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Bilateral Investment Treaties and Land Reform in Southern Africa

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1. Introduction

In recent years, foreign ownership of land in developing countries has come under increased scrutiny. Considerable attention has focused on so-called land grabs: with private or state-owned foreign investors acquiring vast tracts of land in developing countries, often for the purposes of growing and exporting food or other commodities.² A range of concerns have been raised with respect to such land acquisitions including with respect to the transparency of arrangements, their impact upon local users of the land, and domestic food production and access to food.

More generally, however, foreign ownership of land in developing countries, as either modern-day large-scale land-acquisitions or longstanding patterns of colonial-era stratified ownership, poses unique policy challenges for governments keen on broadening access to land and promoting human rights such as the right to food.

A special international legal regime exists to protect cross-border investments, including ownership of land and property. Foreign owners may enjoy enhanced rights and protections thanks to this separate regime of some 3,000 bilateral and multilateral trade and investment treaties.

As will be explained below, this regime may influence and in some cases complicate efforts by governments to pursue human rights policies designed to remedy historic inequalities. Equally, however, the regime may be used, in certain contexts, to advance (or supplement) the protection of human rights, as has been the case recently in Zimbabwe where a handful of Dutch nationals have had some success suing Zimbabwe for forced evictions.

2. The Human Rights Context

Before turning to this international regime for the protection of foreign-owned property, it is important to recall the human rights context in which governments operate.

All governments have human rights obligations. Increasingly, it has been noted that such obligations may require that governments take certain measures to guide land ownership patterns and policies. Relevant human rights may include the right to property, the right to non-discrimination and the right to food, each of which is discussed briefly below.

The human right to adequate food is protected by the UN Covenant on Economic, Social and Cultural Rights, as well as other human rights instruments.³ Although such economic and cultural rights contemplate *progressive* realization, the right to adequate food may demand

² See among others Joachim von Braun and Ruth Meinzen-Dick, “*Land Grabbing*” by Foreign Investors in Developing Countries: Risks and Opportunities, International Food Policy Research Institute, IFPRI Policy Brief 13, April 2009.

³ The UN Special Rapporteur on the Right to Food cites a number of relevant human rights obligations including the Convention on the Rights of the Child (articles 24, para. 2 (c), and 27, para. 3), the Convention on the Elimination of All Forms of Discrimination against Women (article 12, para. 2) and the Convention on the Rights of Persons with Disabilities (articles 25 (f) and 28, para. 1). He adds that the right “is stated most explicitly, at a more general level, in article 25 of the Universal Declaration of Human Rights and in article 11 of the International Covenant on Economic, Social and Cultural Rights.

certain immediate and urgent steps in order to respect the “right to the fundamental freedom from hunger and malnutrition”.⁴ Moreover, as recently noted by the UN Special Rapporteur for the Right to Food, security of land tenure and access to land are essential for the protection of the right to food. In his interim report, the Rapporteur noted that “(h)alf of those who are food-insecure live in smallhold farming households, and approximately twenty per cent are landless agricultural labourers: security of land tenure and access to land as a productive resource are essential for the protection of the right to food of both of these groups of people.”⁵

Meanwhile, the right to property of poor and marginalized individuals or groups may be relevant to discussions on land reform and land access. For instance, human rights courts have observed that the right to property of indigenous groups may entail certain positive obligations on the part of states to ensure access to land and land title.⁶ In a recent study, Christophe Golay and Ioana Cismas observe that “in a country characterized by extreme inequalities in access to property, the State’s failure to take corrective measures could represent a violation of the obligation to fulfill the right to property.”⁷

Apart from the right to food and the right to property, other human rights obligations of states, including to non-discrimination which is entrenched in the International Covenant on Civil and Political Rights, may oblige states to take affirmative action measures “to diminish or eliminate conditions, which cause or help to perpetuate discrimination prohibited by the Covenant.”⁸ Meanwhile, at the domestic level, laws and constitutions may countenance, or even require, steps to promote access to land, security of title, and other human rights-inspired policy measures.

While human rights obligations may not point to particular policy courses for governments, they oblige governments to adopt policies that ensure respect for the rights to food, to property or to non-discrimination. In such contexts, however, the task of policymakers may be complicated by certain parallel legal protections owed to foreign nationals owning property. Of particular importance will be the large constellation of treaties protecting foreign investment. This treaty regime is surveyed below followed by cases examples from Southern Africa where such treaties have had an impact upon land reform initiatives.

