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The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labour Relations Act 66 of 1995

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“The white man makes all the laws, he drags us before his courts and accuses us, and he sits in judgment over us.”¹

“That spiritual and physical oneness we all share with this common homeland explains the death of the pain we all carried in our hearts as we saw our country tear itself apart in terrible conflict, and as we saw it spurned, outlawed and isolated by the peoples of the world, precisely because it has become the universal base of the pernicious ideology and practice of racism and racial oppression. We, the people of South Africa, feel fulfilled that humanity has taken us back into its bosom. That we, who were outlaws not so long ago, have today been given the rare privilege to be host to the nations of the world on our own soil Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another and suffer the indignity of being the skunk of the world. . . . Let freedom reign. God Bless South Africa.”²

*Nelson Mandela*³

1. Jose I. Fernandez, *Dismantling Apartheid: Counterproductive Effects of Continuing Economic Sanctions*, 22 LAW & POL'Y INT'L BUS. 571, 571 (1991) (quoting Nelson Mandela, arguing for the Magistrate's recusal at his trial in 1962 for inciting a general strike to coincide with the formal declaration of the Republic of South Africa, and for leaving the country illegally afterward).

2. *A Common Victory For Justice, For Peace, For Human Dignity*, BOSTON GLOBE, May 15, 1994, at 74 (reprinting the text of Nelson Mandela's inauguration speech on May 10, 1994 at Pretoria, South Africa). Mandela's inauguration took place at the Union Buildings Amphitheatre, the highest point in Pretoria, South Africa's administrative capital. *ANC's Mandela Inaugurated as South Africa's First Black President; Elected by Assembly Unopposed*, FACTS ON FILE WORLD NEWS DIGEST, May 12, 1994, at 337 A1. When South African whites built the amphitheatre in 1910, their intent was to create a symbol of white power and domination over the black community. *Id.*

3. Nelson Rolihlahla Mandela was born in 1918 in the Transkei territory of South Africa. 13 WORLD BOOK ENCYCLOPEDIA 136 (1996). Mandela gave up his tribal right to succeed his father as a tribal chieftain and studied law instead. *Id.* After receiving his degree from the University of South Africa in 1942, he opened the first black South African law partnership (with future African National Congress President Oliver Tambo) in the township of Soweto. *Id.* Mandela joined the ANC in 1944. *Id.* When the South African government established the policy of apartheid in 1948, the ANC began leading open resistance to the government. *Id.* In 1956, Mandela was tried for treason and other serious crimes, but was acquitted in 1961. *Id.* The government had outlawed the ANC in 1960, but Mandela renewed his protests and went into hiding. *Id.* He was arrested in 1962, convicted of sabotage and conspiracy in 1964 and sentenced to life in prison. *Id.* In 1994, four years after his release from prison, Mandela was elected South African President in the country's first fully-democratic, multi-racial elections. 18 WORLD BOOK ENCYCLOPEDIA 621 (1996).

I. INTRODUCTION

Before the mass anti-apartheid movement of the 1980s, South Africa⁴ was a very attractive place for foreign investment.⁵ Until the international condemnation of apartheid,⁶ foreign companies earned high investment returns⁷ while ignoring the gross inequities apartheid created for the country's black population. Although the pillars of apartheid began crumbling as early as 1979,⁸ Nelson Mandela's inauguration speech following the African National Congress (ANC)⁹

4. The Republic of South Africa, situated at the southern tip of the African continent, covers an area roughly twice the size of Texas. THE WORLD ALMANAC AND BOOK OF FACTS 820 (11th ed. 1995) [hereinafter WORLD ALMANAC]. South Africa became an independent state within the British Commonwealth in June, 1934. KCWD/KALEIDOSCOPE, COUNTRY: SOUTH AFRICA, ABC-Clio (1995), available in LEXIS, World Library, Profil File [hereinafter KCWD]. The union became the Republic of South Africa following a referendum on May 31, 1961 and withdrew from the Commonwealth as a result of the growing international condemnation of apartheid. *Id.* Countries bordering South Africa are Namibia to the northwest, Botswana and Zimbabwe to the north, Mozambique to the northeast, Swaziland to the east, the Indian Ocean to the southeast, and the Atlantic Ocean to the south and west. *Id.* South Africa also completely surrounds the country of Lesotho, in the eastern part of the Republic. A. MACGREGOR HUTCHESON ET AL., AFRICA SOUTH OF THE SAHARA 1994, at 791 (23rd ed. 1994) [hereinafter SUB-SAHARA]. South Africa's estimated population is 43,715,000, a number expected to grow to 48,904,000 by the year 2001. 18 WORLD BOOK ENCYCLOPEDIA 610 (1996).

5. Lynn Berat, *Undoing and Redoing Business in South Africa: The Lifting of the Comprehensive Anti-Apartheid Act of 1986 and the Continuing Validity of State and Local Anti-Apartheid Legislation*, 6 CONN. J. INT'L L. 7, 7 n.1 (1990). The apartheid system of cheap labor was primarily responsible for the favorable investment climate. *Id.* at 7-8. In 1985, the South African government estimated that 10% of the country's total annual investment capital came from sources abroad. INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COM., 2 INVESTMENT CLIMATE IN FOREIGN COUNTRIES 293 (1985) [hereinafter INVESTMENT CLIMATE].

6. When the National Party gained power in 1948, South Africa began implementing interrelated apartheid laws designed to preserve white supremacy. 27 NEW ENCYCLOPEDIA BRITANNICA 655 (1991). According to the doctrine of apartheid, each race and nation has a unique, divinely ordained destiny and cultural contribution to offer to the world. SUB-SAHARA, *supra* note 4, at 794. Each race should be kept apart so each can develop individually and interracial contacts must be avoided. *Id.* Apartheid assumes that any cultural advancements are racially determined, the races are inherently unequal and that each racial group should have its own territorial area to develop its own unique personality. *Id.*; *see also id.* at 794-96 (detailing these laws and South Africa's implementation of the apartheid system). Under South Africa's system of apartheid, the population was classified into four major racial groups (White, Coloured, Indian, or African), each South African was compulsorily registered at birth as a member of one of these races, and this classification was the basic determination for all future rights and entitlements. Bronwen Manby, *South Africa: Minority Conflict and the Legacy of Minority Rule*, 19 FLETCHER F. WORLD AFF. 27 (1995); *see also id.* (providing a detailed analysis of South Africa's apartheid system, domestic and international opposition to apartheid, and events in South Africa eventually leading to the country's first multi-racial elections in May of 1994); WORLD ALMANAC, *supra* note 4 at 820 (describing some of the consequences for blacks under the apartheid system).

7. The cheap labor contributed to high returns on U.S. capital investment. Berat, *supra* note 5, at 7 n.1. In 1969, for example, U.S. returns on South African investments averaged 9.5% as compared to a return of 4.9% for all countries. *Id.*

8. *See infra* notes 76-80 and accompanying text (describing the implementation of racially-neutral labor laws in South Africa).

9. The African National Congress (ANC) was founded in 1912 by South African blacks to defend their political rights. 1 WORLD BOOK ENCYCLOPEDIA 136s (1996). The South African government began apartheid as an official policy in 1948 and young ANC members, led by Nelson Mandela, began resisting the

election victory in 1994 marked the end of apartheid and the official beginning of a new era in South Africa. The implementation of the Labour Relations Act 66 of 1995 (New Act) indicates the commitment of the newly-democratic South African government to eradicate the remaining vestiges of racism¹⁰ and to promote renewed economic development within the country.¹¹

For most of the late twentieth century, being African¹² under the apartheid system of South Africa meant being politicized from birth.¹³ Black and white South Africans rarely interacted, except as masters and servants or rulers and subjects.¹⁴ Adult South African blacks were generally very poor, barely literate,¹⁵

government, mostly through civil disobedience. *Id.* After the ANC was outlawed in 1960, its members began a policy of violent resistance to the South African government. *Id.* Mandela and others were jailed and many others were killed or exiled. *Id.* at 136s-136t. With F.W. de Klerk's historic speech in 1990, the ban on the ANC was lifted. *Id.*; see *infra* note 93 and accompanying text (providing the details of de Klerk's speech).

10. One area where the effects of South African racism can be clearly seen is in the development of its labor laws. See *infra* notes 63-85 and accompanying text (providing a history of South African labor law in the 20th century). A major challenge for the new South African government in developing the new Labour Relations Act was to give effect to the racially-neutral labor laws already in existence. See generally Labour Relations Act 28 of 1956 (amended 1991), 4 JSRSA 2-53 (1992) (treating all races equally on the facial terms of the old South African labor law) [hereinafter 1992 LRA].

11. Labour Relations Act 66 of 1995, 30 STATUTES OF THE REPUBLIC OF SOUTH AFRICA 1401, pmb1. (1995) [hereinafter New Act]. The legacy of apartheid has created a large underdeveloped segment of South Africa's population. INVESTMENT CLIMATE, *supra* note 5, at 293.

12. Africans (blacks) make up about 75% of South Africa's population, Whites 14%, Coloureds (those of mixed race) 8.5%, and Indians make up about 2.5%. THE WORLD FACTBOOK, U.S. CENTRAL INTELLIGENCE AGENCY, COUNTRY: SOUTH AFRICA (1994), available in LEXIS, World Library, Profil File.

13. NELSON MANDELA, LONG WALK TO FREEDOM 83 (1994).

An African child is born in an Africans only hospital, taken home in an Africans only bus, lives in an Africans only area and attend Africans only schools, if he attends school at all. When he grows up, he can hold Africans only jobs, rent a house in Africans only townships, ride Africans only trains, and be stopped at any time of the day or night and be ordered to produce a pass, failing which he will be arrested and thrown in jail.

Id.

14. Central to the original plan of apartheid was the solution of the "race problem" by removing Africans from "white" South Africa and deporting them to the homeland areas. Manby, *supra* note 6. Under this plan, Blacks would lose their South African citizenship and be allocated to one of the tribal homelands. *Id.* They would then be allowed into white South Africa as migrant labor, on the condition that they receive travel passes and temporary residence permits to live in the townships outside of the white cities. *Id.* Although millions of blacks were deported, the system was never fully implemented, the mass forced removals ceased by the mid-1980s, and the pass requirements were abolished. *Id.* Unnecessary harassment of Africans by police and the ruthless application of the pass laws were constant reminders that blacks were only tolerated by white South Africa with the greatest restraints. STEVE BIKO, I WRITE WHAT I LIKE 62 (1978).

15. South Africa's national literacy rate in 1991 was 76%. KCWD, *supra* note 4. However, in 1990, 99% of South African whites were literate, compared with 69% of Asians in the country, 62% of Coloureds (mixed race) and 50% of Africans. WORLD ALMANAC, *supra* note 4, at 820.

and possessed few job skills.¹⁶ If blacks were fortunate enough to have a job¹⁷ in the mines or in an urban area, they had to endure a great deal of hardship¹⁸ just for the opportunity to earn a wage far below that of their white counterparts.¹⁹

Despite the poor economic conditions of many South Africans,²⁰ the country enjoys many advantages over other African countries in attracting foreign investment.²¹ South Africa is one of the richest²² nations on the African continent and has Africa's most sophisticated economy.²³ However, South Africa's climate for

16. Until the late 1970s, blacks were prohibited from forming corporations, owning manufacturing plants, or entering most skilled professions. *Id.* Estimated unemployment among Blacks was more than 40% in mid-1992. *Id.*

17. To perpetuate the racism of apartheid, blacks had to be denied any chance of accidentally proving their equality with whites. BIKO, *supra* note 14, at 88. For this reason, there was job reservation, a lack of training in skilled work, and mass control over job opportunities for blacks. *Id.*

18. A large problem for blacks was oppression from an external world through institutionalized machinery, heavy work conditions, poor pay, very difficult living conditions and poor education. *Id.* at 100. In addition, the black man has developed in himself a certain state of alienation, associating "white" with all that is good. *Id.*

19. In 1985, whites enjoyed a per capita income of US\$8260, compared with US\$1815 for blacks. *Day and Night: The Chasm Between Two Peoples*, U.S. NEWS & WORLD REP., Sept. 2, 1985, at 28.

20. Whites, comprising only 14% of the South African population, receive about 54% of the total personal income while the large African population receives only 36%. COUNTRY REPORTS: SOUTH AFRICA, Walden Pub. (1995), available in LEXIS, World Library, Profil File. The income differential between those residing in the metropolitan areas (mostly white) compared with the rural homelands (mostly black) was 18:1 in 1985. *Id.* Discriminatory policies and legislation by the South African government severely reduced the economic opportunities available to South African blacks. *Foreign Economic Trends and Their Implications for the United States - South Africa*, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COM., FET 92-34, at 9 (July 1992) [hereinafter *Foreign Economic Trends*].

21. JENNIFER D. KIBBE, INVESTOR RESPONSIBILITY RESEARCH CENTER INC., U.S. BUSINESS IN POST-SANCTIONS SOUTH AFRICA: THE ROAD AHEAD 13 (1991). There are few legal impediments on non-residents operating or investing in South Africa. ERIC S. LOUW, TAXATION & INVESTMENT IN SOUTH AFRICA 41 (1995). South Africa's infrastructure—including its transportation, communications, and financial institutions—is highly developed. INVESTMENT CLIMATE, *supra* note 5, at 293; see also *Foreign Economic Trends*, *supra* note 20 (detailing basic aspects of South Africa's economic structure and the United States involvement in South Africa's economy); LOUW, *supra*, at 35-38 (describing South Africa's infrastructure and natural resources); see generally KIBBE, *supra*, at 13 (evaluating South Africa's market potential in the post-apartheid era); *infra* note 35 and accompanying text (describing the equality of investment laws for foreigners compared to local investors).

22. KIBBE, *supra* note 21, at 13. South Africa occupies only about 4% of the continent's area and has only about 6% of the continent's people. 18 WORLD BOOK ENCYCLOPEDIA 616 (1996). However, South Africa produces 40% of Africa's manufactured goods, nearly one-half its minerals and 20% of its farm products. *Id.* South Africa's average annual income in 1986 of around US\$2500 was more than six times the average for the rest of Sub-Saharan Africa. Kenneth P. Doyle, *Sanctions Won't Bend South Africa*, N.Y. TIMES, July 11, 1986, at A31. In Africa as a whole, South Africa's 1986 per capita income ranked second to Gabon's US\$2613. Mary Anne Fitzgerald, *Black Africa Shows Unity on S. Africa*, CHRISTIAN SCI. MON., July 29, 1986, at 12. The African continent had 25 of the world's 34 poorest countries with per capita incomes as low as US\$88 in Chad. *Id.*

23. South Africa's economic development proceeded slowly until the discovery of gold and diamonds in the late nineteenth century. INVESTMENT CLIMATE, *supra* note 5, at 293. Miners, fortune seekers, and others from Britain and other countries flocked to the area where the city of Kimberly now stands in the northern part of the country after the discovery of a rich diamond field in 1867. 18 WORLD BOOK ENCYCLOPEDIA 619 (1996). A similar population explosion took place near present-day Johannesburg after the discovery of the

foreign investment is at a critical juncture.²⁴ Many U.S. companies are making new investments in South Africa for the first time in years.²⁵ Although the New Act will not substantially impact U.S. companies, the New Act's effects on South Africa's black workers and economy will certainly affect the investment decisions of those companies.

