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FLEXIBLE ARBITRATION FOR THE DEVELOPING WORLD: PIERO FORESTI AND THE FUTURE OF BILATERAL INVESTMENT TREATIES IN THE GLOBAL SOUTH

*Andrew Friedman**

I. INTRODUCTION

Over the past few decades, international trade has become inundated with bilateral investment treaties (BITs), “agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country.”¹ Capital exporting and capital importing states have begun to use BITs as a precursor to investment. In fact, as of 2005, more than 140 countries were party to at least one such treaty, most having agreed to considerably more.² Today, well over 2,000 BITs exist and there is little doubt that the growth trend will continue.³ The international system of BITs has become extremely important, affecting not only ultra rich and poor countries, but countries at all stages of development. The rapid expansion of BITs around the world has raised an important issue in international law: whether entering into a BIT precludes a country from passing legislation to correct past social injustices. This particular issue was recently addressed in *Piero Foresti v. Republic of South Africa*, an arbitral case in which the parties ultimately settled outside of the tribunal, thereby leaving important questions unanswered pertaining to the future development of the Global South.⁴

The *Foresti* case began on November 8, 2006 when several Italian citizens and a number of Luxembourg-based corporations engaged in mining in South Africa registered a request for arbitration with the

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¹ *What are BITs?*, U.N. CONF. ON TRADE & DEV, http://www.unctadxi.org/templates/Page_1006.aspx (last updated Aug. 17, 2004).

² 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, 3 (2005).

³ *ICSID Database of Bilateral Investment Treaties*, INT'L CTR. FOR SETTLEMENT OF INVESTMENT DISP., <http://icsid.worldbank.org/ICSID/FrontServlet> (follow “Bilateral Investment Treaties” hyperlink; follow “View All” hyperlink) (last visited Oct. 25, 2010).

⁴ See *Piero Foresti, et al. v. Republic of S. Afr.*, ICSID Case No. ARB(AF)/07/1, Award of the Tribunal (Aug. 4, 2010), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (scroll to number 185; follow “English(Original)” hyperlink) [hereinafter *Foresti*].

International Centre for the Settlement of Investment Disputes (ICSID) against the Republic of South Africa.⁵ The case concerned the Black Economic Empowerment (BEE) provisions of the Minerals and Petroleum Resources Development Act of 2002 (MPRDA), which was enacted after South Africa transitioned from an apartheid system to a democratic government.⁶ Pursuant to authority granted under the MPRDA, the South African government seized ownership of all natural resources located in the country,⁷ and thereafter determined the rights of mineral exploitation through a system of licensing.⁸ Companies that previously held private mineral rights were forced to apply for licenses to continue their operations.⁹ While these laws were designed to alleviate the effects of the historical racial inequity that occurred under the apartheid system, the claimants challenged the policies as a violation of South Africa's international obligations under its BITs and claimed that they amounted to expropriation under international law.¹⁰

The *Foresti* case is vastly important to the future of a democratic South Africa, and also has wide implications for the development of the entire Global South. As the expansion of BITs continues, the question posed in the *Foresti* arbitration is likely to come up quite frequently. As stated by various human rights organizations involved in the *Foresti* arbitration, the issue at hand "is the scope of the post-apartheid South African government's ability, under domestic and international law, to implement legislative and policy decisions designed to redress the devastating socio-economic legacy left by apartheid."¹¹ More generally stated, the issue is whether entering into BITs can prevent a developing country from using certain types of legislation to correct past social injustices. The answer to such a question is likely to have tremendous repercussions throughout the developing world.

This article is divided into several parts. Part II will give a brief overview of apartheid and its social and economic effects on South Africa to set the stage for a discussion of the *Foresti* arbitration. Part III will discuss the South African government's efforts to cure the social and

⁵ *Id.* ¶ 1.

⁶ See Piero Foresti, et al. v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, ¶ 4.1-4.2 (July 17, 2009), available at <http://www.investmenttreatynews.org/documents/p/214/download.aspx> [hereinafter Human Rights NDP Petition].