3. International Treaty Protections for Foreign Property-Owners

At the international level, the key protections for foreign-owned property are found in the provisions of bilateral investment treaties (BITs) as well as in the investment chapters of broader

⁴ Committee on Economic, Social and Cultural Rights, “The Right to Adequate Food”, General Comment 12, E/C.12/1999/5, May 12, 1999, at para 1

⁵ Report of the Special Rapporteur on the Right to Food (UN doc. A/63/278), Oct. 21, 2008, at para 33, <http://www.srfood.org/images/stories/pdf/officialreports/or-2-ungareporta63278en.pdf>

⁶ Case of the Sawhoyamaya Indigenous Community v. Paraguay, Inter-American Court of Human Rights, Judgment of March 29, 2006

⁷ Christophe Golay and Ioana Cismas, “Legal Opinion on the Right to Property from a Human Rights Perspective”, Rights & Democracy and Geneva Academy of International Humanitarian Law and Human Rights, May 2010 found at www.dd-rd.ca/site_PDF/publications/humanright-en.pdf

⁸ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994)

free trade agreements (FTAs). During the second half of the twentieth century, there was tremendous growth in the number of these treaties; many developing countries have concluded dozens, and sometimes more than a hundred, such treaties. Cumulatively, there are more than 2,600 BITs worldwide, as well as several hundred more FTAs or broader economic agreements.⁹

While these treaties differ in their particulars, they typically provide for protection against denial of justice or other fundamental violations of due process such as arbitrary or unfair treatment. Another major function of the treaties is to provide for compensation in cases of expropriation or nationalization. In addition, the treaties generally oblige states to treat foreign investors in a non-discriminatory fashion compared with nationals of the host country. However, host countries are not obliged to treat foreign investors identically. Where nationals of the host country and foreigners are similarly-situated (or in “like circumstances”) there may be a need to provide comparable treatment.¹⁰

It is important to note that these international protections are layered on top of whatever protections may be available in domestic law. Indeed, one of the prime purposes of such treaties is to supplement the sometimes-meager legal protections accorded to property in some countries. By setting certain baseline international law protections, these treaties ensure that governments may not simply change local laws so as to permit the destruction or confiscation of (foreign-owned) property without any compensation.

These investment protection treaties also provide for their own system of enforcement. States typically give advance-consent to international arbitration in cases where a foreign investor alleges breach of the treaty protections. Thus, foreign investors may be able to bypass national courts, and pursue legal action against a government before an international arbitration tribunal in cases where their property is alleged to have been harmed.¹¹

As will be seen, the existence of these additional legal protections complicates national policy-making with respect to land reform even if they do not prevent it.

4. Emerging Investment Treaty Impacts on Land Reform in Southern Africa

A number of countries in the Southern African region are dealing with persistent demands to rectify inequalities resulting from highly-stratified patterns of property ownership dating to the colonial era. With the (anomalous) exception of Zimbabwe, land reform efforts in the region

⁹ See UNCTAD, “Recent Developments in International Investment Agreements (2008-June 2009)”, IIA Monitor No.3, 2009, available on-line at: http://www.unctad.org/en/docs/webdiaeia20098_en.pdf

¹⁰ For example, a foreign-owned nuclear power plant might be in like circumstances with a locally-owned nuclear power plant, but not with an organic farm. A host state would be unlikely to have “discriminated” against the foreign-owned power plant simply because it imposed different regulations on it than it did to the organic farm. However, on rare occasions, arbitral tribunals have taken an expansive approach and compared the treatment of businesses engaged in different economic activities. For example, in the July 2004 ruling in *Occidental v. Ecuador*, the tribunal compared the tax treatment of energy companies with those in other sectors such as seafood or cut flowers. See: http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf

¹¹ Alternatively, investors may sometimes bring claims in domestic courts, alleging breach of the international treaty protections.

have been tentative. As is highlighted in the following sections, international law on foreign investment looms large over the land reform process in the region.

4.1 South Africa

In Southern Africa's largest economy, there are persistent cries for more radical land reform measures. Lately, South Africa has explored the possibility of moving past the "willing-seller, willing-buyer approach" to pursue a more aggressive strategy of expropriating certain land-holdings.¹²

The Constitution of South Africa provides for the expropriation of land and also stipulates that "just and equitable" compensation be paid.¹³ Of particular note, the Constitution identifies various criteria that will be relevant to a determination as to what is "just and equitable", including the country's "commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources".¹⁴ Legal commentators have noted that these considerations could lead to less than market-value compensation being awarded under certain circumstances.¹⁵

In seeming contrast, a succession of investment protection treaties signed by South Africa make no references to the importance of land reform or of ensuring equitable access to South Africa's natural resources.¹⁶ Consequently, it has been suggested that these treaties may entitle foreign investors to greater amounts of compensation than might be awarded by South African Courts under South African law.¹⁷

