Free trade, the Washington consensus, and bilateral investment treaties the South African journey: an example of a rethink on the rules on foreign investment by developing countries

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Abstract

This paper will seek to consider the trade and monetary policies pursued by South Africa, Africa's most developed if not largest economy in the post 1994 period. The embrace of free trade resulted in the decimation of key sectors of the economy.Having embraced free trade, South Africa like other developing countries on the African continent and elsewhere have come to the realization that free trade with the developed world and an essentially passive government has adverse consequences for its development. Many developing countries have soured on free trade and BITs.There is an emerging consensus that free trade among similarly situated countries in the continent offers better opportunities for the developing world. Free trade with the developed world has not delivered a manufacturing base to most African countries leaving them dependent on the export of raw materials. The BIT agreements, which complement free trade, served as a significant constraint on the ability of governments to shape its public policy.

Introduction

The internationalization of business constitutes one of the dominant features of commerce today. Ever since World War II, the prevailing mantra of trade policy among western countries is free trade. Countries in the developed world are expected to eliminate all restrictions on the free movement of goods and services across national borders. This is codified in the rules of the World Trade organization (WTO) which entered into force in 1995 and the predecessor regime under the General Agreement of Trade and Tariffs (GATT) entered into in 1948. Free trade is complemented by the rules of the International Monetary Fund (IMF), which requires countries particularly those from the developed world, to remove currency restrictions. The push by the developed world for other countries to embracefree trade has been relentless most recently seen in the Washington Consensus.

This paper will seek to consider the trade and monetary policies pursued by South Africa, Africa's most developed if not largest economy in the post 1994 period. In the immediate aftermath of South Africa's first democratic elections, the country embraced the Washington Consensus and the underlying notion of free trade. In addition, it entered into a number of Bilateral Investment Treaties (BITs), with several European countries. These agreements have proved to be profoundly detrimental to South Africa as a developing country. It has undermined South Africa's ability to nuance its economic policy choices to deal with the legacies of apartheid. The developed world embraced free trade after they achieved a particular level of development. Countries among the developed world can engage in mutually beneficial free trade when their economies achieved similar levels of sophistication and development. Moreover, their population functions under superior standards of education and high material standards of living. South Africa adopted free trade under circumstances of extreme inequality and abject poverty. Unlike the western world, South Africa has a deficient education system, which suffers from severe impediments, due to decades of apartheid. Parts of the economy are highly developed and a minority lives under "first world" conditions. South Africa assumed largely first world free trade obligations despite the reality of the majority subsisting under conditions of poverty and rampant unemployment unlike any other country, which assumed similar obligations. Former President Thabo Mbeki described South Africa as a dual economy with an industrialized and underdeveloped part. (This description was used in his State of the Nation speech. http:www.info.gov.za/speeches/2003/03021412521001.htm).

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

The difficulty of competing against other developing countries has been compounded by a Constitution and legal order, which guarantees socio-economic and labor rights to its population. The progressive Constitution and the guarantees, granted therein are something one expects in the developed world. When viewed in relation to competition from the developing world, which does not provide similar legal guarantees, it raises the cost of doing business in South Africa. This makes it difficult to compete with other developing countries that do not have a transparent, rights based and democratic constitution.

In hindsight, many developing countries have soured on free trade and BITs. Having embraced free trade, South Africa like other developing countries on the African continent and elsewhere have come to the realization that free trade with the developed world and an essentially passive government has adverse consequences for its development. There is an emerging consensus that free trade among similarly situated countries in the continent offers better opportunities for the developing world. Free trade with the developed world has not delivered a manufacturing base to most African countries leaving them dependent on the export of raw materials. The BIT agreements, which complement free trade, served as a significant constraint on the ability of governments to shape its public policy.

Embrace of free trade and the Washington Consensus

The ideas for free trade finds inspiration in the writings of various economists such as Adam Smith. After World War II, United States trade policy was shaped by the ideas of free trade. Free trade proponents argued that parochial concerns among nations, favoring their own nationals to the exclusion of others, resulted in protectionism, which was one of the major contributing factors for the great depression, which preceded World War II. Free Trade is grounded in the concept of comparative advantage – signify the idea that consumers across nations will be better off if all restrictions on the sale of goods across national borders are removed. The foremost theorist of comparative advantage is David Ricardo. (http://www.encyclopedia.com/topic/free_trade.aspx).

By virtue of market forces, producers will specialize in the production of goods, which they are more efficient in producing. There will be greater variety and quantity of goods available at a cheaper price, which consumers across national borders will be able to purchase from sellers in other countries. Ultimately, countries will achieve the greatest aggregate wealth and quantitative income. From a historical perspective, the developed countries used various

forms of protection and interventions into their economy during the formative stages of their industrialization. These protections are now deemed contrary to the idea of the free market.
The phrase "Washington Consensus" is often seen as the equivalent of "neoliberalism" and "globalization."(http://www.cid.harvard.edu/cidtrade/issues/washington.html).

