THE 2009 BILATERAL INVESTMENT TREATY BETWEEN SOUTH AFRICA AND ZIMBABWE: BALANCING BETWEEN COMPETING PRESSURES

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Abstract

This paper discusses the Bilateral Investment Promotion and Protection Agreement (BIPPA) between South Africa and Zimbabwe entered into in November 2009. It highlights the fact that policymakers in both countries realised the need to have an agreement in place that would boost Zimbabwe's beleaguered economy and serve as a protection mechanism for investments in both countries – amidst objections from South African farmers who tried to stop the agreement from being signed. The paper discusses the implications of these two countries' entering into such an agreement against the background of their national economic policies, national laws and international law. The paper suggests there is a need to maintain a balance between national polices and international law as competing pressures are brought to bear when it comes to the BIPPA's implementation. The question here is whether or not the Agreement alone is likely to solve the long-standing conflict brought by Zimbabwe's land policy, which resulted in the seizing of land and the issue of investor protection. Competing pressures that are raised in this regard are issues of constitutional rights, legislative supremacy, diplomatic protection, and treaty interpretation in regard to investor protection. In this regard, the paper investigates the implications of the Agreement from the point of view of other legal obligations invoked in different forums, namely domestic South African and Zimbabwe law, Southern African Development Community (SADC) regional law, international law, and international customary law. Further questions are whether or not the BIPPA can, on its own, solve any investor dispute that may arise, and whether or not investors will be faced with a host of other competing legal pressures that could be brought to the forefront in future investment disputes. Of particular importance would be the BIPPA's dispute resolution clauses. The discussion explores whether or not the signing of this Agreement ushered in a new dawn in the Zimbabwean economy and the stabilisation of the southern African region in general. The discussion is concluded by suggesting that, in seeking to balance the competing interests between national policies and international law and to ensure the constitutional responsibilities of the state are not interfered with, the BIPPA attempts to regulate future cross-border investment disputes between South Africa and Zimbabwe.

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I Introduction

The proliferation of Bilateral Investment Treaties (BITs)[1] and other international financial agreements[2] in the last few decades continues with great vigour. While originally operating mainly between developed and developing economies, the phenomenon has extended exponentially in all directions on the globe to include agreements being concluded between developed and emerging economies, and among states in regional treaty arrangements. In the absence of a global multilateral treaty on investment, and with the limited role of the World Trade Organization (WTO) in this area, the proliferation is not likely to abate soon.

A BIT such as the Bilateral Investment Promotion and Protection Agreement (BIPPA) signed on 27 November 2009 between South Africa and Zimbabwe was entered into because both governments anticipated it will encourage investment in a competitive global environment.[3] In the case of the BIPPA, its nominal reciprocal character belied the reality that it was designed to stimulate the South African business community's interest in investment opportunities in Zimbabwe, mainly in the agro-processing, telecommunications, mining and infrastructure sectors. However, it also aimed to signal to other foreign investors that both governments acknowledged the need for the internationally recognised protection of investors and their investments. BITs also constitute a part of the legal architecture which sustains economic globalisation and are a significant feature of contemporary international economic law. In the global arena, BITs rub shoulders with other sources of international economic law emanating from nation states, from regional and multilateral treaties, and from international economic organisations.[4]

The overall picture presented by BITs is one of complex and traversing systems of rights and obligations in the cross-border investment area, complicated by regional, bilateral and multilateral treaties. It is further complicated by a plethora of dispute resolution systems, parallel proceedings, disputed jurisdictions, and competing norms and adjudications. Many developing and developed countries have explicit measures that define the regulatory framework for cross-border direct investment into such countries, and address specific public interest considerations arising from cross-border direct investment. These take the form of explicit legislation that articulates

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1 Bilateral Investment Treaties (BITS) are agreements entered between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country. BITs in most instances cover the following areas: scope and definition of investment, admission and establishment, national treatment, most favoured nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds and dispute settlement mechanisms.

2 *International financial agreements* are those concluded between one or several states, international financial institutions or other international organisation or corporation that establishes an actual or contingent financial obligation including any loan agreement, guarantee, investment protection agreement or other financial instruments.

3 The agreement was signed by South African Trade Minister, Rob Davies, and Zimbabwe's Economic Planning Minister, Elton Mangoma, amidst objections from South African farmers who tried to stop the agreement from being signed. Negotiations for this agreement started in 2004 and it took the power sharing-government that came into being in 2009 to conclude the process.

4 On the law of globalisation generally, see Laurence Boulle *The Law of Globalization* (2009).

the conditions within which foreign direct investment (FDI) is expected to have nets for the country. The pluralisation of legal sources and dispute resolution systems entail that the rule of law has not been crystallised as it still an emerging concept in this area of international economic law.

In broad terms, BITs and other international investment agreements[5] share with international economic law and public international law a reflection of dominant society norms and interests. Conversely, the rights and interests of emerging and developing economies are not adequately reflected in the substantive treaty provisions or in their procedural features. This is sometimes justified in terms of a necessity argument along the lines that economic reality requires a bargain between the needs of capital-seeking developing countries and motivations for prospective foreign investors. However, it is noteworthy that the correlation between BITs and the attraction of investment is not that clear, and that the existence of BITs is not the major determinant in FDI decisions by transnational companies.[6] A high point in the 'imbalance'[7] critique of such agreements is found in Schneiderman's[8] contention that BITs 'constitutionalise' the rights of investors without providing reciprocal obligations for investors or rights for host states.