This comment focuses on foreign investment and labor law in South Africa in the era following the demise of apartheid. Part II provides a history of foreign investment in South Africa, focusing mainly on U.S. policies toward South Africa during the era of apartheid.²⁶ Part III details the turbulent history of South Africa's labor laws prior to the fall of apartheid and the rise of South Africa's new democratic government.²⁷ Part IV chronicles the actual fall of apartheid and the economic and social forces that caused apartheid's fall.²⁸ Part V discusses South Africa's sweeping Labour Relations Act 66 of 1995, providing a summary of the significant provisions of the New Act, highlighting the New Act's commitment to collective bargaining as the preferred method of dispute resolution.²⁹ Part V also analyzes the New Act and concludes that, while the New Act is not fundamentally different from older South African labor laws, the gains that the New Act provides for South African workers should translate into stability in the work-

Witwatersand gold field in 1886. *Id.* These discoveries transformed South Africa's agricultural-based economy into primarily a mining economy. INVESTMENT CLIMATE, *supra* note 5, at 293; see SUB-SAHARA, *supra* note 4, at 801 (describing South Africa's economy in terms of its natural resources). Manufacturing industries developed during World War II and South Africa became virtually self-sufficient in consumer goods by 1985. INVESTMENT CLIMATE, *supra* note 5, at 293. Today, most analysts agree that South Africa needs to continue developing its manufacturing base and become less dependent on its mining sector. KIBBE, *supra* note 21, at 13.

24. See *Survey of South Africa*, FIN. TIMES LTD., Nov. 21, 1995, available in 1995 WL 11160824 (describing the challenges facing South Africa and its leaders in 1996, particularly in attracting foreign investment). Compare Alerts and Updates in South Africa: Better and Better, ECON. INTELL. UNIT BUS. AFR., Nov. 1, 1995 (predicting increasing growth in South Africa's economy, based on positive economic indicators) with *Economic, Industrial Policy Spats Slow Recovery in South Africa*, 12 Int'l Trade Rep. (BNA) No. 14, at 637 (Apr. 5, 1995) (claiming that the disputes between government, labor, and business factions in South Africa will slow the country's recovery).

25. *U.S. Companies Heading Back to South Africa*, S. AFR. BUS. INTELL., May 5, 1995, at 9. Major companies that returned in the year after the elections after having disinvested in the 1980s included Coca-Cola, Ford, IBM, PepsiCo, and Xerox. *Id.* However, many foreign companies remain cautious of returning despite some optimistic economic forecasts. *Chamber Chief Says Investors are Cautious on South Africa*, 11 Int'l Trade Rep. (BNA) No. 38, at 1512 (Sept. 28, 1994). However, in the 18 months following Mandela's calls for the lifting of economic sanctions, the number of U.S. companies with direct investments or employees in South Africa increased 36%. *Economic Recovery in South Africa Seen on Track For Sustained Growth*, 12 Int'l Trade Rep. (BNA) No. 8, at 368 (Feb. 22, 1995). Economists were predicting that South Africa's Gross Domestic Product would enjoy a period of sustained growth over the medium term. *Id.*

26. See *infra* notes 32-62 and accompanying text.

27. See *infra* notes 63-85 and accompanying text.

28. See *infra* notes 87-104 and accompanying text.

29. See *infra* notes 105-273 and accompanying text.

place and less labor strife.³⁰ Finally, Part VI predicts a solid future investment climate and the success of foreign companies in South Africa, despite gloomy forecasts that the new Act provides too much protection to workers and will harm South Africa's economy.³¹

II. HISTORY OF FOREIGN INVESTMENT IN SOUTH AFRICA

Beginning in the 1940s, South Africa's favorable investment climate attracted billions of dollars in foreign investment.³² The combination of cheap labor and permissive U.S. laws³³ made South Africa an attractive place for U.S. companies to invest.³⁴ The U.S. government merely implored American firms to be responsible and pay fair and adequate wages to South African workers by adhering to the Sullivan Principles.³⁵ Unfortunately, these good intentions had little effect on

30. See *infra* notes 128-31, 146-51, 164-77, 177-79, 187, 202-08, 219-24, 235-37, 253-56, 270-72 and accompanying text.

31. See *infra* notes 273-81 and accompanying text.

32. Berat, *supra* note 5, at 7.

33. Under U.S. law, no restrictions on South African investment existed. *Id.* at 8. The U.S. government had adopted a neutral policy known as constructive engagement on South African investment by U.S. companies. *Id.* As a consequence of these neutral policies, U.S. direct investment in South Africa rose 4000 percent, from US\$50 million in 1943, to US\$2 billion in 1978. *Id.* at 9. Constructive engagement intended to coax South Africa into ending apartheid. *Id.* at 23. Supporters of this policy urged that sanctions would diminish U.S. leverage over South Africa and cause the South African government to strike back, either at blacks or at Western countries. *Id.*; see also D.J. VENTER, SOUTH AFRICA SANCTIONS AND THE MULTINATIONALS 144 (1989) (explaining that, from the discovery of diamonds and gold in the late 19th century until President Reagan's imposition by executive order of limited sanctions against South Africa in 1985, the U.S. government had generally supported U.S. businesses in South Africa).

34. As of 1985, South African investment laws were designed to attract significant foreign investment. In both law and practice, foreign and local investors enjoyed equal treatment in nearly every instance. INVESTMENT CLIMATE, *supra* note 5, at 294. With the exception of a few industries considered strategic by the South African government, there were no economic sectors in which foreign investment was discouraged or restricted. *Id.* at 295. No prior permission from the South African government was needed for direct foreign investment except in the event of a new or expanded industrial enterprise involving importation of technology, equipment, or raw materials, in which case a proposal needed to be submitted to a subcommittee of the Department of Industries and Commerce. *Id.* The government was welcoming because of rising unemployment in the country at the time, particularly among the mostly black unskilled labor force. *Id.* at 296. In addition, any profits, interest, or dividends earned by non-South African residents were freely transferrable abroad. *Id.* The U.S. total investment in South Africa peaked at about US\$2.6 billion in 1981. Berat, *supra* note 5, at 29. South Africa's Gross Domestic Product in 1981 was over US\$81 billion. United Nations Statistical Yearbook 1988/89, Dept. of Econ. & Soc. Dev. Statistical Office (1992).

35. INVESTMENT CLIMATE, *supra* note 5, at 298. The Sullivan Principles was a voluntary employment code advocating equal treatment of employees and attention to the advancement of black workers. *Id.* Developed in 1977 by Rev. Leon Sullivan, a black civil rights activist and member of the board of General Motors, the Principles called for desegregation of the workplace, fair employment practices, equal pay for equal work, job training and advancement and improvement in the quality of workers' lives. Berat, *supra* note 5, at 15, 19. Despite the U.S. government's urgings, adherence to these fair employment practices was not required for U.S. companies in South Africa until after the passage of the Comprehensive Anti-Apartheid Act of 1986. Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5117 (1993), repealed by South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4(a)(2), 107 Stat. 1505 (Supp.

South Africa's black workers because only a very small percentage of them were actually employed by Sullivan signatories.³⁶

Significant changes began taking place in the 1980s, dramatically impacting South Africa's attractiveness to foreign investors. After Zimbabwe gained its independence from Great Britain on April 18, 1980,³⁷ South Africa's system of apartheid came under increased scrutiny, and foreign companies began disinvesting their South African assets.³⁸ This divestment movement exemplified the international business community's desire to trigger social change in South Africa.³⁹ It was these social forces that initially impacted U.S. companies' investment decisions towards South Africa.

Of the groups criticizing U.S. policy, student protestors were the first to affect U.S. investment in South Africa.⁴⁰ Shortly thereafter, state and local governments

1995) [hereinafter Anti-Apartheid Act] (outlining a Code of Conduct for U.S. companies in South Africa largely based on the Sullivan Principles). At the end of the first ten years of the existence of the Sullivan Principles, only 135 of the over 300 companies doing business in South Africa were signatories, half of those signing in the last year. MARK ORKIN, *DIVESTMENT, THE STRUGGLE, AND THE FUTURE: WHAT BLACK SOUTH AFRICANS REALLY THINK* 20 (1986).

36. Berat, *supra* note 5, at 21.

37. On November 11, 1965, Zimbabwe (then known as Rhodesia) declared its independence from Great Britain. 21 *WORLD BOOK ENCYCLOPEDIA* 605 (1996). Rhodesia declared itself a republic on March 2, 1970, although no country recognized its independent status. *Id.* After a decade of widespread fighting between black factions (98% of Zimbabwe's population is black) and the Rhodesian government, a peace settlement was established in September 1979. *Id.* at 605-06. Democratic elections were held in February 1980, blacks gained power, Britain recognized the country's independence and Rhodesia's name officially became Zimbabwe. *Id.* at 606.

38. Berat, *supra* note 5, at 10. After Zimbabwe's transformation, South Africa and South African-controlled Namibia were the only remaining African countries ruled by a white minority. *Id.* at 10. Namibia gained its independence from South Africa on March 21, 1990. *International Country Risk Guide-Subsaharan Africa*, Jan. 1, 1993, available in 1993 WL 2553012; see SUB-SAHARA, *supra* note 4, at 618-21 (detailing Namibia's history, culminating in the end of South African occupation, the creation of its own government, and the treaty resolving the conflict with South Africa over the Walvis Bay territory). Namibia currently boasts a welcoming foreign investment environment and substantial economic potential, most notably in the mining and minerals sectors. *Id.* See generally WILLIAM F. MOSES, *INVESTOR RESPONSIBILITY RESEARCH CENTER, A GUIDE TO AMERICAN STATE AND LOCAL LAWS ON SOUTH AFRICA* 4 (1992) (giving a history of economic sanctions against Namibia, culminating in the nearly total removal of sanctions by August of 1992).

39. See *infra* notes 40-54 and accompanying text (describing the divestment movement, the Comprehensive Anti-Apartheid Act of 1986, and the effects of both on South Africa's economy); see also note 42 *infra* (defining disinvestment and distinguishing the term from the more-commonly used divestment).

40. Berat, *supra* note 5, at 10. By the end of 1982, over thirty colleges and universities in the United States had divested over US\$100 million from banks and corporations that had operations in South Africa. *Id.* at 10. From 1977 to 1987, more than 80 universities divested nearly US\$4 billion from U.S. multinational corporations doing business in South Africa. VENTER, *supra* note 33, at 148; see *Divestment Report Card; Students, Stocks and Shanties; Colleges Divest From South Africa*, *THE NATION*, Oct. 11, 1986, at 337 (describing the success of the student protest movement in causing universities to divest their funds and highlighting the movement's biggest victory, the withdrawal of US\$3.1 billion of stock by the University of California in 1986 from companies that did business in South Africa).

began their own divestment⁴¹ movements by passing numerous laws restricting investment in South Africa.⁴² As a result of these laws, large U.S. corporations either made no new investments in South Africa, or disinvested their assets in the country.⁴³ However, the financial effects of divestment may have burdened those divesting funds⁴⁴ more than the South African economy.⁴⁵ Consequently, U.S.

41. Divestment is the compulsory transfer of title or disposal of interests (such as stock in a corporation) upon government order. WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 663 (16th ed. 1971); see BLACK'S LAW DICTIONARY 478 (6th ed. 1990) (defining divestiture as a firm's act of selling off one or more of its parts, such as a subsidiary, a plant, or certain assets that create productive capacity). One commentator notes a distinction between *divestment* and *disinvestment*. ORKIN, *supra* note 35, at 17. *Divestment* occurs when a church, university, or city authority, for example, sells its holdings in a foreign company because that company is doing business in South Africa. *Id.* *Disinvestment* occurs when the company itself closes or sells its South African operations and withdraws from the country, selling what assets it can. *Id.*

42. Legislation passed in 1982 alone resulted in the removal of as much as US\$300 million in publicly controlled investment funds from companies doing business in South Africa. Berat, *supra* note 5, at 10. This resulted solely from the laws passed by Philadelphia, Pennsylvania and Wilmington, Delaware. MOSES, *supra* note 38, at 145. In 1976, the city council of East Lansing, Michigan agreed to a binding resolution to favor bidders who did not have South African business ties for all city contracts. *Id.* at 5. This was the first of the state and local governments in the United States acting to place an economic burden on South African related entities. Other jurisdictions passing anti-apartheid laws between 1976 and 1980 were Cambridge, Massachusetts (divestment laws and bank restrictions passed in February, 1980) and Madison, Wisconsin (selective contracting policy passed in December of 1976). *Id.* at 131, 143. In 1978, the small Northern California town of Cotati became the first U.S. jurisdiction to divest public funds from companies with South African ties. *Id.* at 4. Only US\$350,000 was involved, however. Berat, *supra* note 5, at 14 & n.47. The state of Michigan and city of Davis, California followed in 1980 as the first jurisdictions to place restrictions on banks with holdings in South Africa. MOSES, *supra* note 38, at 4. This type of divestment legislation peaked in the mid-1980s. *Id.* A coalition of civil rights and African-American organizations, students, trade unions, and politicians, succeeded in passing divestment, selective contracting and other South Africa-related policies in 115 states, localities and public funds in 1985 and 1986. *Id.*; see *id.* at 13 (listing the various state and local resolutions and laws concerning investment in companies, banks, etc. with South African ties).

43. Pressure exerted by the anti-apartheid groups and the existing legislation combined with growing political unrest in South Africa resulted in the withdrawal of 214 of the 324 U.S. companies doing business there. Henry, *Even if Sanctions are Lifted, Few Will Rush to South Africa*, N.Y. TIMES, Oct. 28, 1990, at C5.

44. For example, California's divestment of South African stock cost the state's Public Employee's Retirement System about US\$529 million in net investment-opportunity losses. *South Africa Divestment Cost California Millions*, 22 Pens. & Ben. Rep. (BNA) at 555 (Feb. 27, 1995), available in WESTLAW, Bna-Lb Database. Another good example of the legislation affecting the funds themselves is seen with the State of Illinois and its Teacher's Retirement System. In 1985, the Illinois State Legislature introduced legislation that would have required divestment of more than US\$3.5 billion in securities, including investments in the majority of large U.S. corporations, all of whom still had investments in South Africa, as well as all investments in every major Chicago bank. *Impact of Divestiture by Firms in Firms Doing Business in South Africa Analyzed*, 12 Pens. & Ben. Rep. (BNA) No. 11, at 404 (Mar. 18, 1985). The main reason the legislation failed was because of estimates that the divestiture would have cost the pension funds US\$215 million immediately and US\$300 million in the following decade. *Id.* Illinois ultimately limited the strict legislation to apply only to new investment. MOSES, *supra* note 38, at 16. The City of Chicago ultimately passed divestment legislation with respect to the city's investments in 1990. *Id.* at 45.

45. Disinvestment by U.S. companies may have actually benefitted the South African economy to some degree, as South African interests acquired over half of the U.S. multinational companies that were sold. VENTER, *supra* note 33, at 146-47. Nearly 71% of the U.S. multinational corporations that disinvested from South Africa between 1984 and 1987 were sold and only 11% actually completely closed down. *Id.* at 147. South African businesses were the initial major beneficiaries of U.S. disinvestment, and Venter argued that the

constitutional challenges⁴⁶ were raised to the ordinances, and only fifteen U.S. states passed divestment legislation between 1983 and 1990.⁴⁷

The most prominent U.S. law affecting investment in South Africa was the Comprehensive Anti-Apartheid Act of 1986 (CAAA).⁴⁸ The CAAA⁴⁹ restricted

South African economy was no more than marginally harmed by the U.S. disinvestment of the mid-1980s. *Id.* However, Venter also argued that the role of the U.S. pressure groups should not be ignored. *Id.*

46. See, e.g., Board of Trustees of the Employees Retirement Sys. Baltimore v. Mayor and City Council of Baltimore City, 317 Md. 72, 562 A.2d 720 (Md. Ct. App. 1989) (upholding Baltimore's divestment ordinance against pre-emption, commerce clause, and intrusion on foreign policy arguments), cert. denied, 493 U.S. 1093 (1990). This lawsuit was filed as a result of an ordinance passed by the Baltimore, Maryland City Council in 1986 that barred pension systems from investing in banks or financial institutions that made loans to South Africa or in companies "doing business" there. *Maryland Court Upholds Baltimore Laws Requiring Disinvestment From South Africa*, 16 Pens. & Ben. Rep. (BNA) No. 37, at 1628 (Sept. 11, 1989). The court upheld the laws even after finding that the initial cost to the funds of divestiture would be US\$750,000 and the funds would sustain annual losses of US\$1.2 million. *Board of Trustees*, 317 Md. at 86-87, 562 A.2d at 726-27. The potential for challenging the laws also sparked a great deal of commentary. Compare Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987) (concluding state and local statutes would withstand constitutional attack under claims of both foreign affairs and commerce clause violations) with Christine Walsh, *The Constitutionality of State and Local Governments' Response to Apartheid: Divestment Legislation*, 13 FORDHAM URB. L. J. 763 (1985) (concluding the statutes would not survive attack under claims of violating the foreign affairs power and the commerce clause).

