



SA's Bilateral Investment Treaties: Implications for Development and Human Rights

Roundtable Discussion with Luke Eric Petersen, 10/05/2006

1. Background

Since the end of Apartheid, South Africa has negotiated at least 42 foreign investment protection treaties. Conceived as bulwarks against capricious or egregious state interference with foreign-owned property, such treaties are a common feature on the international landscape. Collectively, the international community has negotiated well over 2000 such instruments (bilateral investment treaties), with most countries having entered into dozens of these treaties with key trading partners.

For many years, such agreements were viewed as instruments of last resort, and foreign investors rarely had recourse to the protections contained in these obscure treaties. However, in more recent times, there has been a growing recognition amongst foreign investors that these treaties may have broad application, including in contexts where investors object to a particular government regulation, tax measure, administrative decision or proposed policy.

There is clearly a need for a detailed review of South Africa's existing investment treaties, to assess how such agreements balance foreign investment protection with other competing government goals, particularly poverty-eradication and human rights promotion. Such a review would chart the evolution of South Africa's negotiating position; offer analysis of existing treaties; and highlight strategies for addressing treaty shortcomings and loopholes.

The Roundtable discussion brought together a number South Africa's policy makers; treaty negotiators; and civil society representative to hear the preliminary findings of a research paper commissioned by SAIIA.

2. Proceedings

a. Mr Peter Draper (SAIIA)

Welcome; vote of thanks, and introduction of the speaker

b. Mr Luke Eric Petersen

BIT S

- The myth about bilateral investment treaties (BITS) unravelled – that they are benign agreements and omni-positive to the country signing them. They have an impact on South Africa's ability to regulate investment and impinges on the country's regulatory space.
- More than 2400 BITS in the world, SA has signed 42, half of which have entered into force.
- Mainly entered with Western countries and a few in Latin America.
- They contain vague provisions on standards of treatment of foreign investors and their investments.
- South Africa signed these BITS to assure foreign investors that their investments would be protected in this country.
- In the past BITS were used in cases of dire emergency, but of late especially after the signing of NAFTA investors began to invoke these treaties more often.
- Litigation under the BITS attracted a lot of negative publicity – forcing governments to cave in to avoid negative perceptions.
- In Bolivia we expect a raft of lawsuits in the energy sector.
- Some governments are discovering that the BITS they signed were not signed in a very careful manner.
- In South Africa, the BITS do not generally indicate (say in the preamble) why SA wants to attract foreign investments. This becomes relevant in cases of disputes to determine whether the country has failed to honour its obligations.
- Some governments have begun to revisit the BITS and provide exceptions in certain areas.
- South Africa's BITS with some European countries fail to provide exceptions for BEE and other policies aimed at redressing the imbalances of the past.
- Investors are promised market value compensation in cases of expropriation. Level of compensation under BITS is greater than one under the SA constitution.
- South Africa has already faced litigation on allegations of expropriation.

BITS&BEE

- Ø SA has already faced a notice of lawsuit in the Mining sector relating to BEE policies
- Ø It is a myth to describe these treaties as lacking in substance.
- Ø Equity transfers have been held to amount to expropriation but not affirmative action in employment.

Concluding Remarks

- + Review of SA obligations in the BITS, with a view to amending some.
- + Bring greater transparency on disputes relating to these treaties – open up to the public.
- + Some governments have responded to public sector in this area. In the water sector dispute in Argentina, it was opened to the public
- + Governments have to take the disputes seriously, invest in defence.
- + Canada recently caved in to an investor's threats before the lawsuit and was heavily criticised for that.

c. *Open Discussion*

- ✓ Mark F (SARS), national treatment obligations not clear in BEE coz in certain cases investors are required to undertake BEE as well – the effect could be that foreign investors may see themselves as having to bear a disproportionately higher burden, i.e. with respect to requirements to employ black people.
- ✓ BEE legislation is very careful in what it asks for example on equity transfers foreign investors are required to offer equity equivalents.
- ✓ Enforcement, the treaties include provisions for arbitration and arbitral awards can be enforced by a relevant high court. Argentina will be a test case as both the government and courts have indicated their unwillingness to honour arbitral awards.
- ✓ ICTSD award is like an award of any member court (SA is not a member). The New York Convention to which SA belongs is also enforceable in the courts of any member state.
- ✓ Where a government fails to honour the award then an appointing authority can be made to choose a court to enforce the decision.
- ✓ South Africa as an FDI provider to the rest of Africa is pressured by its companies to sign Bits with other African states to protect the investments.
- ✓ The reason why the US-SACU FTA failed is because SA says there is no need for the Investment protection chapter.

- ✓ Obligations under these BITS only fall on the govt but not investors – governments cannot sue the investor for failing to meet its promised performances.
- ✓ BITS lead to better treatment for foreign investors vis-à-vis local companies.
- ✓ Is renegotiation feasible? Yes, the Czech government has undertaken a revision of its BITS after losing cases to investors.
- ✓ Processes of consultation between the government and the public are inadequate. Policy coherence an issue. MFN in BITS what does it mean: Coherence in international commitments a difficult issue. On MFN clause, this is difficult to deal with.
- ✓ South Africa would like to amend some of its BITS.
- ✓ Not clear where we draw the line between legitimate regulation and expropriation.
- ✓ Concern about public awareness and the scrutiny that goes into these agreements.
- ✓ Arbitration is different from normal court procedure as it has confidentiality and no precedent systems as its corner stones. They are changing slowly to include as of late amicus curiae. Moves to have these disputes dealt with in a normal court of law.
- ✓ Opening up to the public can happen if both parties agree to it. Another way of doing it is to include transparency provisions in the treaty.
- ✓ BITS play a role in creating investor-friendly environments. To what extent these BITS influence the investor decisions is debatable.
- ✓ Having an investment agreement in the WTO would have been positive in as far as questions of transparency are concerned and to balance the needs of investors with that of governments.

3. Synopsis

The presentation and ensuing discussions underscored the growing importance of bilateral investment protection treaties and the potential risks they pose to a South Africa's economic and development policy options. The discussions stressed the need for negotiators and the South African government to exercise utmost care to ensure that the provisions of BITS are in sync with its domestic policy objectives like redressing the imbalances of the past (through BEE), eradicate poverty amongst others. Further the need to allow greater public scrutiny or transparency when negotiating BITS was emphasized.