In recent years, the newfound influence of emerging economies has led to fresh policy considerations in this area, both in relation to the 'standard' contents of BITs and the dispute resolution options they embody. Some jurisdictions had already gradually stopped pursuing BITs and others are now reviewing their whole policy framework for FDI. With less global trade and investment revolving around the former hubs of Europe, Japan and North America, there is increasing investment activity among the former "peripheral" economic systems. Moreover, both private and sovereign FDI has been emanating from newly emerging economies, and some countries that were formerly heavily reliant on inward foreign investment are now exporters of capital. At the regional level, investment provisions and protocols are being included and developed in economic communities and in agreements, including the Economic Partnership Agreements with the European Union. Finally, the ongoing malaise in global trade and finance has created space for policies and practices in cross-border investment to be reconsidered as well. The jury is still out and clarity is needed as to whether or not the existence of an international investment agreement and the right to arbitrate claims has incentivised foreign investment. The existence of BITs is one of the variables that may affect decisions to invest globally, but is not the only one. Other factors include the potential financial risks and benefits to the investor, the stability of the investment environment, the availability of appropriate human and physical infrastructure capital, access to an effective enforcement procedure, and the existence of personal and professional relationships.

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5 In addition to BITs, there are a number of other agreements that address investment matters but as part of a range of other issues, most prominently trade, intellectual property, competition and government procurement.

6 Brazil has in recent years been a major beneficiary of FDI despite having no finalised BITs.

7 See David Schneiderman *Constitutionalizing Economic Globalization* (2005).

8 Ibid.

One cannot underestimate the importance of the availability of investment treaty arbitration in influencing the flow of investment, but the specific scope and impact of that role still has to be articulated. The fundamental truth is that, for most developing countries, good governance is still in its infancy, vulnerability to shock is high, and supply-side constraints are relevant to growth in the economy. This means that investment and trade that rely mainly on BITs to attract FDI are a very risky business that could result in the loss of investment assets.

In this context of fluidity and flux, this paper examines aspects of the dispute resolution clause in BITs and other international investment agreements in relation to emerging and developing economies, with particular reference to a recent case study involving South Africa and Zimbabwe. The study shows how the development of a BIT is interwoven with a prolonged dispute between foreign investors and a host country, and the involvement of at least four levels of courts in the two countries concerned. The paper examines the South Africa – Zimbabwe BIT to give an overview of the obligations and implications between the two countries in light of the agreement, domestic economic policies, and international law. Of particular importance in regard to the South Africa – Zimbabwe BIT are its dispute resolution clauses. In a globalised age, it is not unusual for parties in dispute to be faced with a choice of remedial avenues for seeking enforcement of their rights. Parties to a dispute have a right to domestic law, bilateral treaties, and regional and multilateral conventions. Two problems arise in these contexts: one relates to enforcement, and the other to reconciling the different outcomes.

II The South Africa – Zimbabwe BIPPA: An Overview

The BIPPA has conventional aims: to promote investment in both countries, and provide security for each country's investors. The BIPPA provides legal safeguards for foreign investments, including those relating to investment in the agricultural sector, with provision for compensation and dispute resolution procedures. The Agreement emerged in the context of a US$50-million credit line from South African businesses to assist Zimbabwe on its road to recovery.[9] The BIPPA, however, expressly excluded claims arising from Zimbabwe's past land seizures despite some claims having been upheld by a relevant international tribunal, i.e. the Southern African Development Community (SADC) Tribunal.[10] This entailed inconsistency in international rules and dragged the BIPPA into an extended controversy over the rights of foreign landowners, which overshadowed matters even before the Agreement was signed. The issue at stake was the case brought by Mike Campbell (PVT) Limited and 78 other white commercial farmers concerning an action of the violation of human rights which had resulted in the expropriation of agricultural

[9] Zimbabwe Investment/Leadership Online 'Protection agreement in murky waters' (2010); available at *http://www.leadershiponline.co.za/articles/leaderships-intelligence-bulletin/344-zimbabwe-investment,* accessed 21 April 2010.

[10] In the case of *Mike Campbell (PVT) and Others v The Republic of Zimbabwe* SADC (T) 02/2007, past expropriation and prospective expropriation without due compensation were held unlawful.

land in Zimbabwe by the government in that country. This was one of the first cases before the SADC Tribunal which was provisionally suspended in 2007. In the case, a landmark judgment was delivered by the Tribunal in favour of Mike Campbell and the others, to the effect that the Republic of Zimbabwe was in breach of its obligations under the SADC Treaty.[11]

Prior to the Agreement's finalisation, the property rights of dispossessed South African farmers in Zimbabwe had been subjected to forces of political expediency. As a result of this perception, efforts were made through the South African courts to prevent the South African government from signing the BIPPA. Although these efforts failed, a court order was successfully obtained to direct the South African government to protect the land rights of its citizens in Zimbabwe and to respect the rulings of the SADC Tribunal. The controversy over finalising the agreement resulted in Business Unity South Africa – the principal representative of business in South Africa[12] – boycotting the signing ceremony. Commentators have raised questions over whether the ratified BIPPA would provide any real guarantee of security for South African investors in Zimbabwe.