47. The states that passed divestment legislation include California, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Rhode Island, Tennessee, Vermont, and Virginia. MOSES, *supra* note 38, at 145. The U.S. Virgin Islands also passed divestment legislation. *Id.*

48. On September 9, 1985, President Reagan signed Executive Order No. 12532 which called for some limited sanctions against South Africa. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law; Economic Sanctions: South Africa*, 80 AM. J. INT'L L. 153, 153 (1986). Earlier Congress passed a very tough Anti-Apartheid Act. *House Votes 295-127 to Pass Bill Calling for Economic Sanctions Against South Africa*, 2 Int'l Trade Rep. (BNA) No. 24, at 778 (June 12, 1985). Reagan's Executive Order adopted weaker measures and called on Congress to wait for at least nine months before imposing stricter sanctions. *Excerpts From Speech in Response to Reagan*, N.Y. TIMES, July 23, 1986, at A 13; see also Berat, *supra* note 5, at 25 (claiming Reagan issued the order to pre-empt stronger sanctions passed by Congress). Even after Congress overrode Reagan's veto of the CAAA, he implemented another executive order giving agencies of the Executive Branch authority to oversee implementation of the CAAA. *Id.* A major push for stronger sanctions than those in Reagan's initial executive order came as a result of the South African government declaring a state of emergency in early 1986, further restricting the civil rights of South African blacks. Jeff Walker, *Economic Sanctions: United States Sanctions Against South Africa—Comprehensive Anti-Apartheid Act of 1986*, 28 HARV. INT'L L.J. 117, 117 (1987). Passage of the Anti-Apartheid Act over President Reagan's veto constituted a major foreign policy defeat for his administration. *Id.* It was the first time since the enactment of the War Powers Act in 1973 that Congress had overridden the President on a major foreign policy issue. Walker, *supra*, at 122. This came three months after Reagan had delivered a speech, characterized by the New York Times as "The Speech That Launched a Thousand Critics," in which he called the African National Congress and other South African anti-apartheid organizations perpetrators of "calculated terror" planning to cause a race war through "Soviet-armed guerrillas." Berat, *supra* note 5, at 25.

49. The purpose of the Act was to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a nonracial, democratic form of government. *Id.* § 5002; see Berat, *supra* note 5, at 25-26 (describing the Act, its purposes, some circumstances of its passing, and the conditions that must be met for its repeal).

financial activities of U.S. nationals who conducted business in South Africa.⁵⁰ Under the CAAA, no U.S. national was permitted to make new investment in South Africa.⁵¹ This prohibition had minimal economic impact on South Africa or on U.S. companies there.⁵² By 1986, U.S. companies were already making few new investments in South Africa,⁵³ largely because of South Africa's internal problems.⁵⁴ The CAAA thus had little impact on either the labor conditions in South Africa or foreign investment there.

50. Anti-Apartheid Act, *supra* note 35, §§ 5055, 5058. The CAAA prohibited U.S. nationals from extending credit to the South African government or any organization controlled by the South African government and forbade U.S. banks from holding or accepting any deposits from the South African government or an agency controlled by the South African government. *Id.*; see Walker, *supra* note 48, at 117, 119-20 (describing the various prohibitions mandated by the Anti-Apartheid Act). The CAAA also prohibited the export of numerous goods to South Africa as well as the importation of many South African goods into the United States. Anti-Apartheid Act, *supra* note 35, § 5059. These sections of the Anti-Apartheid Act were terminated by President Bush in 1991. Exec. Order No. 12,769, 56 Fed. Reg. 31,855 (1991).

51. Anti-Apartheid Act, *supra* note 35, § 5060(a). This section of the Anti-Apartheid Act was also terminated by President Bush in 1991. Exec. Order No. 12,769, 56 Fed. Reg. 31,855 (1991).

52. See Walker, *supra* note 48, at 121-22 (describing the limited impact that these sanctions were expected to have on the South African economy). Rather, more of an effect on investment in South Africa occurred in 1991 when President George Bush lifted the ban on new U.S. investment. *South Africa: Investor Organization Tracks Return of Major U.S. Companies to South Africa*, Int'l Bus. & Fin. Daily (BNA), at 58 (Feb. 17, 1994) available in WESTLAW, Bna-Ibfd Database [hereinafter *Investor Organization Tracks Return*]. More than 43 major U.S. companies re-entered the South African market between the lifting of the ban and early 1994. *Id.* See *supra* note 45 and accompanying text (claiming that disinvestment actually helped South Africa's economy to some degree).

53. Walker, *supra* note 48, at 121-22.

54. The introduction of a new constitution in November 1983 created a rebellion in the black townships that exceeded the seriousness of the 1976 Soweto riots. SUB-SAHARA, *supra* note 4, at 796-97; see 18 WORLD BOOK ENCYCLOPEDIA 620 (1996) (describing the Soweto riots where 600 people, mostly blacks, were killed as a result of protests against policies requiring some classes in schools for blacks to be taught in the Afrikaans language). This rebellion was supported by strikes, most critically in the economically important mining industry. SUB-SAHARA, *supra* note 4, at 797. In December of 1984, the Congress of South African Trade Unions (COSATU), a federation of black trade unions politically aligned with the African National Congress, was formed and demanded the release of Nelson Mandela from prison and the withdrawal of foreign investment. *Id.* The township rebellion escalated when, on March 21, 1985, the 25th anniversary of the Sharpeville massacre, South African police opened fire on an unarmed African procession in Uitenhage, killing 20 and wounding many others. *Id.*; see 18 WORLD BOOK ENCYCLOPEDIA 620 (1996) (detailing the Sharpeville massacre where 69 blacks were killed by police and the subsequent outlawing of the African National Congress and the Pan-Africanist Congress). Despite the government declaring a state of emergency in 36 districts in July, the violence escalated as black policemen, community counselors, and informers were killed in growing numbers. SUB-SAHARA, *supra* note 4, at 797. The government lost control of some townships for extended periods and on June 12, 1986, the state of emergency was extended to the whole country. *Id.* at 97-98. These upheavals significantly aroused international opinion against South Africa and were largely responsible for the United States passing into law the Comprehensive Anti-Apartheid Act of 1986. *Id.* at 798.

However, by 1989, international⁵⁵ and internal pressures on the South African government to end apartheid dramatically increased.⁵⁶ The South African economy was suffering⁵⁷ from the effects of international sanctions⁵⁸ and increasing

55. In September 1989, following informal meetings in Britain with key South African parties, U.S. President George Bush indicated he would assent to stricter economic sanctions if there was no effort to release Nelson Mandela from prison in nine months. SUB-SAHARA, *supra* note 4, at 798; see David B. Ottaway, *U.S. Gives South Africa a Deadline on Apartheid*, WASH. POST, Oct. 4, 1989, at A8, available in WESTLAW, Allnews Database (describing new punitive measures to be implemented by President Bush unless apartheid ended); Nathan E. Fagre & Catherine Casey, *Use of Economic Sanctions to Promote Human Rights: The Case of Economic Sanctions Against South Africa*, 399 ALI-ABA 165 (1989) (detailing the history of economic sanctions against South Africa and describing the Bush Administration's pressures on the South African government).

56. SUB-SAHARA, *supra* note 4, at 798. Although the African National Congress (ANC) and the South African Communist Party (SACP) lost a major source of financial backing with the collapse of communism in the former Soviet Union, their movement was again gaining strength. *Id.* at 798. On October 29, 1989, 70,000 black and white activists rocked a giant soccer stadium, chanting and singing protest songs, in a 10-hour rally celebrating the release of seven ANC members from prison and calling for an intensification of the sanctions campaign until the white minority-led government was serious in its negotiations with the ANC. Scott Kraft, *Apartheid Foes Stage Huge Rally*, L.A. TIMES, Oct. 30, 1989, at A 1, available in WESTLAW, Allnews Database. Some commentators felt that Nelson Mandela had become so powerful as a symbol of the ANC's movement during his lengthy prison term that his continued jailing severely harmed de Klerk's National Party. Anthony Hazlitt Heard, *The Jailed Becomes the Jailer*, L.A. TIMES, Oct. 13, 1989, at B 9, available in WESTLAW, Allnews Database; see Jonathan Kapstein, *South Africa: The Squeeze is On -- As Sanctions Bite Hard, Will de Klerk Choose Reform or Repression?*, BUS. WEEK, Sept. 11, 1989, at 44, available in WESTLAW, Allnews Database (describing in great detail the types of pressure on F.W. de Klerk and the South African government); see also Roger Thurow, *Clock is Ticking Loudly for South Africa*, WALL ST. J., Sept. 8, 1989, available in WESTLAW, Allnews Database (chronicling past election bloodshed in 1989 and other pressures on F.W. de Klerk's campaign promises to end apartheid).

57. 1985 was South Africa's twelfth consecutive year of double-digit inflation. INVESTMENT CLIMATE, *supra* note 5, at 294. The high rate of inflation and the South African recession were cited by many companies disinvesting. KIBBE, *supra* note 21, at 7. The majority of these companies felt that the economic problems of South Africa were really just a subset of its political instability. *Id.* Many companies disinvesting from South Africa in this era cited the poor state of the economy as their chief reason for leaving. *Id.* South Africa's economy was clearly stagnant by 1989, hit hard by inflation, low gold prices, and the international capital boycott from 1986. Kapstein, *supra* note 56, at 44. The U.S. government was also poised to increase sanctions if apartheid was not dismantled. *Id.* On the domestic side, South Africa's unemployment rate stood at 22%, interest rates were as high as 19%, and the sales tax tripled in the prior ten years, up to 13%. *Id.* In addition, South Africa was losing large numbers of skilled workers to Britain, Australia, and the United States. *Id.*

58. SUB-SAHARA, *supra* note 4, at 802. 1984 saw inward foreign direct investment (FDI) reach an all-time high of R641.7 million (approximately US\$160 million). U.N. DEP'T OF ECON. & SOCIAL DEVELOPMENT, 3 WORLD INVESTMENT DIRECTORY, 1992, *Developed Countries*, at 374, U.N. DOC. ST/CTC/136 (1993). The rand is South Africa's basic unit of currency. 18 WORLD BOOK ENCYCLOPEDIA 610 (1996). The rand currently trades at a rate of 0.2228 U.S. dollars (R4.4880=US\$1). WASH. POST, Feb. 11, 1996, at F8. Between 1985 and 1989, the annual average flow of FDI was negative R206.5 million (approximately US\$52 million). WORLD INVESTMENT DIRECTORY *supra* at 374. In 1985 alone, inward FDI was more than negative R1 billion (approximately US\$250 million). *Id.* at 375. In the previous ten years, there had been an average positive inflow of FDI of R70.5 million (approximately US\$18 million). *Id.* Most companies with interests in South Africa were removing their investments voluntarily, largely as a result of enormous public pressure encouraging companies to divest. Between 1985 and 1990, a total of 209 U.S. firms sold or closed their South African subsidiaries. *Investor Organization Tracks Return*, *supra* note 52, at D-8. The number of U.S. companies with investments in South Africa reached its low in 1991, when there were only 104 firms in South Africa. *Number of U.S. Companies Investing in South Africa Reaches 164*, IRRRC Says, 11 Int'l Trade Rep.

expenditures on internal security.⁵⁹ The majority of the white-controlled political parties in South Africa began realizing that apartheid was unsustainable and detrimental to South Africa's economic future.⁶⁰ Pressure was on the government of South Africa to make changes if it hoped to regain its status as a favorable country for foreign investment.

While not specifically targeting South African labor laws, the divestment movement and international sanctions hastened the end of apartheid by strengthening the internal influences to force the South African government to change its policies.⁶¹ These movements did have a profound effect on the labor laws of South Africa because, until apartheid was completely removed, the color-blind labor laws alone had little real beneficial effect on blacks.⁶²

III. EVOLUTION OF SOUTH AFRICA'S LABOR LAWS

With colonization of the Cape of Good Hope⁶³ in 1652 by the Dutch East India Trading Company, the law of master and servant was introduced into South Africa as part of the general body of Roman-Dutch law.⁶⁴

(BNA) No. 34, at 1313 (Aug. 24, 1994).

59. SUB-SAHARA, *supra* note 4, at 798; *see supra* note 57 (describing the conditions of South Africa's stagnant economy); *see also supra* notes 56, 58 and accompanying text (detailing South Africa's internal problems in this era).

60. SUB-SAHARA, *supra* note 4, at 798. The conservative National Party lost 30 Parliamentary seats (down to 93) in the 1989 election, while the more liberal Democratic Party picked up 13 seats (up to 33). Thurow, *supra* note 56. The pro-apartheid Conservative Party did manage to pick up 17 additional seats to control 39. *Id.* The conservatives had not done as well as hoped, however. *Id.* Analysts thought that these election results would steer the government to dismantle apartheid. *Id.* But *see* Scott Kraft, *Afrikaners See Signs of Doom Under New Policy: The Right Wing Does Not Buy the Dream of a Peaceful, Multiracial Future*, L.A. TIMES, Nov. 11, 1989, at A 12, available in WESTLAW, Allnews Database (describing the arguments of some white-controlled groups who felt that de Klerk had already conceded too much to the black majority).

61. VENTER, *supra* note 33, at 147.

62. *See supra* notes 12-20 and accompanying text (describing the life of a black worker under apartheid).

63. The Cape of Good Hope is a peninsula in South Africa that lies about 100 miles northwest of Cape Agulhas, the southern tip of Africa. 3 WORLD BOOK ENCYCLOPEDIA 188 (1996). Tradition claims that when Portuguese explorer Bartolomeu Dias discovered the cape in 1488, he named it the Cape of Storms. *Id.* at 189. King John II of Portugal gave the cape its present name in the hope that Dias had found a sea route to India. *Id.*

64. Dennis Davis, *From Contract to Administrative Law: The Changing Face of South African Labour Law*, 1989 ESSAYS ON THE HISTORY OF LAW 79, 80 & n.10 (1989); *see* 18 WORLD BOOK ENCYCLOPEDIA 618 (1996) (chronicling the history of South Africa's settlement). As early as 300 A.D., Bantu-speaking farmers entered eastern South Africa from the north. *Id.* at 618-19. These settlers were the ancestors of South Africa's present-day black population. *Id.* Although the slave industry ended in 1834, many features were maintained in the system of free labor which continued to operate in South Africa after emancipation. Davis, *supra*, at 81. These laws were suitable for an agriculturally-based economy but became inadequate to deal with employer demands after the discovery of gold and diamonds towards the end of the century. *Id.*; *see* SUB-SAHARA, *supra* note 4, at 801 (describing the twentieth century development of South Africa's economy).

The first significant development in modern South African labor law occurred in 1909 when the Industrial Disputes Prevention Act (IDPA) became law.⁶⁵ This law was promulgated in response to the rise of militant organizations of white workers.⁶⁶ In 1911, South Africa enacted the Mines and Works Act insuring that particular jobs were reserved only for whites, always enabling white workers to have satisfactory wages.⁶⁷ Following the Rand Revolt in 1922,⁶⁸ the Industrial Conciliation Act⁶⁹ was passed and there was a dramatic decrease in labor unrest.⁷⁰ There was virtually no change in the rights of white workers until 1979.⁷¹

The first recognition of black workers' rights came in 1947 as a result of the publication of the Industrial Conciliation (Natives) Bill.⁷² It was not until the late 1970s, however, when labor unrest⁷³ and an economy demonstrating large short-

65. Davis, *supra* note 64, at 82.

66. *Id.* The Industrial Disputes Prevention Act (IDPA) intended to aid in the prevention of strikes by workers and of employer lockouts. *Id.* at 82 & n.16. The IDPA placed severe restraints on the right to strike in exchange for the official recognition of white trade unions through conciliation boards. *Id.* at 83. Not surprisingly, the IDPA also specifically excluded anyone who was "not a white person." *Id.* at 82.