4.1.1 Mining Case Could Have Foreshadowed Impact of BITs in Land Cases

For a time, it appeared that the contested language of South Africa's investment treaties might be interpreted and applied in a live legal arbitration, albeit not one arising out of land reform per se, but rather out of sweeping changes to the country's natural resources sector. In 2004, South Africa passed legislation introducing the Black Economic Empowerment (BEE) scheme for governing the country's mineral and petroleum resources. Many western investors objected to requirements of the BEE including: that shareholding stakes be sold to Historically-Disadvantaged South African (HDSA) business partners; that all mineral wealth be vested in the

¹² See for instance draft proposals currently under consideration: <http://in.reuters.com/article/rbssConsumerGoodsAndRetailNews/idINLDE62N1XW20100324?pageNumber=1&virtualBrandChannel=0>. The "willing-buyer, willing seller" approach relies upon the willingness of land-owners to voluntarily sell their land for redistribution purposes.

¹³ For background see Luke Eric Peterson, "South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights", South African Institute for International Affairs/Frederich Ebert Stiftung, FES Dialogue of Globalization Series, Briefing Paper No.26, November 2006, available at: <http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf>

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ For background on SA's BITs see a 2009 draft discussion paper: "Bilateral Investment Treaty Policy Framework Review: Government Position Paper", Department of Trade and Industry, June 2009, <http://www.thedti.gov.za/ads/bi-lateral.htm>

¹⁷ Brendan Ryan, "Gov't jitters at \$6.6 Billion expropriation claim", Miningmx (news service), Nov.7, 2004, available at: <http://www.miningmx.com/news/archive/388786.htm>

hands of the state; and that investors be re-licensed provided they meet various criteria (for example, a commitment to Black Economic Empowerment).¹⁸

Certain requirements – particularly the percentage of shareholdings to be divested – were watered down before the legislation was passed. Although this seemed to have placated many critics, a small group of Italian investors in the stone sector complained that the divestment rules and other requirements would result in significant losses for them. Indeed, the Embassy of Italy in Pretoria submitted an “Aide Memoire” to the Government of South Africa setting forth Italy’s views on the BEE legislation, and signaling the Italian government’s support for the aforementioned Italian investors.¹⁹ According to Italy, the new minerals Act had “a significant and deleterious effect on Italian investors’ investments in the South African mining industry.”²⁰ Italy warned that the Act “might produce a breach” of the Italy-South Africa investment protection treaty. In particular, Italy warned that the Act’s “social upliftment objectives” and its preferencing of ownership by HDSAs could be deemed breaches of “just and fair” and non-discriminatory treatment for Italian nationals.

Following these diplomatic interventions, the Italian investors initiated an arbitration claim against South Africa, seeking to challenge certain aspects of the country’s BEE policies as breaches of South Africa’s investment treaties.²¹ The arbitration attracted considerable publicity and stimulated debate as to how arbitrators should balance the demands of investment treaties with certain human rights and social justice.²² While the parties exchanged written legal arguments in 2008 and 2009 as a prelude to hearings in April of 2010, they also continued to explore prospects for a settlement of the claims. As of the date of this paper, it appears that there is a high likelihood the case will be discontinued rather than culminate in a final arbitration ruling.²³

Consequently, the tribunal may not need to determine whether certain of South Africa’s investment treaties provide for more generous compensation terms in the case of property loss than do the provisions of domestic law. Any such ruling would have been keenly watched by observers, as it might have offered a first hint as to how future land reform disputes might be resolved by arbitrators. With demands for land reform continuing in South Africa, disputes between the government and other foreign land-owners could soon find themselves in international arbitration. Such cases are likely to test key questions that were not resolved in the Italy-South Africa example.

¹⁸ Peter Leon, “Creeping expropriation of mining investments: an African perspective”, 27 *Journal of Energy & Natural Resources Law*, No.4, 2009, pp 597-644

¹⁹ Document on file with authors

²⁰ See Aide Memoire at <http://www.iareporter.com/downloads/20100615>

²¹ “Italian Groups Challenge Pretoria over BEE”, Luke Peterson and Alan Beattie, *The Financial Times*, March 9, 2007

²² “South Africa mining arbitration sees another amicus curiae intervention”, Luke Eric Peterson, *Investment Arbitration Reporter*, September 2, 2009, http://www.iareporter.com/articles/20091008_3

²³ “Mining investors offer to withdraw politically sensitive arbitration against South Africa”, Luke Eric Peterson, *Investment Arbitration Reporter*, November 13, 2009, http://www.iareporter.com/articles/20091124_18 ; “South Africa not prepared to let claimant walk away from ICSID claim without further conditions”, Luke Eric Peterson, *Investment Arbitration Reporter*, November 30, 2009, http://www.iareporter.com/articles/20091228_5

Two lessons from South Africa's experience are of particular relevance: first, home country advocacy on behalf of foreign investors was seen to play a notable role in the mining dispute between Italian investors and South Africa. As is discussed in more detail in section 5.4 below, such advocacy – particularly when views about the legal obligations of the other state are expressed – may raise important questions. For instance, is advocacy by home-state governments on behalf of their overseas investors performed with due regard to the human rights obligations of the host state?