A major factor in the dynamics of the BIPPA negotiation process was the South African government's acquiescence to Zimbabwe's insistence on excluding the restoration of property rights of, or claims for compensation by, South African farmers previously dispossessed of land by the policies of the Zimbabwe African National Union – Patriotic Front (ZANU – PF) policies. A retrospective clause in the agreement would have meant that the South African government had undermined its own constitutional principles; however, its acquiescence in respect of excluding such a clause created inconsistency with a prior SADC ruling, and had a role in Zimbabwe's continued flouting of the SADC judgment, despite both parties being signatories to the SADC Treaty.[13]

This article considers some of the economic, political and juridical factors which surrounded the concluding of the BIT between the two countries, including the exclusion of liability for past dispossessions. These competing factors led to inconsistencies and incongruities as well as to some degree of ambiguity in relation to future investor remedies. In addressing these ambiguities and the circumstances under which the BIPPA was signed, it is necessary to investigate the matters brought before the Tribunal and the judicial decisions relevant to the matter. This includes the interaction among pluralistic dispute resolution options and the interface between the legal and political spheres. For example, at the level of national law, legal proceedings to challenge the validity of the Zimbabwe government were dismissed by

[11] According to Articles 4(c) and 6(2) of the SADC Treaty, member states are obliged not to deny access to justice and also cannot discriminate against anyone on the grounds of race.

[12] The main function of Business Unity South Africa is to ensure that business plays a constructive role in the country's economic growth, development and transformation. It further aims to create an environment in which businesses of all sizes and in all sectors can be competitive, thrive and expand.

[13] Ibid.

Zimbabwean courts, and were referred for consideration by the SADC Summit at the international political level.[14]

It is against this background that the paper will examine case law in light of BIPPA provisions, with particular reference to cross-border investments, future land expropriations, and the various mechanisms for investor – state and state – state disputes. The discussion also makes brief reference to the future dispute resolution provisions included in the BIPPA.

III Chronology

The short chronology of major events in this episode is as follows:

Date	Event	Significance
1992	Treaty of the Southern African Development Community	Article 9 of the SADC Treaty establishes the Protocol on the SADC Tribunal in 1992
2007	*Mike Campbell (PVT) Ltd and Others v The Republic of Zimbabwe* SADC (T) 02/2007	Past expropriation and prospective expropriation without due compensation held unlawful
2008	*Von Abo v President of South Africa* 2008 (CCT 67/08) 2009 ZACC 15	South Africa's High Court delivers a landmark judgment that the state has a constitutional obligation to provide diplomatic protection
2009	*Sub nom Gramara (Private) Limited and Colin Bailie v Government of the Republic of Zimbabwe and Attorney-General of Zimbabwe* HC33/2009	Attempt to ensure Zimbabwe's compliance with the SADC Tribunal
2009	*Mike Campbell (PVT) and Others v The Republic of Zimbabwe* SADC (T) 03/2009	Matter referred to SADC Summit for Heads of State to consider appropriate measures against Zimbabwe
2009	Zimbabwe withdraws from the SADC Tribunal over the land issue	Zimbabwe government declares SADC ruling null and void
2009	BIPPA between South Africa and Zimbabwe signed	International legal remedies for cross-border investment disputes established
2010	*Von Abo v Government of the Republic of South Africa and Others* 2010(3) SA 269	South African government ordered to pay damages to the applicant
February 2010	Court application by AfriForum to have the SADC ruling registered	Domestic court to have jurisdiction over sovereign state

[14] In June 2009, the SADC Tribunal held the Zimbabwe government to be in breach of the Tribunal's decision of 28 November 2008. This defiance was subsequently referred to the SADC Summit for consequential measures to be considered under the SADC Treaty.

Date	Event	Significance
March 2010	Decision of the North Gauteng High Court in Pretoria in respect of the SADC ruling on the AfriForum case	AfriForum granted an order to attach Zimbabwean property in South Africa
April 2010	Prospective appeal by South African and Zimbabwean governments	Possible limitation on applicants' rights to compensation
June 2011	The North Gauteng High Court rejects an application by the Zimbabwean government to prevent assets being sold	In terms of international law, a court has now ruled that an asset of a country guilty of violating human rights is obliged to be sold to compensate victims of such violation

IV Issues that led to the controversy of the BIPPA and implications of non-compliance

In 2000, the Zimbabwean government under President Robert Mugabe introduced a land reform policy. This resulted in the seizure of a number of land properties, some of them belonging to South African farmers. A number of disputes arose and were bought before Zimbabwean courts to challenge the policy. It was during the process of these disputes, the policy being challenged in the courts of both South Africa and Zimbabwe, and the *Campbell* case[15] being brought before the SADC Tribunal, South Africa and Zimbabwe engaged in negotiations to enter into the BIPPA. South African farmers whose land was seized under Zimbabwe's land reform policy lodged an interdict with the Pretoria High Court to stop the two countries from signing the BIPPA. Shortly before the court was to hear the case, South Africa and the farmers' union in South Africa, which had brought the case before the court, reached an agreement. The interdict sought before the court was as a result of the farmers wanting the South African government to recognise the ruling of the *Campbell* case given by the SADC Tribunal in 2008. The Tribunal was the court of last resort for the region's citizens. The Tribunal had found that Zimbabwe's white farmers, including several South Africans, had suffered racial discrimination during the land seizures brought about as a result of the land reform. The Tribunal found that Zimbabwe's seizure of approximately 4 000 farms owned by whites was racist and illegal, and violated constitutional property rights. It ordered the Zimbabwe government to pay compensations to those farmers who had been evicted from the farms in question. Zimbabwe, who is a member of SADC, the 15-nation regional bloc, refused to recognise the Tribunal's ruling – even though it had signed the SADC Treaty establishing the SADC Tribunal.[16]

[15] *Mike Campbell (PVT) Ltd and Others v Republic of Zimbabwe* SADC (T) 02/2007.