The originator of the phrase John Williamson ((http: //www.iie.com/publications/papers/williamson0904-2.pdf.)Used the phrase in 1990 "to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989." Williamson provided an essential framework for the consensus. (The framework is taken from http://www.who.int/trade/glossary/story094/en/).

The policies required under the Consensus included:

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

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

South Africa and Free Trade

South Africa embraced the Consensus in the aftermath of apartheid rule at a time when their objective realities were worse than anything posed by the global financial crisis of 2008 in the western world. Unemployment by conservative estimates was in excess of thirty percent of the population.
(http://dosfan.lib.uic.edu/ERC/economics/trade_reports/1993/ SouthAfrica.html).

The majority of the population existed and continues to reside in conditions of abject poverty. (http://www.dailymaverick.co.za/article/2015-02-03-south-africa-where-12-million-live-in-extreme-poverty/#.VpOmARFUfww). Many did not and still do not have access to basic sanitation, water, basic infrastructure and experiences inadequate education. The economic and financial crisis, which the developed world experienced in 2008, is a perpetual and "normal" reality for many countries in in the developing world. The solutions proposed in the consensus were thrown out of the window by the developed world when they experienced the global crisis. The Consensus among the developed world pretty much dissipated in the 2008-2009 global financial crisis. (*Robert Skidelsky (2009). Keynes: The Return of the Master. Allen Lane. pp. 101, 102, 116–117. ISBN 978-1-84614-258-1.*) In the aftermath of the global financial crisis, we witness rigorous government intervention among many of the developed countries prompting Gordon Brown, the former British Prime Minister to declare, "The old Washington Consensus is over (http://www.pressrun.net/weblog/2009/04/old-washington-consensus-is-over-gordon-brown.html.)Whilst the developing countries suffer this perpetual crisis, they are called upon to embrace the framework of the consensus particularly free trade.

Despite the economic reality that exceeds anything the developed world experienced in the financial crisis of 2008, starting with the government of Nelson Mandela, South Africa embraced the Washington Consensus and rabid free trade. It entered into the GATT agreements, succeeded by the WTO, in terms of which, it undertook first world free trade commitments as a developed country. Some argued that South Africa took its rightful place among the developing world. (See F Ismail http: //www.tulane.edu/~dnelson/PEBricsConf/Ismail%20SA.pdf.) South Africa systematically eliminated tariffs on imported items. South Africa's reduction of tariffs exceeded that of what some may consider similarly situated economies, namely the BRICS countries. Together with elimination and reduction of tariffs, local content rules were eliminated. Even though South Africa is Africa's largest economy, the experiences for the majority of the population remains that of an underdeveloped country. (http://www.academia.edu/365479/Overcoming_Underdevelopment_in_South_Africas_Second Economy). The uncritical embrace of free trade resulted in decimation of sectors of the economy such as textiles. (See http://www.jed.or.kr/full-text/35-4/4.pdf). These industries were important in providing employment and keeping people out of poverty.

Not only did the GATT and WTO agreements meant tariffs in the textile and other industries had to be reduced, it further meant that countries that signed the agreements were legally circumscribed in subsidizing their industries. From the perspective of South Africa, this meant that the historically disadvantaged population, saddled with decades of discrimination and attendant disabilities could not be subsidized or given a leg up because this would invite charges of unfair trade practices. With the decimation of key sectors of the economy, hundreds of thousands of people lost their jobs in the aftermath of South Africa's embrace of free trade. The majority who fail to secure alternate jobs receive unemployment and welfare payments from the state. This drain to the economy is profound. Free trade has moved large sections of the population from employment to welfare. (https://africacheck.org/factsheets/ separating-myth-from-reality-a-guide-to-social-grants-in-south-africa/).Apartheid shielded inefficient industries, which were largely controlled by the white minority population. At the same time, apartheid also meant that the historically disadvantaged Black majority lived and continue to live in an underdeveloped reality. They suffered and continue to suffer grave impediments, which prevents them from competing on an equal footing. Undoubtedly, a lot of unskilled production like the clothing industry has migrated from the developed world to the developing world. (https://www.westerncape.gov.za/other/2005/10/final_paper_most_updated_printing_clothing_and_textiles.pdf p. 6).