67. Karon M. Coleman, Comment, *South Africa: The Unfair Labor Practice and the Industrial Court*, 12 COMP. LAB. L. 178, 182 (1991).

68. The mining industry responded to labor unrest in 1913 and 1914 by attempting to curtail the role of white labor by substituting cheaper black labor in the unskilled positions. Davis, *supra* note 64, at 84-85. Negotiations followed in which the industry tried to implement wage cuts and other major modifications to the labor process. *Id.* at 85. Following these negotiations, 2000 white workers implemented a general strike in the mines. *Id.* The South African government declared a state of martial law and sent in troops to end the dispute. *Id.* at 86. It was estimated that 153 people were killed and 534 wounded. *Id.* at 86 & n.32. In the aftermath, white workers' wages dropped between 25-50%. *Id.* at 87. This was a crushing defeat for the white labor movement as trade union membership dropped by nearly forty percent from 1920 to 1923. *Id.* at 89 & n.41; see Coleman, *supra* note 67, at 182 (describing the labor unrest in South Africa mining from 1907 to 1922 culminating in the Rand Revolt).

69. The major impact of the Industrial Conciliation Act was the creation of industrial councils and conciliation boards to ease dispute resolution. Coleman, *supra* note 67, at 182.

70. Davis, *supra* note 64, at 90. In 1937, amendments to the Industrial Conciliation Act effectively negated all possibilities of blacks undercutting white labor in the large organized industries. *Id.* at 91. This Act provided two different forums for collective bargaining that were still in place prior to the 1995 Labour Relations Act: industrial councils & conciliation boards. *Id.* see *infra* notes 148-208, 238-54 and accompanying text (analyzing the collective bargaining and dispute resolution mechanisms of the 1995 Labour Relations Act).

71. See *infra* notes 76-80 and accompanying text (discussing the abolishment of South Africa's dual labor system in 1979).

72. Davis, *supra* note 64, at 91. The object of the bill was to grant black workers statutory recognition so, at least administratively, they would be treated similarly to white workers. *Id.* However, blacks were prohibited from taking part in industrial councils formed by employers and white unions. *Id.* This policy was politically overwhelmed by the far more coherent commitment of the National Party to rigid control of economic development designed to repress any possible black opposition. *Id.* The period of capitalist development in South Africa brought intensified racial domination of the blacks, with all the sectors of the economy mandating it to promote their objectives. *Id.* at 92.

73. The period of reduced labor difficulties which South Africa experienced since the early 1960s was shattered by a wave of strikes in Durban in early 1973. *Id.* at 93. The strikes paralyzed mines and industries in many parts of the country. *Id.* These strikes proved to be the catalyst for major reforms which undermined the entire foundation of the apartheid system. *Id.* Pay raises significantly increased wages for blacks and labor law reforms finally allowed for the registration of black trade unions. *Id.* at 95.

tages of skilled labor⁷⁴ finally created the impetus for true labor reforms for black workers.⁷⁵

South Africa's labor law was actually at the forefront of racial reform.⁷⁶ In 1979, the Industrial Conciliation Amendment Act became law and abolished the dual labor system by including all workers under the Labour Relations Act.⁷⁷ All workers were entitled to full trade union rights, freedom of association, and collective bargaining.⁷⁸ For the first time, black trade unions were legal.⁷⁹ In addition, the creation of the Industrial Court gave black workers a powerful ally in labor relations.⁸⁰

Under the new system of labor law the black trade unions thrived, prompting the South African Legislature to pass further amendments to the Labour Relations Act in 1981 attempting to thwart this success.⁸¹ The new laws actually had the opposite effect, further strengthening the unions.⁸² These amendments eliminated all references to race and opened the collective bargaining system to all workers.⁸³ These reforms led to a significant increase in trade union membership, and a sub-

74. See *id.* at 92. In 1977, government figures showed vacancies for 99,000 workers in professional and technical occupations and projections made in 1980 predicted a shortage of 758,000 skilled workers by 1990. *Id.* Reasons cited included expansion of the economy, diminished birth rates and a decline in white immigration. *Id.* at 92-93.

75. See *id.* at 92. The National Party came into power in the year after the passage of the Natives Bill and the racial discrimination of apartheid prevented the implementation of the reforms for blacks from being implemented any sooner. *Id.* at 91.

76. See generally *id.* (discussing the reasons for the change in the relationship between black workers and the industries); Coleman, *supra* note 67 (detailing the history of South Africa's labor law reforms).

77. Coleman, *supra* note 67, at 185. The Industrial Conciliation Amendment Act was prompted by the recommendations of the Wiehahn Commission. ALAN RYCROFT & BARNEY JORDAAN, A GUIDE TO SOUTH AFRICAN LABOUR LAW 156 (1992). The Wiehahn Commission created a blueprint to improve the black quality of life, in the interests of political & economic stability, support of the free enterprise system by blacks, and for the interest of economic growth. Davis, *supra* note 64, at 94.

78. Coleman, *supra* note 67, at 185.

79. *Id.* In addition, the concept of an unfair labor practice was implemented into the labor law by the 1979 amendments. RYCROFT & JORDAAN, *supra* note 77, at 156.

80. The 1980 Amendments limited the power of the Industrial Court somewhat, but the court was still able to develop a fair body of labor law over the next ten years. See RYCROFT *supra* note 77, at 157-58 (describing the limitations on the court from the 1980 Amendments); Coleman, *supra* note 67, at 178 (discussing the creation of the court); see also RYCROFT & JORDAAN, *supra* note 77, at 156-75 (chronicling South Africa's labor movements and labor law developments in relation to the changing unfair labor practice definition).

81. Coleman, *supra* note 67, at 178. The purpose of the 1979 Amendments had been to provide a mechanism of control over the black trade unions that had become active in the anti-apartheid movement. *Id.* Legalization prompted a surge in membership and the evenhandedness of the new labor laws gave the black trade unions an accomplice, the Industrial Court. *Id.*

82. *Id.*

83. Davis, *supra* note 64, at 97. The 1981 Amendments altered the definition of "trade union" to include any kind of activity involving employer relations. *Id.* at 98. The effect of that definition required more "trade unions" to become registered in order to avoid the large number of restrictions placed on unregistered unions. *Id.* Strike action increased dramatically between 1980 and 1982. *Id.* at 99. In 1982, there were 394 strikes (up from 207 in 1980) involving 141,571 workers (compared with 61,785 in 1980). *Id.*

sequent increase in strike action, both legal and illegal.⁸⁴ However, even though some of the benefits of labor reforms finally reached them, working conditions for blacks remained unequal.⁸⁵

IV. THE DISMANTLING OF APARTHEID

Since 1979, South Africa's labor laws facially treated members of all races equally.⁸⁶ However, unless apartheid was completely dismantled, these laws were ineffective in improving living conditions for South African blacks.⁸⁷ On February 2, 1990, South African President Frederik W. de Klerk,⁸⁸ in a speech before the South African Parliament, formally abolished apartheid and drastically accelerated reform.⁸⁹ Nine days later, Nelson Mandela was released from prison after twenty-seven years in captivity.⁹⁰ In February 1991, de Klerk repealed all

84. LOUW, *supra* note 21, at 30.

85. BIKO, *supra* note 14, at 101. The townships where most working blacks lived were placed long distances from where they worked. *Id.* The transportation conditions were dangerous and required laborers to be away from home as much as 16 hours a day. *Id.*

86. *See supra* notes 77-83 and accompanying text (describing the race-neutral provisions of the post-Wiehahn Commission labor laws).

87. *See supra* note 19 (showing the 1985 income differential between black and white South Africans).

88. de Klerk was born in Johannesburg in 1936. 5 *WORLD BOOK ENCYCLOPEDIA* 94 (1996). He attended Potchefstroom University and then practiced law until beginning service in the South African Parliament in 1972. *Id.* de Klerk became the head of the Transvaal branch of South Africa's ruling National Party in 1982. *Id.* When Pieter W. Botha resigned as South Africa's leader because of ill health in 1989, de Klerk replaced him and was elected to the post later that year. *Id.*

He had the courage to admit that a terrible wrong had been done to our country and people through the imposition of the system of apartheid. He had the foresight to understand and accept that all the people of South Africa must, through negotiations and as equal participants in the process, together determine what they want to make of their future.

NELSON MANDELA, *LONG WALK TO FREEDOM* 533 (1994) (paying tribute to de Klerk, his fellow 1993 Nobel Peace Prize laureate, during his thank-you speech in Norway).

89. Ambassador Kent DS Durr, *Introduction to Country Report: South Africa*, INT'L FIN. L. REV., COUNTRY REPORT.: SOUTH AFRICA (Special Supp.), May 1992, at 2. de Klerk's speech removed the ban on the African National Congress, the South African Communist Party, the Pan Africanist Congress, and 33 other organizations including the United Democratic Front, and also declared that the South African government was firmly committed to pursuing negotiations with the leaders of the black majority groups. G. Marcus Cole, *Post-Apartheid Future*, 13 J. INT'L L. BUS. 711, 712 (1993) (book review); *see* SUB-SAHARA, *supra* note 4, at 798 (providing details of de Klerk's speech). de Klerk also said that equality of all citizens regardless of race would be guaranteed by an independent judiciary and that protection of individual rights would be entrenched in the new constitution. *Id.*; *see* John Dugard, *South Africa: International Law Provisions of the 1993 Constitution*, 33 I.L.M. 1043 (1994) (describing the speech as the beginning of a political revolution in South Africa).

90. SUB-SAHARA, *supra* note 4, at 798; *see* Vivienne Walt, *The Life of Nelson Mandela*, *NEWSDAY*, Feb. 11, 1990, at 18 (describing Mandela's life and imprisonment on the eve of his release). Mandela gave a public address outside Cape Town's city hall on February 11th, calling for increased efforts towards democracy in South Africa and thanking those others involved in the struggle. *In the Name of Freedom: Text of the Cape Town Address*, *BOSTON GLOBE*, Feb. 12, 1990, at 6. Mandela concluded his speech with the famous words from his 1964 trial when he was sentenced to life in prison:

I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony

remaining legislative pillars of apartheid, including the Group Areas Act and the Population Registration Act.⁹¹ On July 10, 1991, President Bush removed the sanctions against South Africa contained in the CAAA.⁹²

However, many U.S. companies did not rush to reinvest in South Africa, even after the removal of sanctions. There are several reasons for this. First, political and economic instability remained in South Africa.⁹³ Second, many U.S. state and local laws restricting contractual relations with companies doing business in South Africa remained in effect.⁹⁴ The third major problem facing U.S. companies considering reinvestment in South Africa was that the CAAA's repeal had little impact on U.S. state and local divestment laws.⁹⁵ These companies could not

and with equal opportunity. It is an ideal which I hope to live for and to achieve. But, if need be, it is an ideal for which I am prepared to die.

Id.

91. SUB-SAHARA, *supra* note 4, at 799.

92. KIBBE, *supra* note 21, at 2. Nelson Mandela had actually called for increased sanctions in his speech upon release from prison the year before. *In the Name of Freedom*, *supra* note 90, at 6. The CAAA was not actually repealed until 1993. South African Democratic Transition Support Act of 1993, Act Nov. 23, 1993, 107 Stat. 1503.

93. During 1991, there was continuing violence in South Africa between the Zulu-based Inkatha Freedom Party (IFP), which had made peace with the white-led government, and the ANC. 18 WORLD BOOK ENCYCLOPEDIA 621 (1996). The IFP did not want South Africa's new government to be run by the ANC and thousands died in the conflicts between the two groups. *Id.*; see Manby, *supra* note 6 (describing the conflict between the IFP and the ANC in greater detail).

94. KIBBE, *supra* note 21, at 2. As of August 1, 1991, there were still 53 states, cities, or counties in the United States with selective contracting laws that restricted these governments from doing business with banks and corporations that were involved in South Africa. *Id.* at 3. Each of the eight largest U.S. cities and six of the ten largest states still had sanctions against South Africa as late as August 1992. MOSES, *supra* note 38, at 3. Many of these laws were passed before enactment of the CAAA. KIBBE, *supra* note 21, at 3. These state and local selective contracting laws had a more harmful effect on U.S. companies than any portion of the CAAA. *Id.* The main reason for this effect was the different rationale behind the CAAA as opposed to that behind most of the state and local laws. *Id.* The intent of the CAAA was simply to encourage the South African government to enter into negotiations with popular representatives of the black majority. *Id.* F.W. de Klerk's speech before Parliament eighteen months earlier marked the beginning of South Africa's willingness to enter these negotiations. SUB-SAHARA, *supra* note 4, at 798. In addition, the CAAA only sought to limit certain trade with and investment in South Africa, not bar it altogether. KIBBE, *supra* note 21, at 3. Conservative Republicans originally joined with House Democrats to pass a bill with very strong sanctions in hopes of gaining enough votes to sustain a presidential veto. Terry Atlas & Dorothy Collin, *GOP Ploy Seen on Sanctions, S. Africa Bill So Tough Senate Won't Touch It*, CHI. TRIB., June 20, 1986, at C1. This was seen as a ploy to doom passage of the more limited CAAA. *Id.* By contrast, the state and local laws basically asked companies to completely sever their investment and other business links to South Africa in order to be eligible for local contracts. KIBBE, *supra* note 21, at 3. Predictably, most U.S. companies eliminated what were minimal investments in South Africa in order to protect the greater sales that they received from major U.S. jurisdictions. *Id.*

95. KIBBE, *supra* note 21, at 5. This was significant because, as late as September 1991, there were still over 1400 U.S. state and local laws hampering or restricting business or investment ties with South Africa. *Business Not Rushing Back to South Africa*, UPI, Sept. 8, 1991, available in LEXIS, Nexis Library, UPI File. Most state and local sanctions laws did not specify timetables or conditions for their repeal as did the CAAA or, if they did, they used broad formulations that allowed the sanctions to be applied until apartheid had ended, or until all South Africans had equal voting rights. KIBBE, *supra* note 21, at 3. In addition, the local activist groups that originally lobbied for the laws gave no indication that South Africa's government had done enough, and the local governments were hesitant to change their anti-apartheid laws until they had approval from these

safely reinvest as long as the state and local sanctions remained in effect.⁹⁶ However, by the time South Africa implemented its interim constitution in 1993, nearly all of the state and local action laws had been repealed.⁹⁷

Since the mid-1980s, changes in South Africa's political landscape,⁹⁸ along with pressures from foreign countries and investors, have had a dramatic impact on South Africa.⁹⁹ As early as 1991, as South Africa began a political and economic transition away from apartheid, the black community, formerly relegated to a subordinate status, was slowly becoming integrated into the more developed white economy.¹⁰⁰ The South African Parliament approved legislation in September 1993 forming a transitional government to operate the country in the period leading up to the first multi-racial elections in April 1994.¹⁰¹

Following Mandela's landslide election victory, the ANC took control over South Africa's government.¹⁰² The new democratic government immediately

groups. *Id.* at 3-4. For example, the South African Task Force of the National Conference of State Legislatures called for the state sanctions to remain in place until the conditions for repeal of the CAAA had been met and until there was a broad consensus among South Africans that sanctions should be lifted. *Id.* at 4; see Fagre & Casey, *supra* note 55 (calling for tougher and continued sanctions).

