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South Africa's Puzzling New Treaty with Zimbabwe

Luke Eric Peterson (Investment Arbitration Reporter) · Thursday, December 10th, 2009

When I last visited South Africa in 2006, there was much talk of a potential bilateral investment treaty between SA and Zimbabwe.

Three years later, as I make another visit to the region, the long-promised deal has just been sewn up.

But, despite much clamouring for a protective pact – particularly from South Africans with property in Zimbabwe – the recent signing of an SA-Zimbabwe BIT has left many stakeholders unhappy.

Elements of South African business boycotted the official signing ceremony, complaining that the deal ignores the plight of those South Africans who have (already) suffered expropriation in Zimbabwe.

Indeed, a conservative farming organization went so far as to petition a South Africa court in an effort to interdict the South African government from proceeding with the BIT. The applicants argued that the failure of the pact to apply retroactively – so as to provide some remedy for South Africans who have been expropriated in Zimbabwe – may have breached the South African Government's legal obligations to stick up for the interests of its citizens abroad.

I'm skeptical of such legal arguments – whether framed as a breach of the regional SADC treaty or of the international law of diplomatic protection – but I guess we'll never know what the South African courts would have made of them. Rather, the applicants promptly settled their case, with the South African government promising that the new Zim-SA treaty "does not affect existing rights or remedies in terms of other sources of international law, in particular those in terms of the Treaty of the Southern African Development Community (SADC)."

Such assurances must be rather cold comfort for South Africans who have suffered abuses at the hands of the Zimbabwean regime. Some South Africans were part of a claim brought before the regional SADC tribunal, alleging expropriation and human rights abuses. Although the tribunal found Zimbabwe in breach of its SADC obligations, the claimants have struggled to enforce the tribunal's ruling – or to get regional governments to crack down on Zimbabwe for flouting the tribunal's authority.

So, there's not much in the new Zim-SA BIT – or the bland reassurances of the SA Government about the need to respect SADC legal obligations – to give much hope to those who have *already*

lost their shirts in Zimbabwe. Article 11 of the BIT is pretty clear in precluding claims arising out of any property right or interest compulsorily acquired by either party in its own territory before the entry into force of this agreement." (An interesting question, however, is whether this unusual clause would preclude claims that did not pertain to compulsory acquisitions (for e.g. fair and equitable treatment)

At the same time as property-holders have been annoyed by the terms of the new BIT, I'll wager that the agreement will also disappoint civil society groups whose hopes were raised by a scathing draft report issued by South Africa's Department of Trade and Industry (DTI). In the report, which I've profiled at more length in my newsletter, the DTI argued for a wholesale rethink of bilateral investment treaties so as to ensure that they protect foreign investment while not jeopardizing other important public policy interests.

Indeed, the report in question contemplated all manner of changes, including the greater use of exceptions clauses, and more circumscribed investor protection clauses. In procedural terms, it was noted that the investor-state arbitration process should be more transparent, subject to a possible appellate review system, and – most striking – take a back seat to domestic remedies wherever possible.

Yet, remarkably, the latest BIT to be signed by the DTI bears the imprint of none of this radical thinking.

Apart from a (limited) exception for black economic empowerment (affirmative action) programs, the treaty is a very archetypal investment treaty with broad "fair and equitable treatment" protections, and the standard "prompt, adequate and effective" compensation in cases of expropriation.

Whatever one's views on the merits of such unreconstructed agreements, it seems clear that the new SA-Zim BIT gives no signs of having been negotiated by the authors of the recent DTI report.

Likewise, on procedural matters, the new SA-Zim BIT provides for international investor-state arbitration after a 6 month cooling off period. Far from mandating any recourse to domestic remedies, the pact contains a fork-in-the-road clause which might preclude international arbitration for claimants who first try their luck in the domestic courts.

Similarly, the treaty addresses none of the other concerns – such as a lack of transparency or predictability of dispute settlement – voiced in the DTI draft report.

It's possible that the stiff political pressure for South Africa to conclude a protective pact with Zimbabwe has meant that the DTI's Platonic Ideals had to be set to one side. (It should be stressed, moreover, that the DTI Report was a *draft* publication, so it should not be taken as established government policy). However, given the remarkable gulf between the DTI's avowed negotiating philosophy and the latest treaty practice, one wonders how seriously to take South Africa's ongoing investment treaty review process.

It may be full of sound and fury, but not signifying a whole heck of a lot.

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