⁷ See Damon Vis-Dunbar, *South African court judgment bolsters expropriation charge over Black Economic Empowerment legislation in the mining sector*, INVESTMENT TREATY NEWS (Mar. 23, 2009), <http://www.investmenttreatynews.org/cms/news/archive/2009/03/23/south-african-court-judgment-bolsters-expropriation-charge-over-black-economic-empowerment-legislation.aspx>.

⁸ See *id.*

⁹ See *id.*

¹⁰ See Human Rights NDP Petition, *supra* note 6, ¶ 4.2.

¹¹ *Id.*

economic effects of apartheid. Part IV will describe how these efforts led to the *Foresti* case and analyze the expropriations claims in that case. Part V will discuss the traditional test used by arbitral tribunals in expropriation cases under international law and will argue that ICSID should abandon this traditional test in favor of a more flexible three-factor test. Part VI will then discuss the possible implications for developing countries if ICSID were to adopt the proposed three-factor test for analyzing expropriation claims. Part VII will conclude.

II. APARTHEID AND ITS SOCIAL AND ECONOMIC EFFECTS ON SOUTH AFRICA

In addition to the post-apartheid South African government's move toward economic security and development through the signing of BITs, the new government also aimed to alleviate the societal devastation that resulted from more than a half-century of apartheid governance. Through a system of apartheid, white South Africans systematically disadvantaged black South Africans—the majority of South Africa's population—in many ways. Today, this system of apartheid continues to influence South Africa's economic development long after the establishment of the democratic government.¹²

In addition to the visible problems associated with extreme poverty, hunger, and lack of shelter, many less apparent problems continue to limit the opportunities of black South Africans. Under apartheid, the South African government took measures to ensure that black South Africans were not able to become self-reliant.¹³ The apartheid South African government denied black South Africans the possibility of entrepreneurship, self-employment, and skills development.¹⁴ The apartheid South African government also confined Black South Africans to homeland areas that were incredibly impoverished and lacked proper business infrastructure.¹⁵ These disadvantages severely limited the ability of black South Africans to compete in the new dynamic business environment that arose after the fall of the apartheid system.¹⁶

¹² See Bureau of African Affairs, *Background Note: South Africa*, U.S. DEP'T OF ST., <http://www.state.gov/r/pa/ei/bgn/2898.htm> (last updated Nov. 17, 2010).

¹³ See SOUTH AFRICA'S ECONOMIC TRANSFORMATION: A STRATEGY FOR BROAD-BASED BLACK ECONOMIC EMPOWERMENT ¶¶ 1.2, 2.2.3, available at <http://www.kznhealth.gov.za/TED/strategy.pdf> [hereinafter BEE STRATEGY DOC.].

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See BEE STRATEGY DOC., *supra* note 13.

At the time the *Foresti* arbitration was filed, the problems stemming from apartheid in were deeply entrenched in South African society and there remained a large disparity in income between black and white South Africans. According to the United Nations Development Program, in 2003, 62% of Black South Africans lived below the national poverty line, while only 1.5% of White South Africans lived below that level.¹⁷ Similarly, only 45% of Black South Africans lived in formal housing while 89% of White South Africans enjoyed this basic human right.¹⁸ Moreover, while Black South Africans comprised 79% of South Africa's population, they owned only 18% of the country's land at the end of 2008.¹⁹

Besides creating moral and social problems, the post-apartheid South African government also regarded the disparity between white and black South Africans as a significant impediment to economic growth. A strategy paper published by the post-apartheid South African government's Department of Trade and Industry states that "[n]o economy can grow by excluding any part of its people and an economy that is not growing cannot integrate all of its citizens in a meaningful way."²⁰ The South African government chose to address the disparity problem caused by apartheid, in part, by implementing a series of policies known as Black Economic Empowerment (BEE).