96. KIBBE, *supra* note 21, at 5. Other issues in the decision whether U.S. companies would reinvest were the scars left from the disinvestment debate. *Id.* Reinvesting would require an evaluation of all market factors and may not be an immediately viable option for many companies that disinvested. *Id.* For some, the mere mention of South Africa brought back images of demonstrations at corporate meetings and the like. *Id.*

97. *American Divestment Action Ends*, ECON. INTELL. UNIT BUS. AFR., July 1, 1993. As a result, by the beginning of 1994, U.S. companies began returning to South Africa in significant numbers. *Investor Organization Tracks Return*, *supra* note 52, at D8. As of February 1994, 150 U.S. companies had invested directly or had employees in South Africa. *Id.* In addition, 435 more companies had non-equity ties (such as licensing and distribution agreements), compared with only 184 when the investment ban was lifted. *Id.*

98. See *supra* notes 37-60, 86-92 and accompanying text (describing South Africa's political climate over the past fifteen years).

99. See *supra* notes 32-62 and accompanying text (detailing the history of foreign investment in South Africa focusing on the external pressures from other countries).

100. KIBBE, *supra* note 21, at 13. This integration was taking place by way of increased wage levels for blacks and increased access to capital and greater economic opportunities. *Id.* The levels of disposable income for blacks subsequently were on the rise, thus creating for companies expectations of a vast, essentially new, market for them to target. *Id.*

101. SUB-SAHARA, *supra* note 4, at 800. Because of the elections, a great deal of uncertainty surrounded the future of South Africa's economy. *South Africa's Economy After the Election*, S. AFR. BUS. INTELL., Apr. 22, 1994, at 1, available in 1995 WL 8280975. In the four months prior to the elections, South Africa's rand plunged in value by 9.5% against the U.S. dollar, falling to an all-time low of R3.60. *Id.*; see generally *supra* note 58 (explaining South Africa's exchange rate). However, there was really no danger of economic collapse, regardless of the outcome of the elections. South Africa's Gross Domestic Product had been forecast to grow at an annual rate of up to 4%, the highest since the 1970s. *Id.* Newly-elected President Nelson Mandela had promised to continue monetary and fiscal policies designed to maintain economic stability to attract private investment. *South Africa: Summers Says South Africa Can Achieve Real Growth of 5 Percent*, Int'l Bus. & Fin. Daily (BNA), at D4 (June 7, 1994). The outlook for South African companies' profits improved and many economic indicators began showing positive signs. *Bullish Outlook for Company Profits in South Africa*, S. AFR. BUS. INTELL., Mar. 14, 1994, at 4, available in 1994 WL 822115; but see *South Africa: World Bank Mission Official Says "Serious Investment" is Years Off*, Int'l Bus. & Fin. Daily (BNA), at D-5 (June 15, 1994).

102. *Text of Mandela Victory Speech*, REUTERS WORLD SERV., May 2, 1994.

faced challenges in continuing reforms and in reviving South Africa's long-stagnant economy.¹⁰³ One of the most important challenges was implementing meaningful labor reforms.

V. THE LABOUR RELATIONS ACT 66 OF 1995

As part of its bill of rights, the interim South African Constitution implemented in 1993 guaranteed certain fundamental rights for workers and employers.¹⁰⁴ However, the initial impact of this section of the constitution on South African labor law was limited because it specifically intended to shield the Labour Relations Act from constitutional scrutiny.¹⁰⁵ Although the existing labor laws, combined with no apartheid restrictions, gave black trade unions significant powers, some of the more powerful unions sought more significant reforms.¹⁰⁶ Because these unions were instrumental in accelerating apartheid's demise and in bringing the ANC to power, the South African government complied with their demands and completely reworked the country's forty-year old Labour Relations Act.¹⁰⁷ Originally intended to take effect on December 22, 1995,¹⁰⁸ institutional structures have delayed implementation of the New Act until November 11, 1996.¹⁰⁹ South Africa is now living between systems, one that is falling apart, and one that is not yet in place.¹¹⁰

Many aspects of the New Act were included as a result of the recent increase in labor unrest in South Africa.¹¹¹ The New Act's primary author, Labour

103. *New South African Labor Minister Mboweni Outlines Five-Year Plan on Labour Relations*, Daily Lab. Rep. (BNA) No. 111, at D-11 (June 13, 1994) [hereinafter *Labor Minister Outlines Five-Year Plan*].

104. S. AFR. INTERIM CONST. CH. 3, § 27 (1993). Those rights included the right to fair labor practices, to form and join trade unions and employer organizations, to organize and bargain collectively, and the right for workers to strike and employers to lock-out for collective bargaining purposes. *Id.*

105. DAWID VAN WYK ET AL., RIGHTS AND CONSTITUTIONALISM - THE NEW SOUTH AFRICAN LEGAL ORDER 451, 451-52 (1994). Section 33(5)(a) of the interim constitution, which limits the application of the fundamental rights chapter to labor practices, reads as follows:

The provisions of a law in force at the time at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in full force and effect until repealed or amended by the legislature.

S. AFR. INTERIM CONST. CH. 3, § 33(5)(a).

106. Don L. Boroughs, *First Freedom, Then Jobs: South Africa has Staggering Unemployment that Threatens the Country's Political Compact*, U.S. NEWS & WORLD REP., Aug. 19, 1996, at 40, 1996 WL 7811270.

107. *South Africa's Labor Minister Drafts New Labour Relations Act*, Daily Lab. Rep. (BNA) No. 223, at D12 (Nov. 22, 1994) [hereinafter *Labor Minister Drafts New Act*].

108. New Act, *supra* note 11, pmb1.

109. Mark Ashurst, *Strained Relations*, FIN. TIMES, Oct. 3, 1996, available in 1996 WL 10617114 [hereinafter *Strained Relations*].

110. *Id.*

111. *Labor Minister Drafts New Act*, *supra* note 107, at D12. Overall, strike action was down markedly in 1995 compared to the three prior years. *Industrial Action Declines in South Africa in 1995*, AGENCE FRANCE-PRESSE, Dec. 27, 1995, available in 1995 WL 11490233. South Africa's Labour Minister Tito

Minister Tito Mboweni, envisioned South Africa as a country where the truculent labor and profit-driven business community are at peace with one another.¹¹² Unfortunately, this vision might be unrealistically optimistic. South Africa's economy relies heavily on investment from other countries.¹¹³ Historically, foreign companies investing in South Africa did so because of the large quantities of cheap labor, particularly in the unskilled black population.¹¹⁴ In order to contribute to attracting foreign investment, the New Act must strive for true equality amongst all its workers to avoid a reprise of large-scale international sanctions.¹¹⁵ This may be in direct contrast with the South African government's aim to re-attract foreign investment through sustained economic growth.¹¹⁶

A. Purpose, Application, and Interpretation

The New Act's primary purpose is to monitor industrial policy, particularly in the areas of collective bargaining between trade unions and employers' organizations.¹¹⁷ The New Act also governs the resolution of labor disputes.¹¹⁸ Other purposes of the New Act include advancing economic development, social justice, labor peace and the democratization of the workplace.¹¹⁹ The New Act specifically guarantees and regulates the fundamental rights from section 27 of the Interim Constitution.¹²⁰ In addition, the New Act gives effect to obligations incurred by South Africa as a member of the International Labour Organization.¹²¹ To guide in its implementation, the New Act mandates that it must be interpreted to give effect to its purposes and to be in compliance with the Interim Constitution and public international law.¹²²

Mboweni claimed that, while a normal event, the strikes reflected serious shortcomings in the laws and institutional capacities inherited from the apartheid government. *Labor Minister Drafts New Act*, *supra* note 107, at D12.

112. *Id.*

113. INVESTMENT CLIMATE, *supra* note 5, at 293.

114. See Berat, *supra* note 5, at 7 n.1 (describing the correlation between cheap South African labor and high investment returns for foreign companies).

115. See *Strained Relations*, *supra* note 109, at 5.

116. *Id.*

117. New Act, *supra* note 11, § 1. The regulation of relations between unions and employers has been the primary purpose of the Labour Relations Act since its inception. See 1992 LRA, *supra* note 10, pmb.; Talbert I. Navia & Michael R. Littenberg, *South Africa's Labor Act Widens Old Law's Scope*, 18 NAT. L.J. 28, Mar. 11, 1996, at C12, available in 1996 WL 6147232.

118. New Act, *supra* note 11, § 1(c)-(d).

119. *Id.* § 1.

120. *Id.* § 1(a); see *supra* notes 104-05 and accompanying text (laying out the fundamental rights from the interim constitution in terms of Labour Relations).

121. New Act, *supra* note 11, § 1(b). The International Labor Organization (ILO) now consists of 171 nations. *South Africa Rejoins ILO After 30 Years*, Daily Lab. Rep. (BNA) No. 101, at D 26 (May 27, 1994). The ILO was created in 1919 to bring governments, employers, and trade unions together for unified action in the cause of social justice and human rights. *Id.*

122. New Act, *supra* note 11, § 3.

To fulfill these broad legislative purposes, the New Act gives effect to section 27 of the Interim Constitution,¹²³ promotes and facilitates collective bargaining at the workplace¹²⁴ and at the sectoral level;¹²⁵ and regulates the right to strike and the recourse to lock-out, in conformity with the Interim Constitution.¹²⁶ It also promotes employee participation in decision-making through the establishment of workplace forums; provides simple procedures for the resolution of labor disputes, establishes the Labour Court and Labour Appeals Court; and provides for a simplified procedure for the registration and regulation of trade unions and employers' organizations to ensure democratic practices and proper financial control.¹²⁷

The express purposes of the New Act are indicative of the South African government's commitment to meaningful labor reform. The major difference between the New Act and existing labor law is the New Act's clear promotion of collective bargaining and workplace forums for dispute resolution.¹²⁸ While this focus has sparked a bit of controversy, the New Act is expected to give South African workers a great deal more power than under previous labor laws.¹²⁹ The thrust of the New Act seems at odds with the South African government's blueprint for economic reform.¹³⁰ Standing up to the even more powerful trade unions will not be easy for the ANC-led government if it attempts to limit that power in implementing plans for economic growth.¹³¹ However, fears that support of the powerful trade unions will result in loss of jobs are mostly unfounded and are likely only negotiating ploys by employers upset that the South African worker has so many new rights.

123. See *supra* note 104 and accompanying text (describing Section 27 of the interim constitution).

124. A workplace usually refers to the place or places where the employees of an employer work. See New Act, *supra* note 11, § 213.

125. A sector simply means an industry or a service. See *id.*

126. *Id.* pmbi; §§ 64-68.

127. The New Act also intends to give effect to the public international law obligations of the Republic of South Africa relating to labor relations, amend and repeal certain laws relating to labor relations, and provide for incidental matters. *Id.*

128. Compare New Act, *supra* note 11, pmbi. with 1992 LRA, *supra* note 10, pmbi; see *infra* notes 152-212 and accompanying text (describing the collective bargaining processes under the New Act); *infra* notes 229-41 and accompanying text (describing the workplace forums).

129. Quentin Peel, *The Test is Yet to Come—New Industrial Laws Aim to Build on the Remarkable Improvement in Labour Relations*, FIN. TIMES, Mar. 28, 1996, at 4, available in 1996 WL 6154654.

130. Boroughs, *supra* note 106, at 40.

131. *Id.* The unions were strong allies while Mandela was in prison and the ANC in exile. *Id.*

B. Freedom of Association and General Protections

The New Act guarantees every employee¹³² the right to join a trade union subject to that union's constitution.¹³³ It also guarantees the right to participate in the formation of a trade union or federation of trade unions.¹³⁴ The New Act guarantees trade union members the right to participate in all lawful union activities.¹³⁵ The law also makes it illegal to discriminate against employees exercising rights under the New Act.¹³⁶ In addition, no employer can prohibit membership in unions or workplace forums as a condition of employment,¹³⁷ prevent employees from exercising rights conferred by the New Act,¹³⁸ or prejudice an employee or anyone seeking employment because of past, present, or anticipated activities within trade unions or workplace forums.¹³⁹ Any contractual provision which contradicts or limits employee rights is invalid unless otherwise permitted within the New Act.¹⁴⁰

Like employees, employers have participatory rights and freedoms from discrimination with respect to their participation in employers' organizations.¹⁴¹

132. The New Act defines an employee as "any person, other than an independent contractor, who works for another person or the State and is entitled to receive remuneration for those services and the definition also includes those who, in any manner, assist in the carrying on or conducting of the business of an employer." New Act, *supra* note 11, § 213.

133. *Id.* § 4(1)(b).

134. *Id.* § 4(1). The New Act defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organizations." *Id.* § 213. The basic requirements for registration of trade unions is covered extensively in Chapter VI of the New Act which provides all of the procedural requirements that trade unions and federations of trade unions must meet, prior to becoming recognized, and the record-keeping and other requirements after recognition by the Registrar. *See id.* §§ 95-107. This process is handled through the office of the Registrar of Labour Relations whose duties are essentially of a record-keeping nature. *Id.* §§ 108-111. This process simplifies the registration procedure under present South African Labor Law. Navia & Littenberg, *supra* note 117, at C12. *See generally* 1992 LRA, *supra* note 10, §§ 4-17 (detailing the registration procedure under the old Labour Relations Act).

135. New Act, *supra* note 11, § 4(2)(a). This includes the right to elect officers and officials, to run for office or serve as a trade union representative. *Id.* § 4(2)(b)-(c). Elected officials must carry out the functions of those offices in terms of the New Act and any collective agreement. *Id.* § 4(2)(d). Collective agreements are defined by the New Act as a written agreement concerning the terms and conditions of employment or any other matter of mutual interest concluded between a trade union on one side and one or more employer or employers' organization on the other. *Id.* § 213.

136. *Id.* § 5(1).

137. *Id.* § 5(2)(a).

138. *Id.* § 5(2)(b).

139. *Id.* § 5(2)(c). In addition, employees cannot be prejudiced against when seeking employment for failure or refusal to do something that an employer may not lawfully require the employee to do, for disclosure of information that the employee is legally required or entitled to give to another, or for participation in any proceedings in terms of the New Act. *Id.*

140. *Id.* § 5(4). An example is the provision of the New Act allowing the employee or employer to contract away some of their rights through collective agreements. *Id.* § 23.

141. *Id.* §§ 6-7. The New Act defines an employers' organization as "any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions." *Id.* § 213. The basic requirements for registration of employers'

In addition, every trade union and employers' organization has the right to determine their own constitution and rules, plan and organize their administration, join in federations of trade unions or employers' organizations and affiliate with and participate in the affairs of international workers or employers organizations.¹⁴²

Parties with disputes about the interpretation of these sections of the New Act can refer those disputes to the Commission for Conciliation, Mediation, and Arbitration (Commission).¹⁴³ The initial burden of proof in these disputes rests with the party alleging that a right guaranteed by the New Act has been infringed.¹⁴⁴ The burden then shifts to the party allegedly engaging in illegal conduct to show the conduct was not covered by the New Act.¹⁴⁵

The language of the new freedom of association provisions do not substantially differ from the protections offered workers under the existing Labour Relations Act.¹⁴⁶ Therefore, it is reasonable to believe that the freedom of association provisions of the New Act will not affect the rights and obligations of South African workers very much, if at all, nor will it significantly affect foreign investment in South Africa. This area of labor law in South Africa has been color-blind in its language and in practice since the reforms of the Industrial Conciliation Amendment Act were implemented in 1979.¹⁴⁷ Although there were no significant changes in this area, the protection of these hard-earned freedom of association rights is important in continuing the movement towards true labor equality between blacks and whites in South Africa.

C. Collective Bargaining

The collective bargaining section of the New Act contains one of the most significant substantive changes from the old labor laws.¹⁴⁸ The New Act encourages collective bargaining as the preferred method of regulating labor relations on a much larger scale than under prior South African law.¹⁴⁹ The complexity and

organizations is covered extensively in Chapter VI of the New Act. *See generally id.* §§ 95-111.