The superstructure of the economies of the developing world is not monolithic. At times, what on the surface might appear to be a developed economy, like South Africa, is not really developed at least from the perspective of the majority of the population. South Africa is more akin to a semi-industrialized industry with foots in both the developed and developing world. (South Africa and the Logic of Regional Cooperation By James J. Hentz p. 181**).** The free trade policies were neither informed, nuanced nor reflective of South Africa's unique realities. No other country with the level of unemployment and abject poverty like South Africa has assumed free trade obligations of a developed world country. The decision makers of South Africa adopted free trade in an uncritical manner. The free trade agreements commenced under the watch of Minister Trevor Manual, democratic South Africa's first Trade and Industry Minister and later first Black Minister of Finance. Minister Manual has been hailed by big business an insightful visionary. If truth were told, he was likely the most unqualified Minister occupying both portfolios, with neither an economics, law nor banking background let alone a university degree.

The conventional orthodoxy of trade and comparative advantage has not resulted in benefits to the South Africa economy. Neither has it resulted in significant foreign direct investment in an apparent politically and economically stable and resource rich country, with a sophisticated infrastructure. South Africa has one of the most advanced constitutions and sophisticated legal framework operating under the rule of law and an independent judiciary. It has a free press and one of strongest financial systems in the world. If we are to believe the Washington Consensus, this is an optimum legal regime. Herein lies one of the stark contradictions. The South African Constitution confers rights including civil and political rights, socio-economic rights and labor rights to its citizens. (See the Constitution of the Republic of South Africa Act 108 of 1996, Chapter 2 the Bill of Rights). The social contract that ushered in the Constitution reflects a realization that the success and legitimacy of the constitutional order is dependent on the realization of fundamental human rights, which include not only civil and political rights but also higher material standards of living for the entire population. In this regard, the constitution confers a right to receive education, health care, water and extensive rights of workers. (See the socio-economic rights with respect to the right to housing, health care, food, water and social security Id. Sections 26 and 27. Labour Rights are found in section 23).

The law provides workers a host rights including the right to fair labor practices. The extensive worker protection finds inspiration from the workers struggle against apartheid. These protections are an unqualified good. The workers have used their power to clamor for a living wage. The granting of higher wages raises the cost of production and doing business in South Africa. Other developing countries do not provide for similar kind of rights and worker protections. The courts of South Africa have interpreted the obligations on socio-economic rights and employer obligations to workers in an expansive and enlightened manner, which exceed the obligations imposed on the state and employers in most advanced developed countries. An oft-repeated mantra of business is that labour laws in South Africa are highly regimented. From the perspective of countries with weak constitutions providing little citizen rights that might be correct.

The South African Constitution emerged from a particular struggle reflecting an enlightenment that is unique to its history and unique in the annals of constitution making. Given that the objective realities of the South African economy is more like a developing country, the worker rights imposes financial challenges, which can be avoided by moving production to countries that do not require these enlightened obligations. From a comparative standpoint, western economies developed in particular stages. They were first liberal - establishing the capitalistic system and solidifying the industrial base. Britain, France and many developed countries embraced free trade only after they achieved a certain level of economic prosperity, which filtered down to their population. (See http://ieg-ego.eu/en/threads/transnational-movements-and-organisations/internationalism/gordon-bannerman-free-trade#TheEmergenceofFreeTradeinEurope). Otherwise, the argument went they could not compete equally. They were democratic later in terms of extending the franchise to the entire population. The distributive function emerged at the final stage where western countries begin to cater to the less well of sectors of society in terms of addressing their material needs. The United States, the most developed western country only embarked on the distributive function during the 1930's under President Roosevelt's New Deal era. (http://fee.org/freeman/the-mythology-of-roosevelt-and-the-new-deal/). A similar pattern of development is reflected in the economic growth of the Asian tigers namely South Korea, Taiwan, Singapore and Malaysia.

The Constitution of South Africa requires that the second and the third requirements be fulfilled concurrently. Democratic accountability and respect for the rights of workers is central in all decision making. There are financial costs incurred from the well-deserved worker rights when compared against other developing countries such as Bangladesh, Vietnam and India or for that matter even more advanced economies like China. Neither do many developing countries exercise political and economic power in a democratic and transparent manner. It is also difficult to compete with countries that have very lax labour laws and no constitutional obligations to provide basic needs to its population. Given these differences, the cost of doing business in South Africa is elevated particularly with respect to low skilled manufacturing.

Given the high cost of manufacturing vis a vis other developing countries that lack an enlightened rights culture, there is an incentive for manufacturers to move their production out of South Africa or for traders to purchase goods cheaper from abroad. Free trade facilitates this incentive. The free trade policies favor consumers that have financial resources, which in South Africa is largely a minority. In the brutal conditions of the marketplace, the majority of the population is not merely consumers. They are also workers and producers. As Montesquieu wrote "in countries where the people are actuated only by the spirit of commerce, they make a traffic of all humane, all the moral virtues; the most trifling things, those which humanity would demand are there done, or there given, only for money." (Stone, Seidman, Sunstein, Tushnet and Karlan, Constitutional Law (Wolters Kluwers 7th. Ed 2013) p.10). Without jobs, ordinary people do not have the ability to purchase goods, whether foreign or domestic, regardless of how cheap or abundant the goods might be. 9 Bruce E Clubb United States foreign Trade Law Vol I (Little Brown and Company 1991) p. Lxii.).