III. BLACK ECONOMIC EMPOWERMENT

BEE policies came to pervade many levels of South African legislation. The South African government's Department of Trade and Industry created a list of policy objectives, which included (1) increasing black South African ownership interest in enterprises in both standard and priority sectors of the economy, (2) increasing the number of new black South African enterprises, and (3) increasing the number of black South Africans in executive management positions.²¹ To accomplish these objectives, the post-apartheid South African government was given broad powers to legislate and regulate.²²

These broad powers allowed the government to include BEE provisions in many future South African laws. These laws addressed

¹⁷ Human Rights NDP Petition, *supra* note 6, ¶ 4.3 (quoting UNDP Human Development Report 2003 and Yolandi Groenawald, *Who owns what land in South Africa?*, MAIL & GUARDIAN ONLINE (Jan 23, 2009), <http://www.mg.co.za/article/2009-01-23-who-owns-what-land-in-south-africa>).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ BEE STRATEGY DOC., *supra* note 13, ¶ 3.4.4.1.

²¹ *See id.* ¶ 3.3.

²² *See id.* ¶¶ 3.5.2, 3.5.3.

incredibly diverse issues including equity of employment, mining rights and mandatory divestments.²³ The most controversial bills containing BEE policies were those requiring the transfer of certain percentages of enterprise ownership to black South Africans. For example, the MPRDA, mentioned above, initially required Black South African enterprises to own 51% of the nation's mining industry.²⁴ This BEE policy was an attempt to alleviate some of the economic problems associated with apartheid and to allow the country to reach its full economic potential by utilizing its entire population.²⁵ In response to much opposition regarding the MPRDA's 51% requirement, the post-apartheid South African government reduced the percentage of ownership by black South Africans to 26%. Despite this change to the MPRDA, the bill led to the *Foresti* arbitration.²⁶

IV. THE CASE

One of MPRDA's stated objectives is to "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources."²⁷ Additionally, the MPRDA contains many BEE provisions that would create large-scale changes to the mining and petroleum industries. As previously mentioned, one of the most controversial sections of the MPRDA is the mandated 26% ownership stake in mineral exploitation by black South Africans.²⁸ Nevertheless, for international investors, this was not the most disturbing provision.

The MPRDA also created a new system by which mineral rights would be distributed to mining enterprises. Under the previous mining law, the South African Minerals Act of 1991 (SAMA), private enterprises that owned land with natural resources also owned those resources. However, under the new system created by the MPRDA, the post-apartheid South African government seized ownership of all natural

²³ LUKE ERIC PETERSON, SOUTH AFRICA'S BILATERAL INVESTMENT TREATIES: IMPLICATIONS FOR DEVELOPMENT AND HUMAN RIGHTS, 16 (November, 2006), available at <http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf> (citing DEP'T OF TRADE INDUS. STRATEGY DOC, A STRATEGY FOR BROAD-BASED BLACK EMPOWERMENT, available at <http://www.dti.gov.za/bee/complete.pdf>).

²⁴ *Id.*

²⁵ See BEE STRATEGY DOC., *supra* note 13, ¶¶ 1.1-1.2.

²⁶ See *Foresti*, *supra* note 4, ¶ 54.

²⁷ Mineral and Petroleum Resources Development Act 28 of 2002 s. 2(d) (S.Afr.).

²⁸ See PETERSON, *supra* note 23.

resources in the country.²⁹ The post-apartheid South African government then determined the rights of mineral exploitation through a system of licensing.³⁰ Private enterprises that previously held mineral rights were given the opportunity to apply for licenses to continue their operations.³¹ However, many of the private enterprises complained that the rights given through the licensing procedure were not the same as the rights they previously enjoyed under SAMA. Mineral exploitation companies found many provisions of the MPRDA upsetting, including a five-year limit on licenses, after which companies must reapply.³² Furthermore, such licenses could be denied for a broad range of reasons.³³

The transition from a system of private ownership of mineral rights established under SAMA to a new system of government ownership under the MPRDA led to the *Foresti* arbitration. As mentioned above, in *Foresti*, a group of Italian nationals and Luxembourg-based companies (claimants) filed for arbitration with ICSID on November 8, 2006, alleging that the MPRDA's system of government ownership of previously held private mineral rights amounted to expropriation.³⁴