142. *Id.* § 8(b).

143. *Id.* § 9. A "council" refers to both bargaining councils and statutory councils. *Id.* § 213. *See infra* notes 184-205 and accompanying text (discussing bargaining and statutory councils); *infra* notes 245-50 and accompanying text (describing the functions and duties of the Commission).

144. New Act, *supra* note 11, § 10(a). A party who alleges that a right or protection conferred by this area of the New Act has been violated has the initial burden of only showing the facts of the conduct. *Id.* § 10. This showing can then be rebutted by the party who engaged in the conduct proving that the conduct did not infringe any rights granted by this area of the New Act. *Id.*

145. *Id.* § 10(b).

146. *See generally* 1992 LRA, *supra* note 10.

147. *See supra* notes 76-80 and accompanying text (recounting the 1979 reforms and the Industrial Conciliation Amendment Act).

148. *See generally* 1992 LRA, *supra* note 10 (providing more limited collective bargaining procedures than under the New Act).

149. Navia & Littenberg, *supra* note 117, at C 12.

detail of the collective bargaining provisions of the New Act effectively mandate that collective bargaining will be the primary source of dispute resolution by making it nearly impossible to avoid when resolving disputes.¹⁵⁰ This focus on collective bargaining is a major concern of those who are critical of the New Act.¹⁵¹

1. Organizational Rights

In conjunction with the greater focus on collective bargaining, the New Act greatly expands the rights of trade unions to conduct their business.¹⁵² Under the New Act, trade union officers and officials have nearly unlimited rights to enter employers' premises to conduct their activities.¹⁵³ Trade union membership fees can be deducted from wages by the employer upon authorization of the employee.¹⁵⁴ This section of the New Act also mandates the number of trade union representatives which must be selected from each workplace.¹⁵⁵

Under the New Act, representatives are entitled to take reasonable time off with pay during working hours to perform their duties, subject to reasonable conditions.¹⁵⁶ The New Act also guarantees the trade union representatives the right to assist and represent employees in grievance proceedings, monitor an employer's compliance with the New Act, and report any alleged violations of the

150. See *infra* notes 238-54 and accompanying text (describing the dispute resolution procedures requiring collective bargaining as the initial method of resolution).

151. Peel, *supra* note 129, at 4.

152. Although the unions were forced to make some concessions during negotiations leading up to the New Act, overall they were satisfied with the new legislation. *Survey of South Africa (4): Smaller in Number and Shorter in Length*, FIN. TIMES, Nov. 21, 1995, available in 1995 WL 1116824.

153. New Act, *supra* note 11, § 12(1). These rights are subject only to reasonable conditions to protect health and safety and to prevent the undue disruption of work. *Id.* § 12(4). Officials of trade unions can enter the employer's premises to recruit members or communicate with them. *Id.* In addition, trade unions themselves are entitled to hold meetings with employees outside working hours on the employer's premises and members can hold any election within their constitution on the employer's premises. *Id.* § 12(2)-(3). Under the current LRA, this disclosure provision applied only to materials subpoenaed by the Registrar. See 1992 LRA, *supra* note 10, § 11 (providing record-keeping and disclosure requirements under the old LRA). In addition, the old law treated employers and unions equally in this regard. See *generally id.* (showing that all references to trade unions also included employers' organizations).

154. New Act, *supra* note 11, § 13. This section also provides mechanisms for these deductions, including when deductions must begin and end and the adequate notice required from the employee when (s)he intends the deductions to cease. *Id.*

155. *Id.* § 14(2). The number of representatives is based on the number of trade union members employed there, in accordance with the trade unions constitution. *Id.* § 14(2)-(3). The number of trade union representatives required ranges from one (if there are 10 members from the union employed in the workplace) up to a maximum of 20 representatives when 5000 or more members of the trade union are employed in that workplace. *Id.*

156. *Id.* § 14(5).

New Act by the employer.¹⁵⁷ If the representative needs to perform trade union activities, the New Act requires the leave to be provided by the employer.¹⁵⁸

Another important aspect of the trade union representative's rights is the employer disclosure provisions of the New Act.¹⁵⁹ These provisions require the employer to disclose all relevant information¹⁶⁰ to trade union representatives in order to allow them to perform effectively.¹⁶¹ Collective agreements¹⁶² that regulate these rights are not precluded by any part of these provisions of the New Act.¹⁶³

Although the New Act requires South African businesses to provide expanded trade union access to the workplace, many foreign companies have already been providing the unions this expanded access.¹⁶⁴ Therefore, the New Act does not significantly change access burdens on foreign companies.¹⁶⁵ Additionally, these expanded trade union rights were not similarly afforded to employers' organizations, and the unequal treatment has sparked a great deal of

157. *Id.* § 14(4). The representative has the right to report any alleged contravention of the New Act not only to the employer and the representative trade union, but also to any responsible authority or agency. *Id.* § 14(4)(c); *see infra* notes 242-58 and accompanying text (describing dispute resolution procedures under the New Act).

158. New Act, *supra* note 11, § 15. The union and the employer may agree in advance to the number of days of paid leave and any conditions attached to such leave. *Id.* § 15(2).

159. *See generally id.* § 16 (outlining the various disclosure provisions, what the employer is required to disclose, and how disputes about disclosure are resolved).

160. Employers are not required to disclose information that is privileged, if disclosure would violate some other law, or private employee information without that employee's consent. *Id.* § 16(5).

161. *Id.* § 16(2). Disputes over disclosure are subject to similar resolution procedures as other provisions of the new Act. *Id.* § 16(6)-(9). *See infra* notes 242-58 and accompanying text (describing dispute resolution procedures under the New Act). A weakness of this provision is that there is no penalty to the employer for failure to disclose this information, the Commission's only available remedy is an order to the employer to disclose the information. *See generally* New Act, *supra* note 11, § 16. This mandatory disclosure right does not exist for employees in the domestic sector. *Id.* § 17(2)(b).

162. *See infra* notes 168-79 and accompanying text (describing the provisions governing collective agreements under the New Act).

163. New Act, *supra* note 11, § 20. Exercise of the rights guaranteed by this part of the New Act is governed by a detailed notification, bargaining, and resolution process expressly detailed in the New Act. *Id.* § 21. A registered trade union may notify an employer that it intends to exercise certain organizational rights. *Id.* Content of the notice is described in Section 21(2). After proper notification, the goal of the procedure is to resolve the dispute through a collective agreement obtained during a meeting within 30 days of the notification. *Id.* If no agreement is reached, either party may refer the dispute to the Commission. *Id.* § 21(4). The dispute will then be resolved through conciliation and, if conciliation is unsuccessful, through arbitration. *Id.* § 21(6); *see id.* Schedule 4, Diagram 2 (outlining a flow chart of the procedure under Section 21). If the dispute concerns organizational rights, and is not covered by Section 21, it can be immediately referred to the Commission by either party and the process immediately goes to the conciliation (and then arbitration) process. *Id.* § 22.

164. Navia & Littenberg, *supra* note 117, at C12.

165. *Id.*

controversy.¹⁶⁶ Finally, many feel that giving South Africa's workers a bigger voice in company policy is in direct contrast to stated governmental goals of sustained annual economic growth and mass creation of new jobs.¹⁶⁷

2. *Collective Agreements*

The New Act also closely regulates the end product of the collective bargaining process: the collective agreement.¹⁶⁸ Collective agreements bind parties to the agreement, members of the trade unions and employers' organizations that are parties to the collective agreement,¹⁶⁹ and other non-union employees expressly identified in the collective agreement.¹⁷⁰ These agreements bind any employee who is a member of the trade union at the time the agreement takes effect as well as employees who subsequently become members of the union.¹⁷¹ This is true regardless of whether the employee remains a member of the trade union for the duration of the agreement.¹⁷² The parties may also enter into a closed shop agreement¹⁷³ which requires all employees to become members of the trade union.¹⁷⁴

166. See Roger Matthews, *Shadow Over Mandela's Smile: High Unemployment & Crime are Among the Many Challenges Still Facing Post-Apartheid South Africa*, FIN. TIMES, Mar. 2, 1996, at 6, available in 1996 WL 6147232.

167. *Id.*

168. The New Act defines a collective agreement as a written agreement concerning terms and conditions of employment or other matters of mutual interest concluded between at least one trade union and at least one employer or employer's organization. New Act, *supra* note 11, § 213.

169. Collective agreements are binding on these other members if it concerns terms and conditions of employment or employee-employer relations. *Id.* § 23(1)(c).

170. *Id.* § 23(1)(d). This part of the New Act also provides for collective agreements, known as agency shop agreements, which cover employees in the workplace who are not members of the trade union, provided the majority of the employees are members of that union. *Id.* § 25. This section provides for employers to deduct an agreed agency fee from the wages of the employees identified in the agreement who are not members of the trade union. *Id.* § 25(1). The agreement is only binding if the employees covered are not compelled to join the trade union and the agreed agency fee is less than or equal to the subscription payable to the trade union by the members of that union. *Id.* § 25(2). The dispute resolution procedure is slightly different with respect to these agency shop agreements. *Id.* Sched. 4, Diagram 4.

171. *Id.* § 23(2).

172. *Id.*

173. Closed shop agreements require employers to hire only union members and require employees to remain union members as a condition of employment. BLACK'S LAW DICTIONARY (6th ed. 1990). These types of agreements have been unlawful in the United States since 1947. *Id.*

174. New Act, *supra* note 11, § 26(1). It is permissible, as long as within the trade union's constitution, to dismiss employees subject to the closed shop agreement for failing to join the trade union party to the closed shop agreement. *Id.* §§ 26(5)-(6). Some exceptions apply, but employees covered by these exceptions will likely still be required to pay an agreed agency fee. *Id.* §§ 26(7)-(8). Dispute procedures are also provided for in this section of the new Act. *Id.* §§ 26(9)-(14). For these closed shop agreements to be binding, they must be voted on by the covered employees and passed by a two-thirds majority. *Id.* § 26(3). A similar vote must take place for termination of the closed shop agreement, although only a simple majority vote of the employees is required to terminate the agreement. *Id.* §§ 26(15)-(17).

In addition, collective agreements vary any employment contracts to which the provisions of the agreement apply and may be terminated by either party to the agreement, provided reasonable notice is received.¹⁷⁵ The New Act mandates that the agreement contain a dispute resolution procedure, and provides for one when the collective agreement does not.¹⁷⁶ This section of the New Act is very detailed and potentially confusing to practitioners and others interpreting it. Once some precedent is established by the various dispute resolution forums, however, disputes over collective agreements should be handled fairly smoothly.¹⁷⁷ The South African government, by implementing the New Act, is actively encouraging collective bargaining as the preferred method of dispute resolution.¹⁷⁸ Unlike in the past, it will be very difficult for parties to circumvent these collective agreements. Of course, if the courts cannot or will not enforce these provisions, there will be no incentive to enter these agreements, and the government's primary purposes will be frustrated. Because the labor courts have been strong allies of the black trade unions since their inception in 1979, it is unlikely that there will be any problems with enforcing most collective agreements.¹⁷⁹

3. Bargaining Councils

An important aspect of the collective bargaining procedure under the New Act is the detailed provisions concerning bargaining councils.¹⁸⁰ These councils function to conclude and enforce collective agreements; prevent and resolve labor disputes; promote and establish training and education schemes; establish and administer benefit programs;¹⁸¹ develop policy and legislation proposals; and confer on workplace forums additional matters for consultation.¹⁸² Bargaining councils are similar to and replace the industrial councils that handled disputes under existing South African labor laws.¹⁸³

175. *Id.* § 23(3)-(4).

176. *Id.* § 24. The procedure in this section is very detailed and is similar to other dispute mechanisms in the New Act in its conciliation and arbitration procedures. *Id.*; see also *id.* Sched. 4, Diagram 3 (providing a flow chart outlining the dispute procedure under this section).

177. See *infra* notes 238-54 and accompanying text (describing the various dispute resolution procedures).

178. Navia & Littenberg, *supra* note 117, at C12.

179. See *supra* notes 76-84 and accompanying text (chronicling the creation of the Industrial Court and its role in helping the black trade unions become powerful).

180. See generally New Act, *supra* note 11, §§ 27-62 (containing the provisions of the New Act applicable to bargaining councils, statutory councils, and the bargaining council for the public service).

181. These programs include pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds. *Id.* § 28(g).

182. *Id.* § 28. Agreements concluded by the bargaining council are only binding on those parties to the agreement. *Id.* § 31. Non-parties, subject to certain restrictions, may also be bound if they fall within the council's registered scope. *Id.* § 32(3); see *id.* § 213 (defining the council's registered scope as the industrial sector in respect of which it is registered).

183. Navia & Littenberg, *supra* note 117, at C12.

Registered trade unions and registered employers' organizations may establish bargaining councils for any industrial sector by obtaining registration and adopting a constitution.¹⁸⁴ Agents of a bargaining council have the same powers as a Commissioner in resolving disputes, except for the power to subpoena expert witnesses.¹⁸⁵ Unlike the Commissioner, the agent has no power to issue arbitration awards or have its rulings become orders of the court.¹⁸⁶

The New Act will significantly broaden the scope of collective bargaining by forcing nearly all disputes to be resolved by the bargaining councils.¹⁸⁷ Although the more formal dispute resolution procedures developed in 1979 still exist under the New Act, their importance is significantly reduced by the increased ability of employers and workers to solve workplace problems through collective bargaining.

a. Bargaining Councils for the Public Service

The New Act also establishes a separate bargaining council for the public service,¹⁸⁸ which performs all the same functions as a private sector bargaining council.¹⁸⁹ This council deals specifically with matters regulated by uniform rules applied across the public service.¹⁹⁰ It also deals with terms and conditions of service across two or more sectors, and non sector-specific matters assigned to the state in its capacity as an employer.¹⁹¹ The main purpose of this section of the New Act is to allow the Public Service Coordinating Bargaining Council or South Africa's President to designate certain sectors of the public service for the establishment of a bargaining council if the uniform rules and standards applicable to the public sector as a whole are insufficient to regulate employment in that sector.¹⁹² These councils also have exclusive jurisdiction to establish collective agreements and resolve disputes in sector-specific matters.¹⁹³

184. New Act, *supra* note 11, § 27(1); *see id.* § 30 (detailing requirements of the constitution). The State may be a party to these bargaining councils if it is an employer in the sector and area covered and is subject to the same laws as an ordinary employers' organization. *Id.* §§ 27(2)-(3).

185. *Id.* § 33(3).

186. *See generally id.* § 143 (describing the power of the Commissioner to issue arbitration awards).

187. *See generally id.* § 24 (describing the imposition of collective bargaining as the initial method of resolving most disputes).

188. These separate councils are very important as seventy-one percent of the man-days lost to strikes in 1995 came in the public sector. *Industrial Action Declines*, *supra* note 111.

189. New Act, *supra* note 11, § 35(a). The council established here is known as the Public Service Coordinating Bargaining Council. *Id.* This council is to be established as determined by Schedule 1 in the appendices to the New Act. *Id.* § 36(1). This schedule deals basically with the procedures in establishing the Council. *Id.*

190. *Id.* § 36(2)(a).

191. *Id.* (b)-(c).

192. *Id.* § 37(1)-(2).