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

Of late, the United States and other countries are facing the problem of inversion, Wherea Company merges with a foreign entity and moves their corporate headquarters of the merged entity to the other company's home country. In effect, this results in the transferring of the U.S. firm's tax residence to a foreign jurisdiction without any actual changes to where and how the company transacts its business.
(See https://www.washingtonpost.com/ business/economy/2014/09/22/e5294e0a-429d-11e4-b437-1a7368204804_story.html).The merger is primarily motivated to lower the tax burden in the United States by shifting profits to the foreign jurisdiction, which has a lower tax base.(http://time.com/money/3378719/ corporate-tax-inversions-leaving-america/). This has created a firestorm among the political branches and calls to punish such corporate behavior in the United States. Although not identical to inversion, ultimately, the liberalization of currency controls and allowing companies that were truly South African to move their primary listing abroad allowed these companies to repatriate their profits to foreign destinations as if they were foreign companies, which they were not.
(http://www.taxjustice.net/cms/upload/pdf/Ilrig_0809_South_ African_giants.pdf).

These companies represented the crown jewels of the South African economy. Crucially, prior to the liberalization in 1995, they had to invest their profits in South Africa to benefit South Africans.(See The Oxford Companion to the Economics of South Africa edited by Haroon

Bhorat, Alan Hirsch, Ravi Kanbur, MthuliNcube p. 64).Now they are permitted to repatriate their profits to foreign jurisdictions. These decisions were indulgent to the privileged sector and the benefits largely accrued to a business elite, who could move their capital out of South Africa and also reduce their tax rates to the detriment of the general welfare.

Liberal currency controls became a reality to many developed countries such as Britain and France only in the late 1970's and early 1980's respectively.(See AC. Swan and John F. Murphy, Cases and Materials on the Regulation of International Business and Economic Relations (Matthew Bender 1991) p. 711). Other Western European Countries within the European Union abolished exchange controls in the early 1990's. Before the abolishment of exchange controls, most foreign currency transactions required approval and were to be conducted through approved intermediaries.(Swan and Murphy, op cit at 711). South Africa liberalized its currency controls, it was nowhere near the level of industrialization as Britain and France. This is another example of liberalization, reflecting choices rigged in favor of a few who were permitted to move their capital out of the country to maximize profits without taking heed of the needs of the majority in South Africa.

Despite decades of isolation, South Africa has much greater foreign trade than other BRICS countries. (BRICS in the World Trade Organization: Comparative Trade Policies Brazil, Russia, India, China and South AfricaEdited by Vera Thorstensen, Ivan Tiago and Machado Oliviera (Published by Institute for Applied Economic Research (Ipea), CCGI (FGV) and South African Institute of International Affairs (SAIIA) March 2014) p. 77). Most of it constitute imports. Foreign direct investments have not materialized to any significant degree. The standard claim by big business as to the lack of investment in South Africa is the high cost of labour. Similarly, those that control capital argue that the trade unions are too powerful and have the ability to win pay rises above the rate of inflation and productivity. (Bhorat ed. P. 64). Economic justice gets scant attention in the debate over wages and free trade. Developing countries like South Africa and Brazil are plagued by extreme inequality. The response of workers is despite working hard, they do not receive affordable wages that they can live off. The debate about wages has to take cognizance of the high cost of living, which before the large deprecation in the South African currency over the past few years exceeded the cost of living in many developing countries. Food and basic staples in South Africa are produced locally and workers earn far less than their counterparts in developed countries. There are monopoly practices, cartels and crony capitalism, which is endemic in many developing countries, which contribute to the high cost of living. There has been high profile exposure of collusion among producers of goods acting in concert to maximize their profits. The collusion has been pervasive extending to the pharmaceutical, bread and construction industries to note a few. (See Competition Commission South Africa Presentation to the Portfolio Committee on Economic Development on 15 years of Competition Enforcement. Presented by Commissioner Tembinkosi Bonakele 10 March 2015 https://pmg.org.za/files/150310compcom.ppt. See also In the matter between: The Competition Commission and Pioneer Foods (Pty) Ltd COMPETITION TRIBUNALREPUBLIC OF SOUTH AFRICA Case No: 15/CR/Feb07 50/CR/May08. http://www.saflii.org/za/cases/ZACT/2010/9.html.
See also http://www.monckton.com/south-african-tribunal-imposes-maximum-fines-bread-cartel-case/. For an overview of the monopoly practices and abuse of dominant sectors, see David Lewis, Enforcing Competition Rules in South Africa: Thieves at the Dinner Table.) These examples constitutes the tip of the iceberg. These are matters, which need to be resolved within the domestic laws of South Africa and other developing countries. Cartels and crony capitalism has an adverse effect on the poor.