After the filing, four non-governmental organizations (NGOs) requested permission from ICSID to jointly file amicus curiae with the tribunal pursuant to ICSID Additional Facility rules 41(3) 27, 39 and 35.³⁵ Of the four NGOs, two were South African and two were international. The two South African NGOs were the Centre for Applied Legal Studies and the Legal Resources Centre. The two South African NGOs claimed that their presence in the *Foresti* arbitration would provide local knowledge and context of the public interest issues at stake, and could thereby assist ICSID in understanding such issues.³⁶ The two international petitioners, the Center for International Environmental Law and the International Centre for the Legal Protection of Human Rights (the "Human Rights NGOs"), focused on bringing an international or systemic perspective on the human rights issues addressed in the arbitration.³⁷

Additionally, the International Commission of Jurists filed a petition to take part in the proceedings as a non-disputing party (NDP).³⁸ In

²⁹ See *Vis-Dunbar*, *supra* note 7.

³⁰ See *id.*

³¹ See *id.*

³² See, e.g., Mineral and Petroleum Resources Development Act 28 of 2002 s. 17(6) (S.Afr.).

³³ See *id.*

³⁴ *Foresti*, *supra* note 4, ¶¶ 1, 54.

³⁵ Human Rights NDP Petition, *supra* note 6, ¶ 1.

³⁶ See *id.* ¶¶ 3.1-3.3.

³⁷ See *id.* ¶¶ 3.4-3.6.

³⁸ Piero Foresti v. Republic of S. Afr., Case No. ARB(AF)/07/01, 3 (Aug. 19, 2009), Petition for Participation as Non-Disputing Party Pursuant to Article 41(3) of the ICSID Arbitration (Additional Facility) Rules, available at

contrast to the perspective that the four other NGOs would bring to ICSID regarding public interest and human rights issues at stake in the *Foresti* arbitration, the International Commission of Jurists intended to provide context based on the status of international law.³⁹ In response to these petitions, and after consultation with the parties in dispute, the ICSID tribunal opted to allow the two sets of non-disputing parties to participate, stating, “NDP participation is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal.”⁴⁰

V. EXPROPRIATION UNDER INTERNATIONAL LAW

To determine whether an expropriation took place in an arbitration case, ICSID traditionally has looked to whether an expropriation occurred under international law. According to this standard, an expropriation occurs where constructive expropriation is found to have taken place and where the effect on the owner is found to be tantamount to an expropriation.⁴¹ There is considerable legal debate surrounding South Africa’s transition from the old-order of private ownership of mineral rights to the new-order of government ownership and licensing of such rights under the MPRDA, and whether such new-order government ownership and licensing amounts to expropriation in *Foresti*. Interestingly, in a similar South African case, *Agri South Africa v. The Ministers of Minerals and Energy*, the High Court of South Africa held that it was in fact possible for holders of old-order mineral rights to prove that they had been expropriated and that the holders had rights to claim compensation for that expropriation pursuant to the MPRDA.⁴²

There is, however, a second and possibly more just method that ICSID could explore when deciding expropriation arbitration cases such as *Foresti*. This method was suggested by the Human Rights NGOs in the *Foresti* case. As mentioned above, the issue in *Foresti* concerned the “scope of the post-apartheid South African government’s ability, under

<http://www.investmenttreatynews.org/documents/p/215/download.aspx> [hereinafter ICJ NDP Petition].

³⁹ See *id.* ¶ 28.

⁴⁰ Letter from Eloïse M. Obadia, Secretary of Trib., Int’l Ctr. for Settlement of Inv. Disputes, to Jason Brickhall, and Carlos Lopez, Senior Legal Officer, Int’l Comm’n of Jurists (October 5, 2009) (on file with author), available at <http://www.investmenttreatynews.org/documents/p/213/download.aspx>.

⁴¹ See Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 79 (2002).