A second issue which is highlighted – but not yet resolved – in the South African context is the perennial question of the standard of compensation to be awarded by arbitrators in cases of land expropriation. There remains some debate as to whether governments can pay *less* than full market-value compensation for expropriation in the context of land reform. As is discussed next, that question was summarily answered in a recent land arbitration involving Zimbabwe; however the brevity of the tribunal's reasoning and the particular facts of the Zimbabwe case signal that the debate is not over.

4.2 Zimbabwe

Throughout the past decade, the Government of Zimbabwe has taken a series of actions which have drawn the condemnation of human rights advocates around the world. These include the violent repression of opposition political parties and their supporters; forced evictions of squatters; harsh mistreatment of journalists and civil society representatives; and the forcible seizure of farms.²⁴

While ostensibly undertaken in furtherance of human rights objectives including provision of land to the landless poor, confiscations have been undertaken in a violent and politically-motivated fashion. As such, they have drawn the criticism of human rights groups and the Southern African Development Community (SADC) Tribunal comprised of senior jurists in the region.²⁵

A range of legal actions have been brought by victims of land seizures in Zimbabwe, including both domestic lawsuits and human rights claims before the aforementioned SADC regional tribunal. In 2007 a group of Dutch farmers sued Zimbabwe for breach of the Netherlands-Zimbabwe bilateral investment treaty before an international arbitration tribunal at the World Bank.²⁶ The farmers alleged that Zimbabwe had unlawfully expropriated their farms without compensation and had failed to provide either full protection and security, or fair & equitable treatment as mandated under the treaty. The Dutch claimants argued that the Zimbabwean authorities encouraged land invasions by so-called war veterans and others, and then enacted

²⁴ See Amnesty International, "Further Information on Fear for Safety of Farming Communities and Opposition Political Activists in Rural Areas", June 15, 2000, # AFR 46/16/00, <http://bit.ly/bRCedW>; see also Amnesty's February 2009 Recommendations to the Zimbabwean Unity Government which document the ongoing nature of human rights violations in the country: <http://bit.ly/aENMYT>

²⁵ Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe, SADC (T) Case no. 2/2007, Judgment of November 28, 2008, available at: <http://www.saflii.org/sa/cases/SADCT/2008/2.html>

²⁶ Farmers use tribunal to tackle Harare", By Luke Peterson, *The Financial Times*, June 27, 2007

legislation condoning such acts.²⁷ The claimants also argued that police and other officials failed to aid and protect those targeted by violence and intimidation.

In an April 2009 ruling, a tribunal chaired by a former President of the International Court of Justice ruled that the confiscation of foreign-owned property without payment of compensation breached Zimbabwe's treaty obligations.²⁸

Notably, arbitrators side-stepped a number of politically-sensitive questions. They did not inquire into the history of colonialism in Zimbabwe; nor did they address many of the treaty claims advanced by the claimants. According to the tribunal, a single treaty breach – failing to pay “just” compensation - made it unnecessary to examine the other treaty claims advanced by the Dutch farmers.²⁹ At the damages stage of the case, Zimbabwe argued that it should be permitted to pay a discounted amount of compensation in view of the social purposes behind its land reform efforts. Arbitrators gave this argument short shrift. As is discussed in Section 5.2 below, the tribunal's view, while likely to be influential, may not quell debate in future about the merits of discounted compensation in cases of (non-violent) land reform.

The Zimbabwe arbitration is the first to address squarely the application of investment protection treaties to land reform processes. The tribunal's holdings in the case point to the potential use of investment treaties to challenge arbitrary deprivation of landholdings without compensation. The tribunal's dismissal of arguments for discounted compensation may be re-examined in future cases of orderly, non-violent land reform.

4.3 Namibia

Following independence from South Africa in 1990, demand for land reform in Namibia has gathered pace. Although one of the world's least densely populated countries, agricultural land in Namibia is highly concentrated - with upwards of 50% held by a mere 3500 owners.³⁰ A 1995 Land Reform Act set out a process to facilitate land reform, including provision for a willing-seller, willing-buyer process of land acquisition.³¹ The Act also countenances expropriation of land, provided that various criteria are followed. Moreover, under Namibia's post-independence Constitution, the expropriation of property in the public interest is expressly permitted, provided that “just compensation” is paid.³²

After more than a decade of slow reform under the willing-seller, willing buyer process, the Namibian government announced that it would expropriate certain farms. Although the process was markedly different from the violent land invasions seen in Zimbabwe, the lawfulness of the government's actions was challenged by several land-owners. Recently, a test case was heard by