193. *Id.* § 37(5).

b. *Statutory Councils*

Trade unions and employers' organizations, each of whom must represent thirty percent of the employees in a sector and area, can apply to the registrar¹⁹⁴ for the establishment of a statutory council in that sector and area if no bargaining council exists.¹⁹⁵ Once established, the statutory councils have the dispute resolution, training and education, and benefit administration functions of an ordinary bargaining council.¹⁹⁶ In addition, if the statutory council so states in its constitution, it may agree to have any of the other functions of an ordinary bargaining council.¹⁹⁷ These statutory councils may ultimately register to become a bargaining council and thus be granted the broader powers of ordinary bargaining councils.¹⁹⁸

c. *General Provisions Concerning Councils*

The councils are subject to annual review by the registrar to determine if the parties to the council are adequately represented.¹⁹⁹ All disputes between the parties to the councils must first be internally resolved, if possible.²⁰⁰ This section of the New Act also provides detailed requirements for the councils in regard to their accounting records and annual audits; their record-keeping duties and disclosure requirements to the registrar; delegation of functions; admission of parties to the council; changes to the constitution or name of the council; variation of the registered scope of the council; and the termination of the council.²⁰¹

194. See generally *id.* §§ 108-11 (describing the mostly record-keeping functions of any appointed registrar).

195. *Id.* § 39(1)-(2). The Registrar has broad discretion in deciding whether or not to establish these statutory councils. *Id.* §§ 39-41.

196. *Id.* § 43(1). The statutory councils also have collective agreement power with respect to these areas. *Id.*

197. *Id.* § 43(2).

198. *Id.* § 48.

199. *Id.* § 49(2)(a). Areas of review include adequate representation with respect to the nature of the sector and the situation of the area. *Id.* If satisfied that the council is adequately representative, the registrar issues a certificate of registration. *Id.* § 49(2)(c). This certificate enables the councils to perform all of their duties. *Id.* § 50(2). The New Act only vaguely describes the effect on a council if adequate representation is not achieved. See generally *id.* §§ 49-63 (describing the councils in terms of being registered, without providing any actual consequences for unregistered councils except by negative implication).

200. *Id.* § 51(2)(a). The councils must attempt to resolve these disputes through conciliation and then arbitration if conciliation does not resolve the dispute. *Id.* § 51(3).

201. *Id.* §§ 53-59. The New Act also contains detailed requirements for the councils in regards to winding up by reason of insolvency, court-ordered cancellations of council registrations, and disputes about boundaries between sectors and areas. *Id.* §§ 60-62.

4. Impact of the Collective Bargaining Emphasis

The collective bargaining provisions of the New Act clearly contain the most important substantive changes from South Africa's old labor laws.²⁰² The establishment of the bargaining councils and their ability to resolve disputes without going through the court system, exemplifies the South African government's commitment to promoting labor peace. However a special commission appointed by Labour Minister Tito Mboweni recently advised the South African government to relax this strong commitment to collective bargaining before actual implementation of the New Act.²⁰³ The commission warned that the unions and business groups needed a bigger role in developing industrial relations and employment policy.²⁰⁴ The commission felt that, if the collective bargaining stance is not relaxed, the resulting unrest could undermine investor confidence and ruin the government's plan to reduce the budget deficit through increased foreign investment.²⁰⁵ Foreign companies will simply look to other countries in Southern Africa with lower wages and less overhead, foregoing a more advanced economy in favor of fewer labor problems.²⁰⁶ However, the number of strikes in South Africa has decreased recently.²⁰⁷ Throughout South Africa's labor history, mass labor reforms have always been followed by extended periods of decreased labor strife.²⁰⁸ Fears of increased labor unrest, at least for the near future, are likely unwarranted.

D. Strikes and Lock-Outs

The New Act provides every employee the right to strike²⁰⁹ and every employer the recourse of a lock-out,²¹⁰ subject to certain procedural require-

202. Navia & Littenberg, *supra* note 117, at C12.

203. Mark Ashurst, *S. Africa Urged to Relax Pay Stance*, FIN. TIMES, June 20, 1996, at 3.

204. *Id.*

205. *Id.*

206. Christopher Ogden, *The Post-Miracle Phase: Is South Africa on a Roll? Everyone Wants it To Be, and There are Many Positive Signs, But the Answer Is Not Quite Yet*, TIME, Sept. 16, 1996, at 46, available in 1996 WL 10668827.

207. *Industrial Action Declines*, *supra* note 111.

208. See *supra* notes 32-62 and accompanying text (chronicling South Africa's often turbulent labor history).

209. The New Act defines a strike as "a concerted refusal to work, or the obstruction of work, for the purpose of remedying a grievance or resolving a dispute in respect to any manner of mutual interest between an employer and an employee." New Act, *supra* note 11, § 213.

210. The New Act defines a lock-out as the exclusion, by an employer, of employees from the workplace for the purpose of compelling the employees to accept a demand in respect to any matter of mutual interest between an employer and an employee. *Id.* § 213. These actions are deemed lock-outs whether or not the employer has breached the employment contract with the employees. *Id.*

ments.²¹¹ An employee who lawfully strikes may not be dismissed.²¹² The New Act also allows secondary (protest) strikes subject to the same requirements as an ordinary strike.²¹³

However, the New Act places some limitations on the right to strike or lock-out. For example, a strike cannot be commenced if a collective agreement between the disputing groups prohibits it or if the agreement requires the issue be arbitrated.²¹⁴ An additional limitation is that those persons employed in an essential service or a maintenance service cannot strike and their employers cannot lock them out.²¹⁵ This public safety exception in the definition of an essential service is very broad and could open this area of the New Act to widely varying interpretations as to who actually has the right to strike or lock-out.²¹⁶ If a strike

211. *Id.* § 64. Before a strike can commence, the parties usually must attempt to resolve the dispute through conciliation, which can last up to 30 days. *Id.* § 64(1)(a). If conciliation fails to resolve the dispute, the strike usually can be commenced with 48-hour written notice to the employer. *Id.* § 64(1)(b). Employers must give 48-hour written notice to the trade union(s) involved before a proposed lock-out after conciliation has failed. *Id.* § 64(1)(c). If the dispute involves the State where there is a proposed strike or lockout, the written notice before either action must be seven days rather than 48 hours. *Id.* § 64(1)(d). These requirements do not apply if the parties have adopted private resolution procedures in their collective agreement, if the strike is in response to an illegal lock-out, or if the lock-out is in response to an illegal strike. *Id.* § 64(3). In general, these requirements are consistent with those applicable to other types of labor disputes regulated by the New Act. Navia & Littenberg, *supra* note 117.

212. New Act, *supra* note 11, § 67(4). The employer does not have to remunerate an employee for services not rendered during the strike unless part of that employee's wages includes the provision of food or other basic amenities, in which case, at the employee's request, must be continued. *Id.* § 67(3). However, the employer may hire replacement labor for the duration of the strike. *Id.* § 76.

213. *Id.* § 66. Picketing in protest of a lock-out or in support of a protected strike is broadly protected by the New Act. *Id.* § 69(1). Protest actions are the same as a strike except they are for the purpose of protesting the socio-economic interests of a worker, and not for any of the purposes referred to in the definition of a strike. *Id.* § 213; *see id.* § 77 (outlining the requirements for a lawful protest action).

214. *Id.* § 65(1)(a)-(b). In addition, no person can take part in a strike or a lock-out (or any conduct in contemplation or furtherance of one) if the issue involved is one that a party has a right to refer to the Labour Court. *Id.* § 65(1)(c).

215. *Id.* § 65(1)(d). An essential service is defined in the New Act as "a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population, the Parliamentary service, or the South African Police Services." *Id.* § 213. A service is a maintenance service if the interruption of that service would have the effect of material physical destruction to any working area, plant, or machinery. *Id.* § 75(1).

216. Beginning January 1, 1996, the Minister of Labour must establish an essential services committee whose function will be to determine which services are in fact essential and to resolve disputes in this area. *Id.* § 70. The committee will also have the power to ratify collective agreements to insure that minimum essential services will continue to be maintained. *Id.* § 72. Disputes about whether a service is essential or an employee is engaged in an essential service will also be resolved by the committee if the dispute is referred to the committee in writing. *Id.* § 73(1)(a). Any dispute that would ordinarily lead to a strike or lock-out in an essential service must be resolved by the appropriate bargaining council, or by the Commission if the council does not have jurisdiction over the dispute. *Id.* § 74(1). These disputes, similar to other disputes covered by the New Act, attempt to be resolved through conciliation procedures first, and then resort to arbitration. *Id.* § 74(3)-(5).

or lock-out does not comply with the New Act, the Labour Court²¹⁷ can intervene with forty-eight hour notice by granting an injunction against the action or proscribe remedies for losses attributable to the illegal strike or lock-out.²¹⁸ The right to strike and lock-out is a critical issue in the debate over South Africa's permanent constitution.²¹⁹ The labor relations clause proposed by the Congress of South African Trade Unions (COSATU)²²⁰ contains an absolute right to strike without granting employers similar rights to lock-out workers.²²¹ Because of COSATU's rigidity in these demands, new jobs are not being created in South Africa.²²² Firms are reluctant to hire workers because it will be difficult to fire them, even if the employees go on strike.²²³ As a result, South African companies are relocating to other locations in Southern Africa where wages and overhead are lower.²²⁴ COSATU's demands, if implemented, would create a situation where employer's hands are tied and opportunities for workers in South Africa will continue to decrease.

E. Workplace Forums

Workplace forums²²⁵ did not exist in South Africa prior to being created by the New Act.²²⁶ Workplace forums are designed by the new Act to supplement

217. See *infra* notes 247-52 and accompanying text (describing the establishment and powers of the Labour Court under the New Act).

218. New Act, *supra* note 11, § 68(2). In addition, participation in an illegal strike may constitute a fair reason for dismissal. *Id.* § 68(5).

219. Michael Hamlyn, *Clauses at the Heart of South Africa's Constitutional Dispute*, AGENCE FRANCE-PRESSE, May 4, 1996, available in 1996 WL 3848908.

220. COSATU is South Africa's largest labor federation with over 1.6 million members. *S. Africa Labor Threatens National Strike*, AGENCE FRANCE-PRESSE, Dec. 14, 1995, available in 1995 WL 11485338. Formed in 1985 at the height of repression of the black South African workers, COSATU was a critical element in the struggle against apartheid and in securing democratic breakthroughs in the post-apartheid era. *ANC Secretary General's Statement on COSATU's 10th Anniversary*, M2 PRESSWIRE, Dec. 4, 1995, available in 1995 WL 10871781.

221. Hamlyn, *supra* note 219. South African employers fear that, without an equivalent lock-out clause, the clause would render the new Act unconstitutional. *Id.* A final compromise, initiated by the ANC, inserted a constitutional provision protecting the New Act as lawful until it is amended by the legislature. *Id.* The issue is still undecided, however, because a South African court has recently struck down the proposed permanent constitution. Tom Cohen, *South Africa Constitution Rejected: Top Court Wants More Power for Provinces*, CHI. SUN-TIMES, Sept. 7, 1996, at 16, available in 1996 WL 6762565. South Africa's highest court found that the constitution did not grant enough power to the provincial governments. *Id.*

222. Ogden, *supra* note 206, at 46.

223. *Id.*

224. *Id.*

225. Workplace forums are simply committees of employees that consult with employers on matters beyond the scope of the collective bargaining process. See generally New Act, *supra* note 11, §§ 78-94 (describing the workplace forums).

226. See generally 1992 LRA, *supra* note 10.

collective bargaining.²²⁷ Workplace forums can be established, upon application by a representative trade union, in any workplace with more than one hundred employees.²²⁸ These forums serve three main roles under the New Act:²²⁹ information sharing,²³⁰ consultation,²³¹ and decision-making.²³²

The goal of the workplace forums under the New Act is to provide employees with an ongoing, institutionalized voice in certain aspects of decision-making outside of the collective bargaining process.²³³ The idea is that the forums will increase productivity and profitability, resulting in increased job satisfaction and a reduction in workplace disputes.²³⁴

There has been a reduction in the number of days lost to strikes recently in South Africa.²³⁵ There are widespread fears that the new structure, while reducing strike action, will produce inflexible blanket settlements of disputes applicable to all areas of industry.²³⁶ These fears have been partially mollified after the main Mercedes-Benz factory settled an angry wage dispute at the plant level.²³⁷ If the workplace forums can continue this type of success after full implementation of

227. Navia & Littenberg, *supra* note 117, at C12. Other goals of these forums include promoting the interests of all employees in the workplace, whether or not they are trade union members, and enhancing workplace efficiency. New Act, *supra* note 11, § 79(a)-(b).

228. *Id.* § 80(1)-(2).

229. Navia & Littenberg, *supra* note 117.

230. This role is achieved through mandatory regular meetings between the employer and the workplace forum. New Act, *supra* note 11, § 83(1). Employers must disclose all information relevant to the operation of the workplace forums to that forum in order to comply with the New Act. *Id.* § 89(1). Privileged, confidential, or personal private employee information is exempt from employer disclosure. *Id.* § 89 (2).

231. At mandatory regular meetings, the employer reports past and anticipated performance and consults with the workplace forum on issues arising from these reports that affect employees. *Id.* § 83(2). The specific matters for consultation, unless regulated by a collective agreement, include restructuring of the workplace, including new technology or work methods, changes in work organization, plant closures, mergers and transfers in ownership, operational-based employee dismissals, exemptions from laws and collective agreements, job grading, criteria for merit increases and performance bonuses, education and training, product developmental plans, and export promotion. *Id.* § 84(1). Prior to the employer implementing any proposal subject to consultation, it must attempt to reach a consensus concerning the proposal with the workplace forum. *Id.* § 85(1). If consensus cannot be reached, the employer must then invoke a previously-agreed upon procedure to resolve differences before implementing the proposal. *Id.* § 85(4).

232. This joint decision-making process requires the employer to consult with the workplace forum and reach consensus on the following issues: disciplinary codes and procedures; non-performance related workplace regulation; anti-discrimination and affirmative action measures; and changes in social benefits. *Id.* § 86(1). These rules and regulations can be modified by collective agreements and are subject to the same dispute resolution procedures of conciliation and arbitration as other areas of the Act; *see id.* § 86(4)-(8); *id.* § 94 (concerning the dispute resolution proceedings for any interpretation of this section of the New Act); *infra* notes 238-54 and accompanying text (describing the dispute resolution procedures of the New Act in greater detail).

233. Navia & Littenberg, *supra* note 117, at C12.

234. *Id.*

235. *Industrial Action Declines*, *supra* note 111.

236. *Strained Relations*, *supra* note 109, at 5.

237. *Id.* The deal struck will supplement, not replace, the industry-wide settlement reached in 1995. *Id.*

the New Act, days lost to strikes should remain at lower levels and the dispute resolution systems of the New Act will be required considerably less often.

F. Dispute Resolution

Most labor dispute resolution procedures have been simplified by the New Act.²³⁸ These new procedures were designed to encourage settlements of labor disputes.²³⁹ Disputes that arise under most parts of the New Act must go through a conciliation procedure as the first step in the resolution process.²⁴⁰ An independent agency established by the New Act known as the Commission handles these conciliation procedures.²⁴¹ If a dispute remains unresolved after conciliation, the Commission has the discretionary power to resolve the dispute through arbitration.²⁴² In addition to its dispute resolution powers, the Commission may serve

238. Navia & Littenberg, *supra* note 117, at C12.

239. *Id.* The New Act defines dispute as a matter of mutual interest between one or more employees and/or trade unions on one side and one or more employers and/or employers' organizations on the other. New Act, *supra* note 11, § 51(1). The following types of disputes must be referred to a bargaining council: interpretation or application of the freedom of association provisions of the New Act; the subject matter of a proposed lock-out or strike; essential services, unfair dismissals, severance pay, or unfair labour practices. *Id.* § 51(3) & n.11. Disputes about organizational rights, collective agreements without dispute resolution procedures, decisions of the Minister, interpretations or applications of collective agreements made by a council whose registration has been canceled, demarcations of areas and sectors of councils, concerning pickets, joint-decision making proposals of workplace forums, and the disclosure of information to workplace forums may not be referred to a council. *Id.* These disputes go directly to the Commission. *Id.* § 51(4)-(5).

240. *See id.* § 51 (describing the resolution procedures for disputes between parties to a bargaining council); *supra* notes 217-18 and accompanying text (detailing procedures for disputes concerning the right to strike or lock-out).