⁴² See *Agri S. Afr. v. Minister of Minerals and Energy* 2009 (1) SA 104 (GNP) (S. Afr.).

domestic and international law, to implement legislative and policy decisions designed to redress the devastating socio-economic legacy left by apartheid.”⁴³ The Human Rights NGOs argued that the ICSID tribunal should take into account the “on-the-ground reality” in South Africa that vast inequalities exist within the borders of South Africa and “they can only be corrected through proactive measures” instead of “abstract economic principles.”⁴⁴ If ICSID were to consider the reality of inequality in South Africa, it would likely be much more inclined to uphold the BEE policies of the MPRDA. In other words, a ruling allowing South Africa “to implement legislative and policy decisions designed to redress the devastating socio-economic legacy left by apartheid” would significantly change the international takings doctrine by allowing arbitral tribunals to examine the reasons behind legislative and policy measures and what such measures were meant to achieve, rather than simply looking at how the owners of property rights were adversely impacted by such measures.⁴⁵

ICSID should consider the purposes behind South Africa’s policy measures for several important reasons. South Africa has obligations that exist under both domestic and international law to eliminate all forms of racial discrimination as well as the remnants of the oppressive apartheid system. These obligations were proposed in the country’s first democratic Constitution, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and several other international conventions.⁴⁶ The United Nations Human Rights Committee has also acknowledged that the principle of equality sometimes “requires States to take affirmative action to diminish or eliminate conditions which cause or perpetuate discrimination prohibited by the Covenant.”⁴⁷ Thus, on one hand, a nation must respect its obligations under its BITs to maintain investor confidence and remain a part of the international business community, while on the other hand, the same nation must make difficult choices to respect international social obligations advanced by various international conventions and found in customary international law. This conflict may require some nations, such as South Africa, to take affirmative action measures to correct past social injustices in the least discriminatory way while minimizing the effect on aggrieved parties and investors. For these reasons, ICSID should replace the traditional expropriation test and employ a new one.

⁴³ Human Rights NDP Petition, *supra* note 6, ¶ 4.2.

⁴⁴ *Id.* ¶ 4.3.

⁴⁵ *Id.* ¶ 4.2.

⁴⁶ See ICJ NDP Petition, *supra* note 38, ¶ 24.

⁴⁷ *Id.* (quoting CCPR Gen. Comment No. 18: Non-Discrimination, thirty-seventh sess., 1989 para. 10) (emphasis added).

A new expropriation test should grant countries the flexibility needed to implement positive change to correct past social injustices while maintaining appropriate safeguards. Under this new test, a tribunal should consider the following three factors when determining whether an indirect expropriation has taken place: (1) whether there is an internationally recognized policy goal for the legislation in question, (2) whether the goal can be accomplished in a less discriminatory way, and (3) whether the goal can be accomplished while minimizing the effects on aggrieved parties and investors.

A potential argument against adopting this new test is that arbitral tribunals will have difficulty determining whether an internationally recognized policy goal can be accomplished in a less discriminatory way while minimizing the effects on aggrieved parties and investors due to the great distance, both geographically and ideologically, between international adjudicative bodies—such as the arbitral tribunals—and the on-the-ground-realities seen in countries like South Africa. However, the participation of non-disputing parties (NDPs) can serve as a solution to this problem. While an average international tribunal sitting in The Hague, Geneva, or elsewhere may not know the policy realities of a capital importing nation, there are likely dozens, if not hundreds, of civil society organizations with the technical expertise and contextual knowledge to help the tribunal understand these on-the-ground-realities. If the ICSID panel in *Foresti* is any indication, there is an increasing willingness to make the documents of disputing parties available to NDPs, allowing for greater expertise and more informed decisions by the tribunal.⁴⁸

A tribunal applying this proposed three-factor expropriation test to the facts in the *Foresti* case should consider the fact that the BEE provisions found in the MPRDA are South Africa's attempt to achieve a valid international policy goal. In particular, by creating the BEE provisions of the MPRDA, South Africa was attempting to remedy a legacy of apartheid as it related to the ownership of mineral rights, a sector that is imperative to the health of the South African economy. As mentioned, eliminating legislative discrimination and taking affirmative steps to remedy past injustices—the policy goals of the BEE provisions—are recognized by the International Convention on the Elimination of All Forms of Racial Discrimination.⁴⁹

⁴⁸ See, e.g., Elizabeth Whitsitt, *An ICSID Tribunal Introduces Innovative Steps into Non-Disputing Party Procedure*, INVESTMENT TREATY NEWS (Oct. 11, 2009), <http://www.investmenttreatynews.org/cms/news/archive/2009/10/10/an-icsid-tribunal-introduces-innovative-steps-into-non-disputing-party-procedure.aspx>.

