328-329 (discussing the 2004 South Africa-Israel BIT which includes an exception for South Africa's domestic affirmative action programs, like BEE, and prohibits Israeli investors from avoiding negative effects of treaty reforms by arguing for treatment based on older investment treaties).

⁶⁸ Weiniger, Satryani, & Ambrose, *supra* note 1.