241. New Act, *supra* note 11, §§ 112-13. The New Act also provides extensive guidelines for the makeup of the Commission and its governing body, Director, staff, committees, finances, ability to charge fees, delegation of its duties, and limits on the Commission's liability for disclosure of information. *Id.* §§ 116-26.

242. *Id.* § 115(1)(a)-(b). The New Act outlines detailed procedures that the Commission must follow when using conciliation or arbitration to resolve a dispute. *Id.* §§ 133-50. Unless the parties agree to an extension, the Commissioner appointed by the Commission to resolve a dispute through conciliation must do so within 30 days. *Id.* § 135(1)-(2). The commissioner's powers in this area include the ability to mediate the dispute, conduct fact-finding exercises, and make advisory arbitration awards. *Id.* § 135(3). If the New Act requires a dispute to be resolved through arbitration after the conciliation process fails, a different commissioner is appointed to resolve the dispute once one of the parties requests arbitration. *Id.* § 136(1). This area of the New Act extensively details the procedural requirements for the arbitration process, including the requirement that the commissioner issue an award within 14 days of the end of the procedures, special provisions for arbitrating disputes in essential services, special provisions for arbitrations about work-related dismissals, disputes where both parties agree to arbitration rather than going before the Labour Court. *Id.* §§ 138-41. The powers of the commissioner include the power to call witnesses, subpoena, and inspection powers. *Id.* § 142(1). Failure to comply with these areas of the commissioner's power can result in contempt of the Commission. *Id.* § 142(8). Other areas covered by the New Act are the effect and review of arbitration awards, performance of the Commission in "exceptional circumstances," and the Commission's advisory and assistance powers. *Id.* §§ 143-49.

in an advisory or training capacity for the regulated parties.²⁴³ Under certain circumstances, the conciliation and arbitration functions may be conducted by a bargaining council or a private agency.²⁴⁴ This procedure applies mostly to disputes within the registered scope of a council.²⁴⁵ However, the Commission's power is very broad, as is its power to make and enforce judgments.²⁴⁶

Not all disputes to which the New Act apply are subject to arbitration.²⁴⁷ The New Act establishes a Labour Court, replacing the old Industrial Court,²⁴⁸ which has jurisdiction over all disputes to which the New Act applies that are not required to be arbitrated.²⁴⁹ The Labour Court has the power to issue an appropriate order in any given dispute.²⁵⁰ Any final judgment of the Labour Court may be appealed to the Labour Appeal Court, also established by the New Act.²⁵¹ The Labour Appeal Court is the final court of appeal in respect to matters within its exclusive jurisdiction.²⁵²

The dispute resolution systems are very similar to those under the existing South African labor law.²⁵³ With the New Act's focus on collective bargaining, the drafters of the labor law hope to avoid the dispute resolution process as much

243. *Id.* § 115(2)-(3). The Commission can serve in this capacity, if asked, on any subject relating to the primary objectives of the New Act. *Id.* These areas include dispute resolution, collective bargaining, workplace forums, disciplinary procedures, dismissals, affirmative action programs, and sexual harassment in the workplace. *Id.*

244. *Id.* § 127. The council or agency must apply for accreditation in order to perform these functions. *Id.* See generally *id.* §§ 128-132 (concerning general provisions for accreditation, amendment, renewal, or withdrawal of accreditation, and subsidies to the council or agency involved to perform these functions). Bargaining councils and private agencies are excluded from performing resolution functions when the dispute concerns organizational rights, collective agreements without procedural mechanisms, agency and closed shop agreements, proposals of statutory councils, interpretations of collective agreements, pickets during strikes and lock-outs, and workplace forums. *Id.* § 127(2) & nn.28-38.

245. Navia & Littenberg, *supra* note 117, at C12.

246. See generally New Act, *supra* note 11, § 114(1) (conferring broad jurisdictional power on the Commission).

247. Navia & Littenberg, *supra* note 117, at C12.

248. See *supra* note 81 and accompanying text (describing the creation of the Industrial Court as the most positive labor law provision for black workers in South African history).

249. New Act, *supra* note 11, § 157. Establishment of the Court, its composition, appointment of judges to the Court, tenure of those judges, and the Officers of the Court are all separately established by various sections of the New Act. *Id.* §§ 151-55.

250. *Id.* § 158(1)(a). These include the granting of urgent interim relief, interdicts, performance orders, declaratory orders, compensation awards, damage awards, and orders for costs. *Id.* In addition, the Court has the power to order compliance with the New Act, make arbitration awards orders of the Court, request the Commission to conduct investigations, and review any decision taken by the State in its capacity as employer. *Id.* § 158(b), (c), (d), (h).

251. *Id.* §§ 166-67. Similar to those in the Labour Court, the New Act provides requirements for the establishment of this court, appointment of its judges and officers, and area of jurisdiction. *Id.* §§ 167-72.

252. *Id.* § 167(2). The Court's exclusive jurisdiction, subject to the Constitution, is to determine all appeals against final orders and judgments of the Labour Court, and decisive questions of law reserved to it that arise during proceedings of the Labour Court. *Id.* § 173(1).

253. See generally 1992 LRA, *supra* note 10, §§ 16-30 (detailing dispute resolution procedures under the old Labour Relations Act).

as possible, preferring to resolve disputes at the workplace and sectoral levels. Despite the delay in implementing the New Act, more employment disputes are being resolved without using the formal dispute resolution procedures of the court system.²⁵⁴

G. Unfair Dismissal

The final substantive chapter of the New Act gives some extra strength to the other sections by creating a right protecting employees from unfair dismissal.²⁵⁵ This section of the new Act is most similar to the controversial "unfair labor practice" definition from prior laws. That definition and its evolution was one of the most exciting aspects of South African labor law over the last fifteen years.²⁵⁶

Dismissed employees may refer a dispute about whether a dismissal was unfair within thirty days to the appropriate bargaining council, or to the Commission if no council has jurisdiction.²⁵⁷ In dismissal proceedings, the burden of

254. See *supra* notes 236-37 (describing early successes of workplace forums in handling labor disputes).

255. New Act, *supra* note 11, § 185. A dismissal includes termination of an employment contract, non-renewal of a fixed-term employment contract, or renewal offers on less favorable terms, when the employee had a reasonable expectation of renewal on the same or similar terms, an employer refusing to allow an employee to resume work after maternity leave, employer's offers of rehire to one more employee without rehiring those dismissed for same or similar reasons, and when the employee terminated the contract of employment because of intolerable work conditions. *Id.* § 186.

256. The 1979 Amendments forced the newly-created Industrial Court to define unfair labor practices. RYCROFT & JORDAAN, *supra* note 77, at 158-59. After a new unfair labor practice definition was introduced in 1980, the South African court's interpretation of unfair labor practices seriously hampered collective bargaining. *Id.* Despite the vague definition, the court was able to build up a substantial body of law. *Id.* at 158. For example, the court found each of the following to be unfair or potentially unfair: the refusal to bargain in good faith; victimization of employees because of their membership in a trade union; selective dismissals and rehiring; dismissals without cause or following proper procedure; the use of derogatory language; the dismissal of workers for participating in a lawful strike; failure to renew a migrant worker's contract where there had been a reasonable expectation of renewal; racial discrimination; and sexual harassment. See *id.* at 158-59 & nn.20-28 (citing cases where the Industrial Court found each of these activities to be unfair labor practices). The definition implemented in 1988 kept the old one as a catch-all provision, but added 14 very specific definitions of what constituted an unfair labor practice. See 1992 LRA, *supra* note 10, § 1 (defining unfair labor practice and referring to the past history of the definition); Coleman, *supra* note 67, at 196 (providing a history of South African labor law and the unfair labor practice definition). The newly codified unfair labor practices were: disciplinary dismissal without cause and without a fair procedure, termination on non-disciplinary grounds, unilateral suspension of employees, unilateral amendments of the terms of employment, use of unfair recruitment by unions, failure to comply with provisions of the LRA, use of intimidation affecting the employer-employee relationship, union support or participation in boycotts, race and sex discrimination, interference with the right to associate and the right to negotiate with the employer, failure to comply with an agreement, secondary strikes, repeat strikes, and illegal strikes. *Id.*

257. New Act, *supra* note 11, § 191(1). If the dispute remains unresolved, it must be arbitrated by the council or Commission if the alleged reason for dismissal relates to the employer's conduct or capacity, an intolerable work environment, or the employee is unaware of the reason for dismissal. *Id.* § 191(5)(a). If the alleged reason for dismissal is automatically unfair, based on the employer's operational requirements, the employee's participation in an unprotected strike, or as a result of a trade union dispute, the employee may refer the dispute directly to the Labour Court for adjudication. *Id.* § 191(5)(b).

proof rests initially on the employee to establish a dismissal.²⁵⁸ If the employee meets his burden of proof, then the burden shifts to the employer to prove the dismissal was fair.²⁵⁹

A dismissal is presumed automatically unfair if it is discriminatory,²⁶⁰ attributable to the employee's participation in or support of a protected strike,²⁶¹ or if the employee was exercising a right conferred to him by the New Act.²⁶² A dismissal is also presumed unfair if the reason for dismissal is that the employer discriminated against the employee, directly or indirectly, on any arbitrary ground.²⁶³ Any dismissal may be considered unfair unless the employer proves that the reason for dismissal is a fair one related to the employee's conduct or is based on the employer's operational requirements.²⁶⁴ In addition, the employer must show the dismissal was effected in accordance with a fair procedure.²⁶⁵

Remedies for unfairly dismissed employees vary widely. If an arbitrator or the Labour Court finds a dismissal was unfairly made, the employer may be required to reinstate or re-employ the unfairly dismissed employee.²⁶⁶ In the alternative, the employer may be required to pay up to twenty-four months' salary to the employee.²⁶⁷ If the employee was dismissed because of the employer's operational requirements, he is entitled to one week's severance pay for each year of service.²⁶⁸ Finally, the New Act does not preclude recovery under any other law, collective agreement, or employment contract.²⁶⁹

258. *Id.* § 192(1).

259. *Id.* § 192(2). Whether a dismissal was fair requires a factual determination by the council, Commission, or Labour Court. Navia & Littenberg, *supra* note 117, at C12.

260. A dismissal is discriminatory if it violates Section 5. New Act, *supra* note 11, § 187(1); *see id.* § 5 (conferring the protections relating to the rights of freedom of association and on members of workplace forums).

261. A protected strike is one that is lawful within the New Act. *See id.* §§ 67-68 (defining which strikes are protected and which are not).

262. *Id.* § 187(1).

263. *Id.* § 187(1)(f). These grounds include, but are not limited to, race, gender, sex, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status, or family responsibility. *Id.* Despite these provisions, a dismissal under this area may be considered fair if the reason for dismissal is an inherent requirement of a particular job or if the employee has reached the normal or agreed retirement age for persons employed in that capacity. *Id.* § 187(2).

264. *Id.* § 188(1)(a). In order to dismiss an employee for reasons based on operational requirements, an employer must consult anyone whom it is required to in accordance with a collective agreement, any applicable workplace forum, any registered trade union where the employees are likely to be affected by such dismissal or, in the alternative, the affected employees themselves. *Id.* § 189(1). These consultations are implemented in order to either avoid the dismissals, minimize their number, change the timing, mitigate the adverse effects, or to reach consensus on the selecting method and severance pay of those to be dismissed. *Id.* § 189(2).

265. *Id.* § 188(1)(b).

266. *Id.* § 193(1)(a)-(b).

267. *Id.* § 194(3). This maximum award amount will be significantly less if the dismissal was not automatically unfair. *Id.* § 194(2). Under the old South African labor law, there was no such cap on damages in an unfair dismissal dispute. Navia & Littenberg, *supra* note 117, at C12.

268. New Act, *supra* note 11, § 196(1).

269. *Id.* § 195.

This section gives South African workers more rights than ever before under the labor law.²⁷⁰ Because most of the labor force consists of black workers,²⁷¹ this section of the law should be seen as a substantial victory for South African blacks: Discrimination in the workplace is now not only outlawed, but subjects employers to severe sanctions if practiced.²⁷² However, employers will certainly argue that the New Act will hurt South Africa's business and industry because of their inability to fire inefficient employees or those who strike.

VI. CONCLUSION

South Africa is finally ruled by its black majority and a fully democratic political process.²⁷³ This process produced a new South African labor law that is much wider in scope and detail than its predecessor.²⁷⁴ The primary impact of the New Act is that it gives South African trade unions more rights than unions in any other country in the world.²⁷⁵ Although some feel that the trade unions now have too much power, labor strife should be reduced as a result of the New Act.

The New Act clearly represents a significant departure from the old Labour Relations Act. Reviews are mixed about the benefits that South Africa's economy will gain by granting the workers so much freedom. Any significant long-term effect of the New Act will depend in large part on the administration and interpretation of the New Act as well as broader economic issues affecting the South African economy.²⁷⁶

Enacting a new comprehensive labor law was definitely a positive step towards continued improvement of the working conditions of South African blacks. Racial harmony and labor peace are significant factors for South Africa's future if it hopes to continue to attract foreign investment.²⁷⁷ Turbulence in South Africa was as important a factor for companies divesting in the 1980s as any concerns over the inequities of apartheid.²⁷⁸

270. See Peel, *supra* note 129, at 4 (claiming the New Act provides South African workers with even more rights than workers in Scandinavia).

271. See Ogden, *supra* note 206, at 46 (estimating black unemployment at over 4 million workers); Boroughs, *supra* note 106, at 40 (counting South Africa's total workforce at 15 million, and the black unemployment rate at 41.1%); Coleman, *supra* note 67, at 181 (estimating 64% of South Africa's workforce as black in 1980).

272. See *supra* notes 266-69 and accompanying text (describing the remedies available against employers who unfairly dismiss an employee).

273. See *supra* notes 101-02 and accompanying text (describing the 1994 elections).

274. Navia & Littenberg, *supra* note 117, at C12.

275. Peel, *supra* note 129, at 4.

276. Matthews, *supra* note 166, at 6.

277. See *U.S. Investors Looking For High Returns in South Africa to Compensate For Risks*, Int'l Trade Rep. (BNA) No. 44, at 1908 (Nov. 10, 1993) (stating foreign investors are looking for very high investment returns whenever there is political risk in South Africa).

278. See *supra* notes 49, 55 and accompanying text.

Although the country has made great strides toward racial equality, there is still a long way to go. However, many South Africans are not within the scope of the New Act and formal representation of the unemployed is also difficult.²⁷⁹ Nelson Mandela is in the third year of what is likely his only five-year term as South African President.²⁸⁰ There are widespread concerns about the future of South Africa after Mandela's retirement. The South African government is aware of the problems in the country and remains deeply committed to economic and human development and social justice through the promotion of the policies in the New Act.²⁸¹

As for foreign investors considering South Africa as an investment opportunity, the New Act should neither hinder nor promote new foreign investment directly. The New Act will stabilize the labor environment in South Africa and this, in turn, should encourage renewed foreign investment. Foreign investors looking to South Africa will likely be more concerned over the state of South Africa's economy. If the economy continues to grow as anticipated, in combination with a stable labor environment as a result of the New Act, South Africa should regain its status as one of the most attractive countries in Africa for foreign investment.

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279. Approximately six million people are outside of the system of labor regulation and rights, according to Labour Minister Mboweni. *Labor Minister Outlines Five-Year Plan*, *supra* note 103.

280. See Matthews, *supra* note 166 at 6 (describing the challenges facing Mandela in the last half of his term as South African President).

281. *Id.*

* B.S., University of California at Davis, 1987; J.D., University of the Pacific, McGeorge School of Law, to be conferred, 1997. This comment is dedicated to my son Aaron Mikel Taylor. He is my life, my soul, my inspiration, and the reason behind everything that I do. I wish he did not have to grow up in a world where some people are treated like second-class citizens because of the color of their skin. I would also like to thank countless friends and family members, too numerous to mention individually, without whom this comment would never have been completed. You know who you are.