South Africans are subjected to regressive laws that provide exclusive licensing rights to privileged parties, which distort competition, and leads to higher prices. Ever since the Appellate Division (as it was then known) decision in the TDK case, parties with distribution licenses can prevent parallel importation of legitimate goods under copyright protection. (Frank & Hirsch (Pty) Ltd. v A Roopanand Brothers (Pty) Ltd. (580/91) [1993] ZASCA 90; 1993 (4) SA 279 (AD); [1993] 2 All SA 521 (A) (2 June 1993). This results in the holder of the copyright being able to exclude other legitimate items and charging higher prices for the goods for which it has an exclusive copyright. The US approach, applies the "doctrine of first sale" which means a legal copy can be sold to anyone. (K Mart Corp v. Cartier, Inc. (1988) 486 U.S. 281, 108 S. Ct. 1811, 100 L.Ed. 2d 313. Quality King Distributors, Inc. v L'Anza Research International. Inc. (1998) 523 U.S. 135, 118 S.Ct. 1125, 140 L.Ed. 2d 254). Once you have a lawfully made product whether purchased locally or from a foreign source, there can be no limitation on selling that product because of an exclusive license. In Japan, the exclusive right of the copyright owner does not extend to genuine or licensed goods, which have been sold to a third party outside Japan. (Ralph H. Folsom, Michael Wallace Gordon, John A. Spanogle Jr., Peter L. Fitzgerald International Business Transactions A Problem-Oriented Casebook (Tenth Edition 2009) p.988-989). The EU through the "doctrine of exhaustion" has increased the scope of competition within member countries. (Silhouette International v. Hartlauer European Court of Justice Case No. C-355/96 (July 16, 1998). The South African approach protects the profit margins of businesses, distorts competition and leads to higher prices for many goods which retail for much cheaper in the developed world.

Extreme inequality is inimical to liberty and counterproductive for long-term political stability. (Ziyad Motala Constitutional Options For a Democratic South Africa A Comparative Perspective Howard University Press (1994) p. 20. The revolutionary writers including Jean Jacque Rousseau and Baron de La Brede Montesquieu, who influenced Thomas Jefferson, wrote about the challenges to democracy where you have wide disparities in wealth. (J. Rousseau, "The Social Contract," in Ernst Barker, Trans; *Social Contract: Essays by Locke, Hume, and Rousseau* (oxford University Press 1952) Book 2 at 190. Stone, Seidman, Sunstein, Tushnet and Karlan, Constitutional Law (Wolters Kluwers 7th. Ed 2013) p.10). Democracy cannot function where beggars and millionaires live side by side. Similarly, Jefferson wrote that democracy would be undermined if one group had large amounts of property where as others had very little. (Stone, op ed. 9-10). South Africa has the largest gini coefficient, which is used to measure inequality. It is astounding that many basic staples and services cost more in South Africa and other developing countries than in advanced developed countries, where individual earnings are multifold more. Hence, the wave of uprisings in North Africa during the "Arab Spring" over low wages and the high cost of living.

Over the past five years, South Africa has suffered labor unrest culminating in the tragedy at the British owned Lonmin platinum mines. The basic clamor of the workers, working under the most difficult conditions, was to demand an affordable wage. South Africa has seen a wave of uprisings over the past few years. Continued inequality compounded with a large underprivileged population politicized by activism, creates a combustible situation.

A rethink on unrestricted free trade

The economic development of the Asian tigers such as Taiwan, Malaysia, Korea, and Singapore occurred as a result in investment in their own people, their education and their economy. (Doing Business in Emerging Markets A Transactional Course Richard N. Dean, James W. Skelton, Jr. and Paul B. Stephan (Foundation Press 2015) p.1). This is also what happened to Germany and Japan after World War II. (See http://www.theglobalist.com/germany-and-japan-a-comeback-story/). These examples reflect the facilitation of economic growth through investment in their own population and the government guiding the process instead of ceding this power to the private sector. (South Africa and the World Economy in the 1990s edited by Pauline H. Baker, Alex Boraine, Warren Krafchik p.189). The example of South Korea is particularly instructive. South Korea's per capita income was about the same as Ghana in 1960, when Ghana achieved independence and below that of a number of Sub-Saharan African countries. (Dean et al op cit at 2). For a number of decades, it followed inward policies and achieved unprecedented growth rates. Today, South Korea is the eight largest exporting nation. (Dean et al op cit at 2). It is integrated into the WTO and firmly in the free trade camp. South Korea and the other Asian Tigers path to development provides valuable lessons to policy makers in developing countries. After almost three decades of the unchallenged mantra of free trade and monetary policy determined by the International Monetary Fund, governments in many developing countries are pushing back. For some like South Africa, it may not be possible to put the genie back in the bottle and make a hundred and eighty degree turn with respect to each and every of the unwise and misinformed choices. The challenge for decision makers is to make strategic adjustments to level the playing field and create better opportunities.