⁴⁹ See ICJ NDP Petition, *supra* note 38, ¶ 24.

After having considered the first prong of the proposed three-factor test and having successfully determined that an internationally recognized policy goal exists for the legislation in question, the tribunal should consider the final two factors of the test—namely, whether South Africa could have used less discriminatory means to accomplish the same policy goal and whether the legislation in question could have been crafted in such a way that would cause less harm to the aggrieved parties, such as investors. If claimants are able to demonstrate that such an alternative means exists, the ICSID tribunal should request NDPs to provide information revealing whether the adopted legislation was in fact the least discriminatory and least harmful method of achieving the desired policy goal—a question of fact that ICSID would likely lack the expertise to determine. If the adopted policy was the least discriminatory means possible and there was no way that the policy could have had a less harmful effect on the claimants, the tribunal should determine that the policy is a valid “[a]ffirmative Action to diminish or eliminate conditions which cause or help to perpetuate discrimination”⁵⁰ under international law. While such a three-factor test may seem novel, there has been some movement toward taking a “examine the purposes” approach in expropriation claims.⁵¹ Nevertheless, such an approach has not become widely accepted in international law because it only focuses on indirect expropriations created for “legitimate purposes,” which is a muddled concept of questionable importance when discussing affirmative steps towards equality.

The three-factor test is advantageous and desirable because it consolidates the two competing international responsibilities of nations like South Africa. It also provides incentives for companies and developing countries to work together in crafting legislation to achieve policy goals with minimal interference to investor interests. Furthermore, under the three-factor analysis, corporations and capital importing countries may be more inclined to form relationships that could lead to the continuous flow of investments, thereby achieving one of the fundamental purposes of BITs and the ICSID arbitral system.⁵²

VI. IMPLICATIONS FOR DEVELOPING STATES

All members of the international community struggle to find a balance between competing international obligations. This struggle is

⁵⁰ ICJ NDP Petition, *supra* note 38, ¶ 24 (quoting CCPR Gen. Comment No. 18: Non-Discrimination, thirty-seventh sess., 1989 para. 10).

⁵¹ See Dolzer, *supra* note 41, at 66.

⁵² See Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOREIGN AFF. 179, 181 (2005).

much stronger for developing states. In addition to their dependence on international investment to bring money and jobs into the country, developing countries are likely to have histories that require some sort of egalitarian social transformation as a result of discriminatory systems such as apartheid, or devastating social events such as civil war, ongoing civil strife, or coups.⁵³ Social transformation of a developing country can also be hindered by a legacy of colonialism, poverty, inequity, poor governance, tropical climate and disease. Identifying some of these social issues will be beneficial when discussing the advantages of using the above three-factor analysis to arbitrate matters involving a conflict between investment obligations stemming from BITs and social obligations under international and domestic law, such as the BEE provisions of the MPRDA. To illustrate some of the issues related to social transformation more clearly, the next section will discuss problems pertaining to urban/rural wealth gaps as well as problems resulting from civil upheaval, both of which are commonplace in developing countries.

A. *The Urban to Rural Wealth Gap*

The first social issue is the prominent urban/rural wealth gap that exists in much of the world. For example, in Bolivia, one of the most impoverished states in Latin America, many of the urban elite are of Spanish ancestry and have historically dominated the country's economic and political sectors.⁵⁴ The majority of rural dwellers, on the other hand, are subsistence farmers or salt miners, often unable to make ends meet.⁵⁵ In addition to the income disparity between the two groups, there is also a disparity in educational opportunities that would serve to eradicate the wealth gap. Furthermore, while schools are prevalent in urban centers, there are virtually no schools in rural areas.⁵⁶

The President of Bolivia, Evo Morales, has vowed to change this disparity.⁵⁷ In President Morales' first term in office, he successfully passed a new constitution that included many new indigenous rights.⁵⁸ The new constitution, for example, contains a provision that has the

⁵³ See generally PAUL COLLIER, *THE BOTTOM BILLION*, 17-19 (2008) (discussing how 73% of the world's poorest people live in countries that have either recently been or are currently civil war, and that by halving a country's income its statistical likelihood of civil war doubles).