[16] The Treaty states in its preamble that SADC is committed to the establishment of a 'developing community', economic integration, and a guarantee of democratic rights, human rights and the rule of law. The Preamble also emphasises SADC's fidelity to the principles of international law governing relations between states.

The BIPPA makes reference to the SADC Tribunal judgment and contains an undertaking by both countries to respect the judgment. The BIPPA also provides for the protection of South African investors' security of tenure, but with the exception of land seized. It provides legal certainty for those engaged in investment in Zimbabwe. Through this initiative, the Zimbabwe government has committed itself to encouraging new local and foreign investment to stimulate economic growth and development. The BIPPA guarantees investors freedom from expropriation in the other's country as well as the right to seek redress in international tribunals. Rob Davies, the South African Minister of Trade at the time, was of the opinion that the BIPPA would provide a level of investor confidence that had not existed before. There would, for example, now be recourse to a whole range of mechanisms in the event of a dispute

Observers believe[17] that, even with the signing of the BIPPA, major uncertainties continue to prevail over President Robert Mugabe's sincerity in respect of honouring agreements – after more than a decade of Zimbabwe flouting regional and international agreements, which, among other domestic policy changes, has contributed to the country's economic collapse.

V Engaging the SADC Tribunal

The *Campbell* case commenced with an application brought on 11 October 2007 by members of the Commercial Farmers' Union in Zimbabwe, who instituted legal proceedings in the SADC Tribunal after exhausting legal remedies in Zimbabwe.[18] The applicants sought relief from the Tribunal by establishing the rights of South African citizens in SADC. They claimed their human rights had been violated by the expropriation of agricultural land in Zimbabwe following the enactment of that country's land reform policy. The Tribunal ruled in favour of the applicants, finding that Zimbabwe's land reform policy was illegal and racist. The Tribunal held not only that the expropriations of the applicants' land was unlawful, but also that prospective expropriations without due compensation, despite being authorised by an amendment to the property clause in the Bill of Rights in Zimbabwe's Constitution, would also be unlawful. An application was simultaneously filed pursuant to Article 28 of the Protocol on the SADC Tribunal for an interim measure to prevent the government of Zimbabwe from appropriating the land. The applicants brought this proceeding to the Tribunal pursuant to Article 15 of the Protocol, as citizens of SADC whose human rights had been infringed by Zimbabwe. The Article provides as follows:

> (1) The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.

[17] Sokwanele, Legal Opinion: Proposed Bilateral Investment Promotion and Protection Agreement between Zimbabwe and South Africa, 26 November 2009; available at http:www.sokwanele.com/thisiszimbabwe/archives/5223, accessed on 21 March 2011.

[18] *Mike Campbell (Pvt) Ltd and others v Zimbabwe* SADC (T) 02/2007.

(2) No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.
(3) Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

On the question of jurisdiction, Article 14 of the Protocol provides as follows:

> The Tribunal shall have jurisdiction over all disputes and all applications referred to in accordance with the Treaty and this Protocol which relate to:
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> (a) the interpretation and application of the Treaty;
> (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
> (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.

Article 4 of the Treaty states the following:

> SADC and member states are required to act in accordance with the following principles-human rights, democracy and the rule of law.

What this means is that SADC, as a collective body of member states, and individual member states are obliged to respect and protect the human rights of SADC citizens. SADC is also mandated to ensure that democracy and the rule of law prevail within the region.

On 28 November 2008, the Tribunal upheld the case brought by Campbell and the other applicants. Specifically, it held that Zimbabwe's land reform policies were in breach of international human rights norms[19] and the rule of law as entrenched by the SADC Treaty.[20] The Tribunal held that the land reform exercise –

- constituted racial discrimination as the measures did not relate to criteria of land use or need, but targeted only white farmers and the ultimate beneficiary of the land seizure policy was designated cronies and a class of political buddies
- amounted to expropriation on an arbitrary basis and without compensation, and
- infringed on the court's jurisdiction to adjudicate on human rights infringements.

In its final determination, the Tribunal ordered the Government of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of farms not yet expropriated, and to pay compensation to those owners whose farms had already been expropriated.[21]

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[19] Example of this are Article 1(3) of the United Nations Charter and Article 2 of the Universal Declaration of Human Rights.

[20] Article 6 of the SADC Treaty does not permit member states from discriminating against any person on the ground of gender, religion, race, ethnic origin or culture. It is worth noting that Zimbabwe ratified the Treaty and is a member of SADC.

[21] *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) 02/2007. Article 4 of the SADC Treaty provides that SADC and its member states are required to act in accordance with the principles of the protection of human rights, democracy and the rule of law.

