

Foresti v South Africa (Italy-South Africa BIT)

AREAS OF POLICY AFFECTED: resource management (mining), industrial policy (diversification of ownership), human rights (racial discrimination, affirmative action).

CASE SUMMARY: A group of investors sued South Africa due to the impact of its Black Economic Empowerment legislation on their assets. The legislation aimed to address past racial discrimination arising from apartheid in South Africa. It required mining companies to divest themselves of a portion of their assets in order to increase indigenous ownership.

The case settled on terms that were favourable to the claimants. South Africa agreed to reduce substantially the ownership share that was required for divestment by the claimants.

COMMENT: The case indicates that an investment treaty lawsuit can impact the implementation of human rights measures. It raises the prospect that the governments will be deterred from adopting such measures due to the risk of investor claims. It also raises the question whether other investors in South Africa, who previously accepted the requirements for divestment, might demand a watering-down of the requirements to match the treatment received by the claimants in this case.

Source: www.iiapp.org (February 2011), based on information in publicly-available awards and materials in known investment arbitrations (for texts of awards, see www.italaw.com). This report was produced by a research team coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada. Please see the disclaimer and statement on terms of use available at www.iiapp.org. © Gus Van Harten 2011. *You may forward or re-publish the information in this report with attribution to www.iiapp.org.*