⁵⁴ *Bolivia Country Profile*, BBC NEWS, http://news.bbc.co.uk/2/hi/americas/country_profiles/1210487.stm (last updated Dec. 28, 2010) [hereinafter *Bolivia Country Profile*].

⁵⁵ See *id.*

⁵⁶ See generally *Bolivia: Education for Life and Citizenship*, UNICEF.ORG, http://www.unicef.org/bolivia/education_for_all_1403.htm (last visited Oct. 25, 2010).

⁵⁷ See *Bolivia Country Profile*, *supra* note 54.

⁵⁸ See *id.*

potential to give the rural populations control of the natural resources in their territory.⁵⁹ This is a substantial change because the country's biggest exports are currently natural resources, such as natural gas and various precious metals.⁶⁰

In light of this new constitutional provision, one potential solution to Bolivia's poverty may lie in its lithium deposits. Bolivia has the world's largest supply of lithium, a heavy metal that was thought to be virtually useless until it gained prominence in batteries for various electronics and electric cars.⁶¹ Because Bolivia's lithium deposits are found in the Salar regions, far from any urban centers, President Morales' new constitutional provision may have the effect of allocating what could well be the country's most important export to Bolivia's rural population, nearly all of whom are of indigenous descent.⁶²

President Morales's new constitution, and its provisions granting Bolivian citizens in rural areas the right to control the natural resources in their territories, has not, thus far, conflicted with any of Bolivia's BITs. However, if a foreign company held mineral rights prior to the establishment of President Morales's constitution, the scenario would be much like the one in *Foresti*. Under such a scenario, and assuming that President Morales's constitutional provision resulted in an expropriation of the mineral rights of foreign owned companies, the first step in the three-factor analysis would be to determine whether such a constitutional change was made pursuant to an internationally recognized policy goal. In Bolivia's case, there seems to be an internationally recognized policy goal for these provisions. Several conventions declare various rights for indigenous populations, including the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, the Rio Declaration of Environment and Development, and the UN General Assembly's Draft Declaration on the Rights of Indigenous Peoples.⁶³ These documents and the overarching principle of equality included in nearly all international conventions and customary international law suggest that affirmative steps to redress a legacy of poverty on indigenous populations are a valid policy goal.

Although the application of the first step in the three-part analysis is straightforward, the application of the next two steps to this fact pattern yield uncertain results. In Bolivia's case, it would be difficult to

⁵⁹ See Simon Romero, *In Bolivia, Untapped Bounty Meets Nationalism*, N.Y. TIMES (Feb. 2, 2009), http://www.nytimes.com/2009/02/03/world/americas/03lithium.html?_r=1.

⁶⁰ See *Bolivia Country Profile*, *supra* note 54.

⁶¹ See Romero, *supra* note 59.

⁶² See *Bolivia Country Profile*, *supra* note 54.

⁶³ See generally Sarah Hymowitz, et al., *Study Guide: The Rights of Indigenous Peoples*, UNIV. OF MINN. HUMAN RIGHTS LIBRARY (2003), <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>.

determine whether there exists a less discriminatory means to accomplish the desired policy goal which is also less harmful to private companies and investors. In this type of difficult situation, the ICSID tribunal should rely heavily on NDPs to understand the degree to which President Morales's constitutional changes will foster equality in rural areas and whether the same level of influence could be accomplished in other ways.

B. Civil Upheaval

A second social issue that developing countries face is the all-too-common problem of civil upheaval. Civil strife of any kind, including civil war, inflicts severe ramifications, both human and economic, on the future of developing nations. Additionally, even when fighting has ceased, a nation will likely face tremendous obstacles in its struggle to return to a unified country. The successful unification of a country during and after civil strife may only be achieved through virulent negotiation, with all sides making concessions.