VI Zimbabwe's Responses

In order to safeguard the government's land seizure policy against the relief granted by the SADC Tribunal, and to guard against subsequent court applications to register Tribunal decisions as provided under the Protocol to the Tribunal, the Zimbabwe government extricated itself from the SADC Tribunal. It cited the fact that the Protocol establishing the Tribunal had not been ratified by the required two thirds of SADC member states. The withdrawal letter was written on 7 August 2009 and signed by the then Justice Minister, Patrick Chinamasa.[22] This decision by the Zimbabwe government meant that the avenues in SADC by means of which Zimbabwe's farmers could seek redress were effectively closed.

In reference to the Tribunal's ruling, President Mugabe indicated that it had erred because it had not considered what he termed the 'historical context' of the whole case. He was further of the opinion that, in arriving at its decision, the Tribunal had failed to take into consideration the fact that the land in dispute was originally forcefully acquired by the colonial administrators of the country and given to white people, which resulted in black people having been dispossessed of their ancestral lands. Magaro argues the shortcomings of this view by analogy: if your loved one is killed by someone and you go out and kill that person or their loved one, the law does not recognise this as a legal defence and a murder charge will be instituted.[23]

VII Developments subsequent to the tribunal proceedings

It is on public record that contrary to the order of the SADC Tribunal, farm invasions continued in Zimbabwe with impunity and with active state participation. Landowners were again compelled to approach the Tribunal, this time for an order declaring the Zimbabwe government in breach of the Tribunal's order of 28 November 2008, and seeking further redress by having the matter referred to the SADC Summit of Heads of State and Government to consider appropriate measures. The farmers once again succeeded in their application, and the Tribunal made a punitive costs order against Zimbabwe.

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[22] Justice Chinamasa held that applying the provisions of the SADC Tribunal Protocol to Zimbabwe violated international law in a significant way. In other words, the Tribunal lacked jurisdiction over Zimbabwe, in that country's view. It therefore followed that, since the Tribunal had no jurisdiction over Zimbabwe, the country could not respond to any action or suit instituted or pending against it before the Tribunal. Chinamasa concluded that any decision made by the Tribunal against Zimbabwe was, therefore, 'null and void'.

[23] The notion that all so-called white-owned land in southern Africa came about as a result of the dispossession of blacks is both false and dangerous. There has been overwhelming evidence to the contrary in other jurisdictions. For example, an argument before the World Court in Liberia and Ethiopia had to be abandoned in the South West Africa mandate case in light of overwhelming evidence that successfully disputed such a claim. This dangerous argument has been used as justification for the illegal 'repossession' of supposedly 'stolen' land. In the case of South Africa, if this argument has to be advanced, the actual people that can lay claim to the land as its original inhabitants would be the Khoi and San, whose rock art can be found all over the country and, thus, testifies to their presence in the past. But the counter-argument is that, if we base ownership on a first-come-first-served basis in relation to whites and blacks, South Africa's Land Act 27 of 1913 bears testimony to forced removals of the African people in South Africa. It is for this historical reason that Section 25 of the Constitution of the Republic of South Africa makes provision for the proper and equitable distribution of land.

However, this decision did not in any way alleviate the situation: farm invasions in fact intensified.[24]

The Harare High Court was then asked to register the rulings of the SADC Tribunal and to bring them into effect in Zimbabwe. The Zimbabwean High Court[25] used South African case law to found a judgment on whether the SADC Tribunal decision in the *Campbell* case could be registered domestically. It used as a precedent a decision by former South African Chief Justice Corbett on the conditions that have to be taken into account in determining whether foreign judgments might be enforceable. Corbett CJ had said that a number of conditions had to be met, amongst them the fact that recognition of the judgment 'would not be contrary to public policy'.[26] Judge Bharat Patel of the High Court of Zimbabwe in Harare held that the SADC ruling was indeed contrary to public policy as it violated a policy that was meant for the 'greater good' of the citizens of Zimbabwe.

The Zimbabwe High Court in Harare also disputed whether the SADC Tribunal had had the jurisdiction to hear the *Campbell* case in the first place. What the Zimbabwe High Court in Harare understood was that, when Zimbabwe signed the SADC Treaty in 2002, the country became subject to the jurisdiction of the Tribunal and, thus, the Tribunal had indeed possessed the authority to hear the *Campbell* case. However, the court disputed that the land reform policy enacted by parliament had been contrary to the Tribunal's ruling: instead, it was felt that the Tribunal's decision contravened the legality of the land reform programme in Zimbabwe. and to recognise the ruling would mean undermining the authority of the Zimbabwe parliament, which –[27]

> … could surely not be contemplated as conforming to public policy in Zimbabwe … This cannot be countenanced as a matter of law, let alone public policy.

In summary, the court held that two contradictory principles had been established: Zimbabwe was legally bound by the SADC Treaty and was subject to international norms, but where the decision by the SADC Tribunal conflicted with state law and policy, there was no need to abide by that decision.[28] The question remains as to what can be done locally to deal with a transnational dispute which generates a complicated balancing act between economic imperatives, procedural fairness and domestic policymaking. At the multilateral level, the Convention on the Settlement of Investment Disputes has been signed by a majority of states, including Zimbabwe. However, despite a general commitment to multilateralism, South Africa has a long-

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[24] This matter was dealt with in the case of *Mike Campbell (PVT) Ltd and Others v The Republic of Zimbabwe* SADC (T) 03/2009.