The starting point is to realize thatfree trade and foreign direct investment by multi-nationals has not delivered African countries from poverty. From Nigeria to South Africa to Uganda, decision makers are recognizing the benefits of trade protection, public development banks and more expansionary monetary policies — all heresies under the Washington Consensus. (See http://foreignpolicy.com/2014/08/07/africas-free-trade-hangover/). There are examples where the developed world talks free trade; they rig the rules of the game by using a host of non-tariff barriers such as supposed quality controls to keep out goods from the developing world.African countries operating individually, given their market size have not been successful in using the same tactics.China and Brazil have been more effective in using the same tools against western countries. (See BRICS in the World Trade Organization: Comparative Trade Policies Brazil, Russia, India, China and South AfricaEdited by Vera Thorstensen, Ivan Tiago and Machado Oliviera (Published by Institute for Applied Economic Research (Ipea), CCGI (FGV) and South African Institute of International Affairs (SAIIA) March 2014) p. P.81 found at www.saiia.org.za/.../546-brics-in-the-world-trade-organization-comparati.). South Africa has attempted to unscramble the egg. They have tried to play hardball with the United States with respect to AGOA.

South Africa imposed high tariffs on the importation of American chicken. It resisted lowering the tariffs arguing that American chicken farmers are aided by government subsidies and the poultry are afflicted with diseases such as bird flu. South Africa has not been as successful in pushing back using non-tariff trade barriers. The United States President has personally stepped in with an ultimatum – unless South Africa removes the restrictions on chicken exports, the United States would remove South Africa's preferential access to US markets under the African Growth and Opportunity act (AGOA).
(See http://www.economist.com/news/middle-east-and-africa/21678672-america-and-south-africa-are-beating-drumsticks-trade-war-playing-chicken). The developing countries do not have the same leverage in the war of non-tariff trade barriers. South Africa stands to lose hundreds of millions of dollars and thousands of jobs if the US does not allow South African exports of fruit products and wine.On the other hand, the South Africans are concerned that chicken exports would hurt small scale emerging black farms. The United States argues that South Africa is a rich and mature country that does not need a leg up.(http://www.economist.com/news/middle-east-and-africa/21678672-america-and-south-africa-are-beating-drumsticks-trade-war-playing-chicken**)**. That description is inaccurate at least

in terms of the reality of the Black majority. South Africa is placed with a dilemma – do they focus on developing their own capacity or lose the prospect of being denied exports to the United States, which would also result in the loss of jobs.

Whilst they unsuccessfully resist the developed countries in the specific skirmishes, the developing world is pursuing a strategy to fight what is perceived as strong-arm tactics if not outright bullying from the developed world. Increasingly there is a realization that governments have an important role to play in the development of the economy, which cannot be left to the marketplace.The executive secretary of the Economic Commission for Africa, Carlos Lopes has called on African countries not to blindly follow IMF's priority of very low higher public investment, particularly for supporting their manufacturing industry. (http://foreignpolicy.com/2014/08/07/africas-free-trade-hangover/). The adoption of rabid free trade stymies developing countries from resorting to government intervention or adopting policies "such as trade protection, subsidized commercial credit, tax incentives, and public support for research and development" to build up domestic industries over time. (http://foreignpolicy.com/2014/08/07/africas-free-trade-hangover/). In a sense, they are forced to relinquish their policy space to adopt industrial policies, which develop their economy. (foreignpolicy.com Id).

Former United Nations Secretary General Kofi Annan recently called on West African countries to proceed cautiously on free trade, which in the context of the EU's deal with West Africa he and others argued would crush what little industry West African countries have and exacerbate the massive unemployment in the region.(http://qz.com/274597/eu-trade-deal-will-likely-crush-industry-in-west-africa/). The deal was finally consummated with enormous pressure being exerted by the EU who threatened to cut of access to European markets for African goods. (http://foreignpolicy.com/2014/08/07/africas-free-trade-hangover/).Apart from raw materials, it is not as though European countries have an overwhelming demand for goods from African countries. Ultimately, the free trade results in the stuttering of what little African businesses exist, which are replaced by imports from European countries.