²⁷ Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award of April 22, 2009, at para 46, available at: <http://ita.law.uvic.ca/documents/ZimbabweAward.pdf>

²⁸ Funnekotter v. Zimbabwe, Award of April 22, 2009

²⁹ At para 98

³⁰ Sidney L. Harring and Willem Odendaal, “No Resettlement Available: An Assessment of the Expropriation Principle and its impact on land reform in Namibia”, Legal Assistance Centre (Namibia), 2008

³¹ Agricultural (Commercial) Land Reform Act No.16 of 1995

³² Constitution of the Republic of Namibia, Section 16

the Namibian Courts following the move by the government to expropriate four farms owned by three German owners.³³

The Kessl case traced its roots to 2004, when the Government notified the three farm-owners of the state's intention to purchase their land-holdings. While the farm-owners were absentee-owners living in Germany, they visited the farms several times per year and hired local managers and employees to run the farms.³⁴ When the farm-owners rebuffed the purchase offers, the government set in motion an expropriation process seeking to compulsorily acquire the properties. Rather than acquiesce to the expropriations, the land-owners turned to the Namibian Courts. The claimants contended that the government had not complied with procedural requirements of its land reform legislation; the Namibian constitution; and the Germany-Namibia bilateral investment treaty.

On March 6, 2008 the High Court of Namibia issued its ruling in the Kessl case. Unsurprisingly for observers, the High Court found that the relevant authorities had bungled the land reform process in a number of respects. The High Court set aside the expropriation orders, and ruled that the Government had failed to comply with the requirements of the Land Reform Act, as well as a bilateral investment treaty between Namibia and Germany. Among the shortcomings of the government were its failures to consult a specialized land reform commission, to study the suitability of the targeted farms, or to assess the impact of expropriation upon workers who lived and worked on the properties.

In addition, the Court stressed that the government could not discriminate against German nationals in the context of land reform because German nationals were protected by the Germany-Namibia BIT.³⁵ Indeed, the claimants had argued before the Court that the Ministry of Lands and Resettlement had selected the four German farms precisely because they were foreign-owned. They argued that such targeting was an undoubted breach of the treaty, and, hence, of Namibian law:

It is respectfully submitted that the Minister and the Commission clearly failed to have regard to the international obligations of Namibia in the decision-making process. The Minister did not at the time, nor indeed in subsequent correspondence, apply his mind in any way to the existence of, or the important impact of, the Treaty. He and the Commission acted illegally in failing to respect the law of Namibia which obliged German nationals to be treated in exactly the same way as nationals of Namibia.³⁶

Without inquiring deeply into the demands of the treaty, the Court made clear that the Government was obliged to heed its strictures: "As German citizens, the three applicants are entitled to the same treatment as Namibian citizens"³⁷

³³ Guenther Kessl and others v. Ministry of Lands and Resettlement and others, (P) A 27/2006, Judgment of March 6, 2008

³⁴ Kessl v. Ministry of Lands, Judgment of March 6, 2008, at paragraphs 102-106

³⁵ Kessl v. Ministry of Lands, Judgment of March 6, 2008, at paragraph 106

³⁶ Kessl v. Ministry of Lands, Applicants' Consolidated Heads of Argument, undated (obtained from counsel in case), on file with Authors

³⁷ Kessl v. Ministry of Lands, Judgment of March 6, 2008, at para 106

4.3.1 Will the Government Attempt to Lower the (Domestic) Bar?

Following the High Court quashing of the government's expropriation orders, land reform in Namibia has been slowed significantly. Although the government moved to appeal the High Court ruling, it remains unclear whether the courts will hear the challenge due to late filing of the appeal.³⁸ Meanwhile, 2009 saw the re-election of President Hifikepunye Lucas Pohamba, who had been the Minister of Land and Resettlement responsible for issuing the expropriation orders in the Kessl controversy. It is not yet known what steps President Pohamba and his new Cabinet will take with respect to land reform. Recently several consultation meetings called to discuss changes to the Land Reform Act were cancelled at short notice.

Even if the Government should seek to lower the administrative hurdles by making amendments to the Land Reform Act, the administration would still need to reckon with the Namibia Constitution. Some of the keenest observers of the process have queried whether the Ministry has the capacity to meet the exacting administrative standards imposed by the current Act, and by Article 18 of Namibia's Constitution – which mandates that administrative agencies and officials act fairly and reasonably. A leading Namibian NGO, the Legal Assistance Centre, in a comment on the Kessl judgment says:

(It) is unclear that the Ministry can meet the constitutional requirements of Article 18, not only in future expropriation cases, but also in other aspects of the land reform process generally, including overall planning, selection of farms, selection of beneficiaries, transparency and resettlement project administration.”³⁹

Assuming, however, that the government was to meet its domestic legal obligations - including the due process obligations spelled out in Article 18 of the Constitution - obligations under its international investment protection treaties would move into the spotlight. Yet, despite the central role that investment treaties could play in conditioning land reform, the government continues to negotiate new treaties. In a December 2009 interview in Windhoek, a government official indicated that BIT negotiations continue with a variety of countries, and that treaties with China and Russia have been concluded in recent years. The subsequent sections of this paper canvas some of the key implications which such treaties could have.