[25] *Sub nom Gramara (Private) Limited and Colin Bailie v Government of the Republic of Zimbabwe and Attorney-General of Zimbabwe* HC33/2009.

[26] Ibid. It is trite that common law provides for the recognition and enforcement of foreign judgments. Article 32(1) of the Protocol on the SADC Tribunal provides that registration of the Tribunal's judgments is to be treated as foreign judgments in terms of municipal law, whether under statutory or common law.

[27] A Asouzu *International Commercial Arbitration and African States – Practice, Participation and Institutional Development* (2011).

[28] Carmel Rickard 'Zim judges juggle with the law', *The Star*, 3 March 2010.

standing policy against signing this Convention.[29] This is based partly on the Convention's subordination of domestic law and its privatisation of dispute resolution, which undermines the constitutional norms enforced by South African courts. To resolve this issue would require a clear and coherent South African policy on both outward and inward foreign investment, something which could be formulated legislatively in a Foreign Investment Act.

When it became apparent that there would be no retrospective protection in the BIPPA, the South African non-governmental organisation (NGO) AfriForum pursued court proceedings on behalf of Louis Fick, a South African farmer in Zimbabwe and member of the Zimbabwe Commercial Farmers' Union, and 244 other South African investors. Fick was party to the SADC Tribunal hearing challenging the land invasions. The action resulted in an out-of-court settlement being reached between AfriForum and the Department of Trade and Industry. This settlement involved the South African government's acknowledgement that actions by the Zimbabwe government to expropriate land without due compensation were illegal, and that the South African farmers whose land had been subjected to this action had a right to claim compensation for the land in terms of the SADC Tribunal's decision.

In another South African High Court case,[30] the South African government was criticised by the court for failing to protect the right of a South African citizen, Crawford von Abo, whose farm in Zimbabwe had been illegally expropriated.[31] The court ruled that Von Abo should have been provided with diplomatic protection by the South African government in relation to his land rights in Zimbabwe.[32]

In July 2008, the North Gauteng High Court in Pretoria in *Von Abo v President of South Africa* delivered a landmark judgment, ruling that Van Abo was entitled to diplomatic protection from his government.[33] Prinsloo J delivered the following opinion:

> The feeble excuse offered from time to time … that the South Africans are dependent on the whims and time frames of the Zimbabwean government is nonsense … [The officials] were simply stringing [Von Abo] along and never had any serious intention to afford him proper protection … [This is] little more than quiet acquiescence in the conduct of their Zimbabwean counterparts and their war veterans

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[29] In this regard, South Africa is wary about contravening Article 27 of the Vienna Convention on the Law of Treaties, which states that a party to an international agreement may not invoke the provision of its internal law as justification for its failure to perform a treaty obligation.

[30] *Von Abo v President of South Africa* 2009(5) SA 345 (CC).

[31] 30. The facts of the case are as follows: Crawford von Abo was a South African citizen who had been farming in Zimbabwe for more than 50 years and had had his land confiscated. He was arrested for "trespassing" on his farm in 1997, and was subsequently jailed in Zimbabwe as ZANU-PF intensified its land reform policy. After an unsuccessful attempt to negotiate with the Zimbabwean government for the return of his farm, he turned to the South African government for diplomatic protection. Despite several meetings with South African Department of Foreign Affairs officials and Zimbabwean diplomats, he failed to receive the protection to which he claimed entitlement. Von Abo further requested the court to order the South African government to become a party to the Convention on the Settlement of Investment Disputes so that he could pursue a compensation claim against Zimbabwe through international arbitration. In the event of the South African government's failure to comply, he applied for R80 million in compensation for losses.

[32] The relief granted was to the effect that the state has a constitutional obligation to provide diplomatic protection and the consequential failure to do so in this case was inconsistent with the Constitution and, thus, the failure to protect was invalid.

[33] Centre for Constitutional Rights (July 2008) 2(21) *Conswatch*.

> thugs … For six years or more and in the face of a stream of urgent requests from many sources they did absolutely nothing to bring about relief … .

The court held that diplomatic pressure on Zimbabwe would include pressure to restore Von Abo's 14 farms and his property such as cattle and farming equipment, and award him compensation for losses suffered as a consequence of the expropriation of white-owned farms. The court further held that the applicant had a right to diplomatic protection from the respondent in respect of the violation of his rights by the government of Zimbabwe, and that the respondents had a constitutional obligation to provide protection to the applicant in respect of the violation of rights. The South African government was ordered to take all necessary steps to have the applicant's rights violation by the Zimbabwean government remedied within 60 days of the court decision date.

Judge Prinsloo was critical of the South African government's failure to conclude a BIT with Zimbabwe. This was seen as a possible remedy to the dispute, provided it had retrospective effect in relation to compensation by the Zimbabwe government. The BIPPA was eventually completed by the two countries in November 2009 and, while it made the customary provision for compensation for expropriation, the Zimbabwean government ensured that a retrospective clause was not included in this agreement. Although Von Abo had for years been waiting for a favourable outcome, the signing of the BIPPA between South Africa and Zimbabwe failed to fulfil his expectations in the absence of this provision. The judge found that the expropriation of Von Abo's farms without compensation was a clear violation of the international minimum standards which gave rise to state responsibility. However, in the words of Rob Davies, South Africa's then Minister of Trade and Industry, –

> … this BIPPA was not to "reopen old wounds" which is why it was impossible for South Africa to negotiate a retrospective clause.