Together with taking back the initiative in setting their own policies to address their unique problems including investment and development in their own people and economies, it is increasingly being recognized that perhaps more can be gained through trade from regional integration within the continent or with similarly situated economies than integration with the developed world. (See the views of the former Brazilian President in this regard http://iatp.org/news/annan-discusses-free-trade-at-un-forum). In the WTO, African countries and the BRICS nations have made common cause to push back against further free trade negotiations with the developed world. (BRICS in the World Trade Organization: Comparative Trade Policies Brazil, Russia, India, China and South AfricaEdited by Vera Thorstensen, Ivan Tiago and Machado Oliviera (Published by Institute for Applied Economic Research (Ipea), CCGI (FGV) and South African Institute of International Affairs (SAIIA) March 2014) p. 37-42).
The most ambitious initiative is The Tripartite Free Trade Area (TFTA) agreed to by African countries in June of 2015 in Egypt. (http://www.comesa.int/index.php?option=com_content&view=article&id =974:tripartite-free-trade-area-an-opportunity-not-a-threat&catid=26:other-news&Itemid=48). The initiative seeks to create a free trade zone across the entire African continent. It envisions bringing together all three of Africa's regional trading blocs to create what would be the largest trading bloc in terms of population.(http://www.ictsd.org/bridges-news/bridges-africa/news/the-tripartite-free-trade-area-agreement-a-milestone-for-africa).
Africans trade more with one another in manufactured goods than they do with the developed world. (https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/General-Industries-Publications/Documents/Manufacturing%20in%20Africa.pdf). The full potential of

the deal is dependent on the development of proper physical and institutional infrastructure in many parts of the continent. (http://www.brookings.edu/blogs/africa-in-focus/posts/2015/06/17-tripartite-free-trade-area-andriamananjara). As in any trade agreement, there is the potential problem of smaller economies in Africa having to compete against large economies. The converse is also true namely that some countries have better rights protections for workers, which increases the costs of doing business. These and other problems including the technical details of the agreement are being worked out and are anticipated to be completed by 2017.

Realizing that foreign direct investment either does not materialize or is not always what it is projected to be, many developing countries are evaluating and abrogating BITS, which undermine their regulatory authority. (http://www.eastasiaforum.org/2014/09/20/why-is-indonesia-terminating-its-bilateral-investment-treaties/). Many developing countriessoured on being compelled to relinquish their sovereignty or compromise their national prerogatives. In this regard, they have determined that is important to have disputes adjudicated before their own courts as opposed to private international tribunals. South Africa, Venezuela, Bolivia, Ecuador, India and Indonesia have all announced cancelation of their BITs agreements. (http://www.ipsnews.net/2014/05/investor-treaties-trouble/. http://www.nortonrosefulbright.com/files/south-africas-changing-approach-to-investment-protection-127893.pdf.http://www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92 00144feabdc0.html#axzz3t7HFIszd).

Over the past few years, South Africa like a number of developing countries has terminated or announced its intention to terminate BITs with several European countries. (http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/). South Africa argues that these BITs are inimical to the country's social and economic goals of Black economic empowerment. Moreover, the continued existence of many BITs prevents the government from adapting the laws to bring the obligations of foreign investors in line with the imperatives of the Constitution. For example the BIT's rules on compensation vary with what the Constitution requires. There are also constitutional mandates on equity embodied in legislation, which the BIT's are at variance with. (See http://www.bowman.co.za/ FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf).

Apart from the constitutional obligations, the feeling is that it is problematic when a country cannot adopt legitimate regulatory laws to advance public interest because the corporate profits of a foreign entity would be depleted. Furthermore, it is untenable that a domestic entity would be bound by the regulatory regime advanced to promote public welfare but a foreign entity that originates from a jurisdiction with which South Africa has a BITs would escape such obligations. The BITs allowed foreign entities to challenge regulatory frameworks to advance the public good, which undermined the social and policy objectives of the government. From the perspective of the government, canceling of BIT's would allow for a recalibrating of the rights and responsibilities of investors and the state. The BITs with Britain was concluded prior to the adoption of the democratic Constitution. The question is how does one explain the existence of the post-1994 BITs? What is highly disturbing is the lack of foresight when these BITs were entered into. Starting from the very top namely Minister Manual, the first Minister of Trade and Industry after the 1994 elections, going down to the bureaucrats that negotiated these treaties, there was a profound lack of knowledge of the legal and technical expertise of international law. (Mohammed Mossallem SOUTH AFRICA'S EXPERIENCE EXITING ITSBITs Report number: WP 2015/97, Affiliation: The Global Economic Governance Programme-University of Oxford p. 7). Mossallem makes the point that it is disconcerting that there are no minutes of cabinet meetings or any sort of empirical findings to show the consequences or benefits these agreement would bring.An informed analysis would have revealed that many of the provisions in the BITs was inimical to the constitutional imperatives and constituted a surrender of the state's law and policy control. Under some of the BIT's the imperative of local particularly Black empowerment was circumscribed by the national treatment clause. (Mossallem op cit p. 7-8).