5. Emerging Impacts of Investment Treaties on Land Reform

While BITs do not bar land reform, they do impose a series of international law obligations which governments must respect. In the following sections, we highlight the ways in which BITs may impact upon land reform, and we emphasize key considerations that policy-makers and human rights advocates must take on board.

5.1 Nationals of a Country May Qualify as Foreigners

As alluded to earlier, many investment treaties are drafted in capacious terms – permitting individuals to incorporate holding companies or other off-shore corporate vehicles which can be used to transform domestically-owned assets into foreign-owned assets. For example, under the

³⁸ Interviews with sources, Windhoek, Namibia, December 7, 2009

³⁹ See discussion in Odendall and Haring, 2008, at pp.14-20

terms of the recent Namibia-Russia BIT, a Namibian national might incorporate a Russian holding company and hold his Namibian farm-holdings “Farm A” via this intermediary company.⁴⁰ The Russian company might then qualify as a “legal person” entitled to protection as a foreign investor under Article 1 (2) (b) of the Russia-Namibia bilateral investment treaty (article defining “investor” within the treaty). In such circumstances, the Namibian government could be obliged to extend the benefits of the Russia-Namibia treaty to “Farm A”.

Depending upon local legal requirements, these off-shore corporate structures may not need to be disclosed to government officials. Thus, governments engaging in land reform initiatives may be surprised to find that policy measures targeting ostensibly “local” property are, in fact, governed by international treaties. Given the potential for locals to be transformed into foreigners, international investment treaties need to be closely scrutinized and considered by policymakers even where land ownership is – on the surface – locally-dominated. Governments might also consider the appropriateness of policies which oblige land-owners to disclose when they hold property through off-shore ownership structures, so that policymakers can have more certainty as to when international treaties may be applicable.

5.2 Discounted Compensation in Cases of Land Reform?

The most relevant protection afforded by investment treaties in the context of land reform will be the guarantee of compensation in cases of expropriation. As highlighted in Volume 3 of the Rights & Democracy series *Investing in Human Rights*, there may be a divergence between the amounts of compensation guaranteed under domestic law, and that mandated by international investment treaties.⁴¹ For instance, in South Africa, constitutional law provides for discounted or less than market value compensation in cases where expropriations are undertaken in order to provide for more equitable use of the country’s land and resources. However, there is some debate as to whether investment treaties mandate a higher amount of compensation, for example full market-value compensation.

In the recent arbitration brought by Dutch farmers against Zimbabwe, the state maintained that it was entitled to pay a “discounted” rate of compensation in cases of systemic land nationalization. However, arbitrators rejected this argument out-of-hand, pointing to the fact that the Netherlands-Zimbabwe BIT calls for “just compensation” – which is further defined in the treaty as representing the “genuine value” of the investments in question. While the tribunal’s reasoning occasioned little complaint outside of Zimbabwe, not least because of the violent and unlawful nature of that country’s approach to land reform, it does raise important questions for future cases.

The arbitrators gave a frustratingly perfunctory treatment of the issue, offering no reasons for the view that discounting is inappropriate – and (strangely) citing a single case, which does not address the question at hand. As a consequence, the tribunal glossed over a long-simmering debate among international lawyers as to whether countries (particularly poorer ones) may be

⁴⁰ The Russia-Namibia BIT, on file with authors

⁴¹ “Bilateral Investment Treaties and Human Rights: Mapping the Role of Human Rights Law Within Investor-State Arbitration”, Rights & Democracy, 2009, available at: <http://www.dd-rd.ca/site/PDF/publications/globalization/HIRA-volume3-ENG.pdf>

obliged to pay *less* than market-value compensation in cases of wide-scale land reform or nationalization.

Arguing for a Discount on Compensation

There is limited authority for the argument that less than market-value compensation is justified under customary international law.⁴² Moreover, if a treaty specifies the compensation owing in greater detail – for example, as market value – there may be even less wiggle-room for discounting. Still, investment treaties do vary in their wording and some may be more susceptible to the discounting argument than others. Thus, while the “genuine value” compensation mandated under the Netherlands-Zimbabwe treaty might be construed as requiring the actual market value of the investments, other treaty wordings may leave more latitude.