The *Von Abo* case highlighted the fact that it is the duty of the state, as enshrined in the Constitution, to protect citizens against the violation of their rights in cross-border situations. However, the legal remedy proved ineffective in practical terms.

VIII Engaging the Constitutional Court

The *Von Abo* case was subsequently taken to the Constitutional Court. Notably, there was no appeal against the judgment of Prinsloo J, and counsel for the state conceded that the government had taken steps to comply with the judgement. However, the proceedings were instituted by Von Abo on the basis that, in terms of the Constitution, the earlier decision involved constitutional matters and required confirmation by the Constitutional Court. In essence, the court was asked to confirm that failure by the President to consider and properly decide Von Abo's request for diplomatic protection was inconsistent with the Constitution and invalid.

The state contended that cabinet exercised collective responsibility, and that the President's actions had not been unconstitutional. It contended that

the relief sought by Von Abo was against the government as a collective unit and not the President. Letters written to the President to try to resolve the matter were subsequently referred to the Ministry of Foreign Affairs in line with the President's obligation to refer it to the line function department in the executive government. The state submitted that it was not the intention of the Constitution that the court had to confirm any attack on the executive, which was headed by the President.

In its judgment, the Constitutional Court declined to consider the merits of the matter on the grounds that the action had been brought only against the President and, in terms of the Constitution, this was not the kind of 'conduct' which required confirmation. Had it been 'conduct' of the prescribed kind, or had proceedings been brought against the ministers responsible, the Constitutional Court would have had to pronounce on the merits of the case involving diplomatic protection for investors' rights.

Nonetheless, the Court went out of its way to emphasise that, although the applicant had approached the Constitutional Court erroneously, the order of the High Court remained of full force and effect. In the absence of any appeal against the judgment, the original order 'had not been assailed and it stands unblemished'. This involved an indirect vindication of the nature of the remedy designed to vindicate investors' rights through the diplomatic route. However, again, there was no compliance with the original order and the saga continued in other forms and forums.

IX Proceedings prior to the signing of the BIPPA

The signature date for the much-awaited BIPPA between the two countries was supposed to be March 2009, but it had to be postponed due to disagreement over the clause dealing with the security of South African investments in Zimbabwe predating the BIPPA. The contentious clause was Article 11 of the BIPPA, titled 'Scope of the Agreement', which reads as follows:

> This Agreement shall apply to all investments, whether made before or after the date of entry into force of the Agreement, but shall not apply to any property right or interest compulsorily acquired by either Party in its own territory before the entry into force of this Agreement.

Prior to the actual signing of the agreement on 27 November 2009, an urgent application was brought before the North Gauteng High Court by AfriForum on behalf of Louis Fick in a bid to prevent the South African government from signing the BIPPA. Fick was one of the South African farmers affected by Zimbabwe's land reform policy when his farm was confiscated. The argument advanced by the applicant was that the so-called exclusion clause was discriminatory and, thus, unlawful; and that the proposed agreement contravened the South African Constitution, international law and the rulings of the SADC Tribunal, specifically that of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*[34] and *William Michael Campbell and Another v The Republic of Zimbabwe*.[35] As mentioned earlier, these rulings by the Tribunal

[34] SADC (T) 02/2007 (28 November 2008).
[35] SADC (T) 03/2009 (05 June 2009).

were not recognised by the Zimbabwe government. The Tribunal's decision of November 2008 was that Zimbabwe's expropriation process had discriminated against the applicants on the ground of race; that fair compensation was payable to the applicant for the properties which had been expropriated; and that Zimbabwe was in breach of several of its SADC Treaty obligations. The 2009 ruling held Zimbabwe in contempt of the 2007 ruling.

This matter was settled by the parties out of court and the agreement was made an order of court. In terms of the settlement, the aim of the BIPPA is to create legal and other remedies for South African citizens 'over and above existing remedies in terms of international law'. Furthermore, an assurance was given by the South African government and the Minister of Trade and Industry that the BIPPA –[36]

> … 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).

In summary, the order of court holds that –

- the SADC Tribunal rulings are not affected by the BIPPA
- the South African government respects the rulings and orders of the SADC Tribunal, and
- the South African government undertakes to honour the rulings in terms of its own obligations under the SADC Treaty.

Notably, these developments had threatened South Africa's reputation as a law-abiding nation. Had AfriForum not intervened and forced an agreement that the South African government abide by the law, the BIPPA could have resulted in Zimbabwe effectively receiving immunity from any actions against its illegal expropriation of land. One advantage that the BIPPA has clarified in regard to the future rights of investors from both countries is the operative dispute resolution systems for such stakeholders. The BIPPA makes provision for arbitration by the International Centre for the Settlement of Investment Disputes or arbitration under the rules of the United Nations Commission on International Trade Law. It is noticeable that the SADC Tribunal is not included as a dispute resolution option, and while domestic courts are not excluded, investors who have a choice of forum are inclined to avoid domestic courts out of concern that they will not obtain favourable outcomes from national courts where an investment is made.