The Constitution makes a distinction between expropriation and deprivation of property. In the seminal case of Agri South Africa, the Constitutional Court held that that there is "no expropriation in circumstances where deprivation does not result in property being acquired by the state." (Agri South Africa v. Afriforum Case CCT 51/12 (2013) at para 59). The court majority held that private property rights cannot be over emphasized at the expense of the state's social responsibilities to ensure that all South Africans can benefit from the mineral resources of the country.(Id at para 62). Where the state takes custodianship of mineral rights and grants it to others, this does not constitute expropriation-warranting compensation. It is a deprivation in furtherance of other constitutional imperatives namely affording opportunities to the historically disadvantaged. (Id at para 68-69 and 73). The South African government felt that the constitutional mandate cannot be effected in relation to foreign firms where you have an existing BIT, which does not distinguish between a deprivation and expropriation.

The incompatibility between the existing BITs and the constitutional imperatives came to a head in the Foresti Case. (In the matter of an arbitration under the Additional Facility Rules of the International Centre For Settlement of Investment Disputes Case No ARB(AF)/07/1 PieroForesti et al v. Republic of South Africa. A copy of the award can be found at http://www.italaw.com/sites/default/files/case-documents/ita0337.pdf.). In the Foresti case, the Italian and Luxembourg petitioners claimed that the applicable Mineral Law, which required them to transfer a percentage of their shares to historically disadvantaged South Africans amounted to an expropriation in violation of exiting BITs with Italy and Luxembourg. The parties ultimately settled the matter. The dispute brought out in sharp focus, the conflict between obligations under the BITs and domestic constitutional imperatives.

An additional problem was the question of compensation. The traditional principle under the BITs requires compensation in terms of market value. The Constitution of South Africa in addition to mentioning market value contain a number of additional factors under Section 25(3), which need to be considered, including the history of acquisition and the purpose behind the expropriation to determine compensation. In calibrating the various factors, the Constitution permits less than market value in determining compensation. The constrains on the government's policy making power and the perception that the BITs conflicted with key constitutional imperatives precipitated the review of South African BITs ultimately leading to the decision to terminate BITs. The BITs were perceived as one-sided favoring the investor to the detriment of public policy.

South Africa announced that it is formulating a new investment law, which will protect foreign investments subject to the mandates under its Constitution and its right to set policy goals. (http://www.bdlive.co.za/opinion/2015/09/25/sa-on-the-right-path-with-new-foreign-investment-law).

The draft has gone through various revisions.
(https://www.thedti.gov.za/gazzettes/Promotion_Protection_Investment _Bill.pdf.) The latest version was released on 4 November 2015. What is clear is that there is no appetite to compel arbitration. (See chapter 12 of the draft bill). The government prefers that disputes must be resolved in the first instance before the courts of the country.

(http://www.africanlawbusiness.com/news/5765-south-africa-new-investment-bill).The issue of expropriation, compensation, public interest and national treatment is going to be aligned with the Constitution. National treatment stands for the proposition that foreigners must be treated the same way as national of the country. This impedes the opportunity to promote the advancement of historically disadvantaged sectors of the population through Black Economic advancement (BEE). National treatment is a key component of the WTO, GATT and TRIPS agreements. (See https://www.wto.org/english/thewto_e/ whatis_e/tif_e/fact2_e.htm). In that regard se section 7 of the draft bill that deals with national treatment, section 9 that makes property rights subject to the provisions of the Constitution and the governments right to regulate and make policy choices, which is set out in section 11.
(See http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment).

Policy makers have moved away from the position that all foreign investment is good towards a model of "investment for sustainable development model" which stipulates that investment must positively contribute to the country's sustainable development objectives. (Mossallem op cit p.4). These developments signify a rejection of the framework for investment put forth by the developed countries. They also mark a realization that there are no automatic benefits, which accrue from free trade and foreign direct investment. BITs often lead to constraints, which limit the ability of developing countries to adopt policies that advance the well-being of its citizens.

Conclusion

The developed world still sing the praise of free trade. They decry the repudiation of the BITs by developing countries. South Africa's embrace of free trade, liberal monetary policies and constraining BITs was done in an uninformed manner without thinking through the implications. It was also adopted in an ahistorical manner. The executive secretary of the Economic Commission for Africa, Carlos Lopes, recently stated, "[i] t's not a matter of choosing between state and market as if these were two opposites. That discussion is over. Everybody agrees now that there is a role for the state and there is a role for the market. There are regulations that are necessary. The U.S., Europe, Japan have done it. The moment they get in crisis, what do they do? They intervene in the banks and so on." [http://foreignpolicy.com/2014/08/07/africas-free-trade-hangover/]. The developing world, particularly African countries have finally caught on to this indispensable reality. They have a right to develop just as the developed countries have. Rabid free trade with the developed world is not always free and often comes with adverse consequences for development. The BITs has proved inimical to developing countries ability to fashion their domestic policy choices and advancing broad public policy. Trade policies and economic choices need critical repositioning otherwise South Africa, like many developing countries will face an existential crisis.

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