Prof. Oscar Schachter long argued that references to “just” or “equitable” compensation might provide considerable latitude for an arbitrator to award less than market-value compensation.⁴³ On Schachter’s view, instances of large-scale expropriations, such as land reform, might require less than market-value compensation where the state would have an otherwise “overwhelming financial burden”. Whatever one makes of the argument – and it is one that is likely to continue to be raised by developing countries – many treaties would make it difficult to pursue because they do not use malleable terms like “just” or “equitable” compensation.

Golay and Cismas argue that property rights may be limited in order to resolve social injustices and advance the human rights of specific disadvantaged individuals or groups. They add that the standard of compensation should “reflect all branches of international law relevant to the subject-matter, including investment law and human rights law” and that “the customary standard of compensation ought to be coherent with the functions fulfilled by the right to property with respect to the individual and society at large”.⁴⁴

Assuming, for the sake of argument, that arbitration tribunals indicate a willingness to award discounted rates of compensation in some cases of land reform, we should still expect (and hope) that arbitrators will scrutinize the words and deeds of the expropriating state. For instance, arbitrators might require clear evidence that a given set of expropriations were undertaken as part of a bona fide land reform scheme and that human rights objectives such as hunger eradication or providing land for the landless, are real. If the arbitrators were open, in principle, to awarding less than full market-value compensation in such cases, the additional scrutiny would allow distinction to be made in cases involving violent and arbitrary measures as

⁴² Prof. Brownlie, a leading contemporary exponent of the view, relies on the writings of Oscar Schachter, in his Separate Opinion in the CME v. Czech Republic arbitration, at para 31, available here: http://ita.law.uvic.ca/documents/CME2003-SeparateOpinion_001.pdf

⁴³ Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff Publishers, Dordrecht, 1991, p.324

⁴⁴ Christophe Golay and Ioana Cismas, “Legal Opinion on the Right to Property from a Human Rights Perspective”, *Rights & Democracy and Geneva Academy of International Humanitarian Law and Human Rights*, May 2010 found at www.dd-rd.ca

seen in Zimbabwe where expropriated properties were handed to the politically-connected, rather than to the genuinely needy.

While less wealthy countries might be expected to argue for a discount in cases of bona fide land reform, it is unclear whether denial of a discount by arbitrators would pose a practical barrier to land reform. Perhaps where there is widespread treaty-shopping – and the consequent transformation of nationals into “foreigners” – this might place more economic pressure on government coffers. However, detailed economic studies would need to be undertaken in order to quantify the real divergence between what local law would award to nationals in case of expropriation, and what a full-market-value award under international law would require.

Indeed, quite apart from the costs inherent in acquiring land, are the additional budgetary allocations necessary to ensure that redistribution of the land leads to meaningful and sustainable human rights improvements. Willem Odendaal of the Namibian Legal Assistance Centre points to the need for financing of resettlement costs, agricultural skills training, infrastructure provision, and the creation of markets where people can sell their products.⁴⁵ It is these latter critical expenditures which may ultimately determine whether land reform experiments truly succeed in their lofty goals.

5.3 Treating Foreigners as Favourably as Nationals

Another investment treaty protection that could have an impact upon land reform is the requirement that host countries accord “national treatment” to foreign investors. While this requirement may vary in its wording, it typically obliges states to ensure that foreigners are not treated less favourably than nationals of the host state. Article 3(1) of the Germany-Namibia bilateral investment treaty provides as follows:

“Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.”

Recall that in the *Kessl v. Namibia* case, the High Court stressed that basing the selection of farms for expropriation merely on account of their being foreign-owned could clash with the Germany-Namibia investment treaty: “As German citizens, the three applicants are entitled to the same treatment as Namibian citizens ... (under the Germany-Namibia treaty)”.⁴⁶

However, the High Court did not rule that states are barred from taking land reform measures which are directed at foreigners. Presumably, states would not encounter serious difficulties if they were to use a series of transparent and reasonable criteria for purposes of assessing properties. Namibia’s Land Reform Act set out a process and a criteria whereby a special Land Reform Advisory Commission should study whether a particular property is appropriate for compulsory acquisition; but these processes were not used by Namibian officials during the previous round of expropriations.

⁴⁵ Interview December 7, 2009, Windhoek, Namibia

⁴⁶ Text on file with author

There is little evidence to suggest that states are obliged to treat foreign investors in a rigidly identical fashion to their own nationals. Different treatment may be called for where the investors are not in similar circumstances. Thus, while the Namibian High Court noted that German nationals are entitled to the “same” treatment as nationals, it should be stressed that there may be a variety of other reasons – apart from nationality - why a foreign investor might be selected for expropriation. For instance, if a plot of rich agricultural land were laying fallow, officials might be expected to focus upon that holding irrespective of its foreign or local ownership.