Furthermore, although civil strife can fundamentally change the political atmosphere of a nation—often completely changing the governmental regime—it usually does not relieve a nation of its international obligations, which include the nation's BITs. To understand why this is the case, consider the following hypothetical situation. Imagine a country in civil war where militias in the western part of the country have waged a multi-year campaign against the government primarily situated in the eastern part. Furthermore, this country has considerable mineral wealth concentrated in the western region. The militias in the west inform the government that they will not relinquish their arms unless they are granted greater control over the minerals in their part of the country. The ruling government based in the east has traditionally contracted with foreign corporations to exploit the mineral deposits in the west. Additionally, the country's BITs require the government to respect the investments of foreign corporations in these mineral deposits. Nevertheless, the government does not see any other way to end to the civil war except to accommodate the militias' request for greater control over mineral rights in the western region. Thus, the government in the east acquiesces to the demands of the militia, thereby increasing the militias control over the country's valuable mineral rights.

Under the traditional test for expropriation, a tribunal might very well determine that an expropriation had taken place and quickly grant

the aggrieved parties an award for compensation from the government. However, under the three-factor analysis proposed above, the results may differ substantially. As previously mentioned, before applying the three-factor analysis, a tribunal must first determine that an expropriation has taken place. In our hypothetical, whether an expropriation has taken place depends on the level of control taken from the foreign corporations and given to the militias in the west. Under the facts given, it is likely that the control given to the militias in the west constitute expropriation of mineral rights from the foreign corporations that previously held these rights.

Applying the three-factor test, a tribunal must first determine whether the government's act of giving the militias control over mineral rights held by foreign corporations was done pursuant to an internationally recognized policy goal. There is little doubt that ending a civil war and returning a country to peace is a valid policy goal. Sovereignty and self-determination are two of the founding principles of the United Nations and there can be no greater goal than a return to these principles from civil war. Thus, following the second and third prongs of the test, the tribunal should next determine whether the government could have stopped the civil war in a less discriminatory manner and whether the government could have minimized the harm caused to foreign corporations. These final two factors would depend on whether there was another way for the government to get the militias to lay down their arms without ceding control of the mineral rights.

Under this fact scenario, the three-factor analysis may lead a tribunal to the conclusion that the ongoing civil war permitted the governments expropriation of mineral rights. However, such a conclusion will not generally be the case in all expropriations done pursuant to civil war. In our hypothetical above, it is clear that the mineral wealth located in the west region was a major reason behind the civil war. Otherwise, greater control of natural resources would not have sparked negotiations. Most civil wars are fought for multiple reasons; control of mineral wealth is only one of many. In a situation where control of mineral wealth is one of many complaints, there is considerable room for debate over whether peace can be achieved through expropriation of mineral rights from foreign investors. Thus, as demonstrated in the above hypothetical, a government's responsibility for damages resulting from expropriation should hinge on whether its actions are reasonable and tailored narrowly to accomplish an internationally recognized policy goal.

VII. CONCLUSION

The various scenarios discussed above do not attempt to identify a bright line rule that must be followed in every situation. Instead, they are intended to illustrate the flexibility that developing countries require in international investment disputes—flexibility that is not currently present in international investment law. Developing countries often have to make difficult decisions that profoundly affect their futures. Many of these decisions are based on a lack of financial resources and require difficult decisions between competing international obligations. For instance, some countries like South Africa are faced with difficult decisions pertaining to the redress of past social injustices and the creation of a unified national identity. International tribunals, including ICSID tribunals, must allow for these unique circumstances in their proceedings by implementing a flexible analysis that accounts for internationally recognized policy goals. One way to offer this level of flexibility is through the three-factor analysis proposed in this article.

In summary, while we may never know whether an expropriation did in fact take place in the *Foresti* case since the parties ultimately chose to settle outside of the tribunal, due consideration should be given to the purposes behind expropriation and any alternative means that could have been used to accomplish the same goals. By using a less rigid method of analysis in expropriation cases, such as the three-factor analysis proposed in this article, and by relying heavily on the expertise of NDPs, developing countries will be better able to participate in the world of international investment while maintaining the flexibility that their individual circumstances require.