X Attachment of Zimbabwean property in South Africa

On 30 March 2010, the North Gauteng High Court ordered that AfriForum, representing South African farmers dispossessed of their land in Zimbabwe, could attach a Cape Town property belonging to the Zimbabwean government in a move likely to trigger similar action by other foreign investors aggrieved by the land reform policy. The attachment followed a ruling in February by the same court to register the 2008 rulings of the SADC Tribunal in favour

[36] Republic of South Africa, Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review* (2009).

of the investors. It was preceded by a ruling that Zimbabwe, as a party, could be joined by an investor in legal proceedings – a requirement for bringing sovereign states before domestic courts. The North Gauteng High Court's ruling enabled the farmers concerned to attach the assets owned by the Zimbabwean government in South Africa "in lieu of" compensation for their farms expropriated by the government in Harare since the land reform policy's implementation in 2000. This ruling by the court may act as a deterrent, albeit a rather remote one, in relation to future similar conduct.

In June 2011, the North Gauteng High Court upheld the ruling that the attachments could proceed and rejected the application by the Zimbabwean government seeking to prevent its assets being sold as compensation for the farmers concerned. This decision paved the way for the properties to be sold.

XI Dispute resolution in the BIPPA

Despite the contentious circumstances surrounding the BIPPA, its dispute resolution provisions are of the conventional variety. Provision is made for three arbitral options: the Convention on the Settlement of Investment Disputes, the United Nations Commission on International Trade Law provisions, or rules of the International Chamber of Commerce. As is customary in these provisions, the choice of forum is based on investor election – the respondent host country has no part in the choice.

This arrangement is at odds with recent government views in South Africa which involved some distancing from private arbitration for investment disputes.[37] This is found in the context of distrust in African countries of different forms of private arbitration, particularly with respect to their undermining of local judicial sovereignty.[38]

South Africa is not a signatory to the Convention on the Settlement of Investment Disputes, but is currently undergoing arbitration under this Convention in terms of the Additional Facility Rules.[39] The fact South Africa is not a signatory to this Convention involves a politically sensitive challenge by a foreign investor in the mining sector on the grounds that Black Economic Empowerment (BEE) policies have affected the value of the investment. A private arbitral award rendered outside the ambit of South African constitutional principles and domestic policies could seriously disadvantage BEE policies if used as a precedent by other foreign investors.

Zimbabwe is currently developing its own version of BEE which could have the same implications. In these contexts, there is some incongruity in the juxtaposition of private arbitration with contentious social policies when the concern is that private arbitrators will construe disputes only in commercial and not in constitutional terms. In Zimbabwe's case, the country turned its

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[37] See Republic of South Africa, Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review* (2009).

[38] See generally Amazu Asouzu *International Commercial Arbitration and African States – Practice, Participation and Institutional Development* (2001).

[39] See *Piero Foresti, Laura de Carli and Others v Republic of South Africa* ICSID Case No. ARB(AF)/07/1.

back on the SADC Tribunal as a dispute resolution forum, but it is still a member of the said Convention. In South Africa's case, it might be a reflection of the country's negotiating strength: in reality most FDI between the two countries will flow in the direction of Zimbabwe and it accords with South African investors' interests to utilise conventional investor – state dispute resolution systems. This presents a dilemma for the broader review of the South African FDI framework, given that the country is both an importer and an exporter of capital.

XII Conclusion

The provisions of any BIT or other international investment agreement are subject to the vagaries of the economic and political forces and their cross-border enforcement in matters that are never straightforward. The BIPPA is a case in point: it was conceived in the context of ongoing enforcement issues arising out of a regional treaty which provided a dedicated international tribunal for the adjudication of disputes. Its gestation was politicised, and legal interventions nearly led to it being still-born. The prodigy has a weak constitution and threats lying ahead may lead to its mortality.

In the courts and tribunals surrounding the BIPPA, several decisions actually held Zimbabwe accountable as a global citizen for flouting international agreements and human rights norms which have seen capital flight, economic collapse, and human rights violations. The decisions construed the implications of policies and principles of international law for the state. They showed that citizens have potential recourse to a wide range of mechanisms in the event of disputes. For the first time, a precedent was set in international law when the North Gauteng High Court ruled that the assets of Zimbabwe, because of its land-grabbing policy and guilt in respect of human rights violations, could be attached and sold at a public auction. However, whether states abide by such rulings is another matter altogether, although their recalcitrance does not detract from the potential significance of relevant domestic or regional policies and policies that are part of international law. It is into this vortex that the BIPPA was introduced as an attempt to regulate future cross-border disputes between South Africa and Zimbabwe.

In the broader context, emerging and developing economies have raised concern over the effectiveness of BITs in terms of their capacity to attract and retain capital. This view is based on some evidence that the presence of a BIT is not, in the assessment of potential investors, a major determinant of final investment decisions.[40] Some major beneficiaries of FDI such as Brazil have neither formalised any BITs nor signed the Convention on the Settlement of Investment Disputes.[41] The effects of the 2008 Global Financial Crisis, which is considered the worst financial crisis since the Great Depression of the 1930s,

[40] See United Nations Conference on Trade and Development Series 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009) *UNCTAD Series on International Investment Policies for Development*.

[41] Bolivia withdrew from the Convention in 2007, while Ecuador has partially withdrawn. Other contiguous countries have also considered withdrawing.

are still being felt across the world. These circumstances have increased the political space for emerging and developing economies to assert their interests in aspects of international economic law, and the investment regimes are likely to be reshaped to some degree under these forces. Individual BITs will be affected over time by these factors as well.