5.4 Home-States and Extra-Territorial Obligations

It is commonplace for foreign investors (and/or their legal representatives) to request face-to-face meetings with government officials, or to write to government ministries, in an effort to dissuade or influence policies under consideration in a host country. At times, foreign investors will argue that specific measures may breach investment protection treaties and could lead to lawsuits for the government.

In many cases, the home-country government of the foreign investor will also become involved. A government may make formal representations to the country where the investment is located through its diplomatic missions or other means. For instance, in the case of the earlier-discussed dispute in South Africa over proposed new mining policies, the Italian Government made diplomatic representations to the South African Government – seeking to dissuade South Africa from pursuing measures which were deemed unfavourable to Italian investors.

It is unknown whether other governments have also used diplomatic interventions to warn South Africa of their concerns about the BEE scheme. Typically, such correspondence is not made public, although the Italian *Aide Memoire* came to light during earlier research into South Africa’s mining legislation. Anecdotal evidence suggests that such diplomatic representations on behalf of foreign investors are commonplace when policy measures by a host country are deemed unfavourable for foreign investors.

Although rarely discussed, home-country diplomacy on behalf of foreign investors could raise concerns from the perspective of human rights law. By virtue of their international human rights law obligations, governments may have certain extra-territorial obligations which should guide foreign policy and related activities.⁴⁷ For example, the UN Committee on Economic, Social and Cultural Rights has noted that states “should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”⁴⁸

⁴⁷ There is debate among human rights experts about the scope and reach of extra-territorial obligations, particularly with respect to state sovereignty and jurisdiction. For an analysis, see *Universal Human Rights and Extraterritorial Obligations*, ed. Mark Gibney and Sigrun Skogly, University of Pennsylvania Press, 2010

⁴⁸ Committee on Economic, Social and Cultural Rights, “The Right to Adequate Food”, General Comment 12, E/C.12/1999/5, May 12, 1999, At para 36

At times, governments have come under fire for alleged failures to take the extra-territorial impacts of their policy choices into consideration. For example, the German Government has come under criticism from certain non-governmental organizations for pressuring the Republic of Paraguay to refrain from land reform measures affecting German landowners in that country. These groups contend that Germany ignored its extra-territorial human rights obligations related to the right to food because the land reform program in Paraguay was part of a larger hunger eradication policy.⁴⁹

Where Governments make representations on behalf of their foreign investors, they should be mindful that such efforts could come into tension with their human rights obligations. Moreover, they may wish to limit such representations to calls for treaties and dispute resolution processes to be used and respected – rather than expressing views as to whether a given action has breached a treaty provision. Given the often-private nature of such diplomacy, these representations and advocacy are rarely scrutinized by outside observers for their human rights compatibility. In future, there may be a role for human rights institutions or other monitoring bodies to request information from governments as to whether their advocacy on behalf of foreign investors is compliant with human rights norms and practices.

6. Conclusions

It is clear that governments contemplating land reform must contend with the international legal framework protecting foreign investors. Indeed, the loose drafting of investment treaties ensures that the ranks of “foreign” owners may swell as nationals of a given country realize the ease with which they can structure their property-holdings via off-shore holding arrangements. At the same time as governments confront such challenges, it is important to recall that investment treaties complicate – but do not preclude – land reform initiatives. In fact, foreign investors and/or their home state governments sometimes overstate the reach of such treaties in an effort to dissuade certain policy decisions including expropriation. Looking to the future, therefore, a number of recommendations can be made.

First, greater transparency is needed so that the influence of investment treaties upon land reform and other land rights of individuals and communities can be monitored and assessed. Transparency should encompass not only the legal arbitration of investment treaty claims, but also the more informal representations made by foreign investors and their home governments. Thus, where a particular host government is alleged to be in breach of its international treaty obligations and in danger of facing an international lawsuit, the allegation should not be hidden from citizens, elected officials or other observers. Greater transparency will allow better monitoring and case documentation by human rights groups, so that the human rights impacts of investment treaties – both positive and negative – are analyzed and reported in a systematic way.

Second, before home-state governments make diplomatic representations on behalf of their investors, they should take steps to ensure that the recommendations respect the human rights

⁴⁹ See for example, *Right to Food Quarterly*, Vol.2 , No.1, 2007, at pg. 6, <http://www.fian.org/resources/documents/categoria-3/right-to-food-quarterly-vol-2-no.1/pdf>

obligations of the host-state. In other words, the representations must not suggest actions that could result in a breach of human rights obligations in the host country.

Finally, further attention should be given to the long-simmering debate about discounted compensation in cases of land reform. There is a need for economic studies that examine whether the payment of discounted compensation would have any meaningful impact on the capacity of states to undertake land reform. Similarly, there is a need to assess possible divergences between domestic and international law on the issue of compensation in order to better understand potential financial implications for states.

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