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Land Reform and Investment Arbitration in Southern Africa

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, June 23rd, 2010

I spent some time in Namibia and South Africa last December looking into the impact of bilateral investment treaties on land reform.

I don't do a lot of field trips, and my wife harboured some suspicion that this "research venture" was merely a tidy excuse to trade the New York winter for the Southern African summer.

These suspicions only grew when pictures surfaced of me on a four-wheeled all terrain vehicle in the Namibian desert – with nary a laptop or notebook in sight.

So, it's with considerable relief that I see that my short paper (written with the South African lawyer Ross Garland) was [published this week](#).

The paper is hardly the first word on the topic. Nor, I expect, will it be the last.

While conflicts over land are hardly exclusive to sub-Saharan Africa, the international law dimension of land politics is coming to a head in this region though. (Indeed, I [blogged](#) about this topic a year ago).

Readers of my [Investment Arbitration Reporter](#) news service will be aware of the international arbitration claim mounted by a bloc of Dutch passport-holders following the violent expropriation of their farms in Zimbabwe. The claimants prevailed in their arbitration at the International Centre for Settlement of Investment Disputes (ICSID) – making out a breach of the Netherlands-Zimbabwe bilateral investment treaty – but they are struggling to collect on the 2009 arbitral award. Don't be surprised if other claims against Zimbabwe should emerge in the months or years to come.

Elsewhere in the region, relations between land-owners and governments have been less fraught, but there are unavoidable political pressures for more ambitious forms of land reform.

Proposed land reform measures tend to be viewed through the prism of domestic constitutions and their property rights guarantees. However, matters don't end there. Foreign owners – as well as locals who dress up in foreign garb via creative ownership structures – may also rely on bilateral investment treaties for a further layer of legal protection.

To date, there have not been large-scale expropriations in Namibia or South Africa. However, if governments move beyond the willing-buyer/willing-seller approach to land reform then we could

see more legal disputes arise.

Already, in the case of Namibia, a handful of German property-owners who were among the first to be targeted for compulsory expropriation turned to the Namibian Constitution and the Germany-Namibia BIT when their lands were targeted for expropriation in recent years.

Likewise, in South Africa, an anonymous Swiss investor complained that the mere prospect of future expropriation had devalued his land to such an extent that it breached the Swiss-SA BIT.

An arbitral panel rejected that claim – in a still unpublished UNCITRAL arbitral award – but don't be surprised if we see the politically-contentious question of land reform taken up by future arbitral tribunals.

In the mean time, let me leave you with a few shots of the Namibian desert: an expanse of beautiful, but arid land that is unlikely to give rise to any investor-state arbitration claims.



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