BRIEFING ON ARBITRATION CASES AGAINST SOUTH AFRICA UNDER VARIOUS BILATERAL INVESTMENT TREATIES

BACKGROUND

The real impact of Bilateral Investment Treaties (BITs) was brought to the fore for RSA in an investment-related dispute which directly challenged RSA's new minerals legislations as well as the fact that several other countries, including developed countries have questioned the 1st generation OECD model BITs and their impact on development priorities in the developing world. The proliferation of BITs during the 1990's also resulted in a marked increase in investment-related disputes, the outcomes of which have also raised awareness of the inherent limitations on development in 1st generation BITs.

Internationally there has been a steep rise in investment cases in the last decade. In 2012, investors initiated 54 known Investor State Dispute (ISDS) cases, 59 cases were initiated in 2013 and 42 in 2014. As most BITs allow for fully confidential arbitration, the actual number of cases is likely to be much higher. In terms of the 2015 Investment Report by UNCTAD, the overall number of known ISDS claims was 608 by the end of 2014. Ninety-nine governments around the world have been respondents to one or more known ISDS claims. Most cases are brought by claimants in developed countries against developing countries although it is interesting to note that cases against developed countries are increasing. According to the UNCTAD report, 3 countries (Italy, Mozambique and Sudan) faced their first (known) ISDS claims in history in 2014. Overall, Argentina, the Bolivarian Republic of Venezuela and the Czech Republic have faced the most cases to date. According to research done by UNCTAD, the outcomes of arbitration awards were against Government Respondents in 60% of the known cases.

INVESTMENT CHALLENGES AGAINST RSA

Case 1: Swiss Investor (Werner Schlaefer) v Republic of South Africa

A Swiss private citizen launched an arbitration claim against South Africa in 2001 under the terms of the Switzerland-RSA investment treaty. During the Apartheid period, the Swiss investor had acquired a private game lodge and farm in Mpumalanga. The investor made improvements to the property, however the property was allegedly plagued by vandalism, theft and poaching. Following the alleged total destruction of the property in the late 1990s, the claimants turned to international arbitration under the Swiss-South African BIT.

In 2003, the presiding tribunal rendered an award on liability, holding the RSA to have breached the treaty obligation to provide "protection and security" to Swiss investors. In 2006, there were unconfirmed reports that the tribunal had taken into account South Africa's level of development in the course of setting the level of protection and security owed to foreign investors. However, subsequent information about the ruling – which still remains unpublished – indicates that the tribunal was not convinced by South Africa's arguments that its level of development should influence the reading of the treaty obligation. The RSA executed the terms of the award in early 2005, but has yet to publicize the existence of this arbitration proceeding; nor has the arbitral award in the case been released to public scrutiny. As such, information about the case remains confidential.

Case 2: Foresti and Others v the Republic of South Africa

The request for arbitration was filed by eight Claimants which included (i) five Italian nationals, members of the Foresti family of Carrara in Italy ("the Marlin Investors"); (ii) two Italian nationals, members of the Conti family of Carrara in Italy ("the RED Investors"); and (iii) a company, Finstone, incorporated in Luxembourg ("Finstone").

The claimants' case involved the extraction of granite. To have their old order mining licences converted into new order mining rights under the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (MPRDA), they had to comply with the equity divestiture requirements of the Mining Charter. The Claimants indicated that this was impossible for them. They said that in the granite sector they could not find anyone interested and able to purchase their equity at market value. While these laws were designed to alleviate the effects of the historical racial inequity that occurred under the apartheid system, the claimants challenged the policies as a violation of South Africa's international obligations under its BITs and claimed that they amounted to expropriation under international law. Thus, they averred that their mining rights were effectively expropriated and they were treated "unfairly and inequitably" in contravention of international law.

The case was brought in terms of the following BITs:

- Agreement between RSA & Italian Republic on the Promotion and Protection of Investments;
- Agreement between RSA & the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments

The Claimants claims were dismissed and they were ordered to pay a sum of EURO 400,000 to the respondent as a contribution towards costs.

Please see the Media Statement of 5 August 2010 in regard to this case jointly issued by the dti and the Department of Mineral Resources, attached hereto as Annexure 1.

CONCLUSION

Although there have only been two investment cases brought against South Africa there have also been a number of threats over the years by investors indicating that they will be bringing investor disputes in terms of various BITs if policy interventions by government affect the profitability of their investments. Internationally investment cases have been increasing and if Government wants to bring about a substantial transformation of the economy, specific policy interventions will be needed that may give rise to further investment cases against South Africa if the rights and obligations between Government and Investors are not probably balanced.

ANNEXURE 1

Successful Conclusion to SA - Foresti Arbitration Proceedings

2010-08-05

The Government of the Republic of South Africa is pleased to announce the successful conclusion of international arbitration proceedings brought against SA in 2006 to challenge the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (MPRDA) and the Broad-Based Black Economic Empowerment (B-BBEE) Mining Charter.

The claimants (certain Italian investors) had previously sought to withdraw all of their claims. In an award issued on 4 August 2010, the arbitral tribunal formally dismissed the claims and ordered the claimants to contribute 400 000 Euros (approximately R3,8 million) to the Government's costs.

The final decision of the tribunal was as follows:

1. "the Claimants shall pay the sum of EURO 400,000 to the Respondent in respect of the fees and costs now claimed by the Respondent; and,

2. the Claimants' claims are dismissed with prejudice."

The claimants had argued that the government had settled the claims made against it. The tribunal did not accept that argument. The tribunal noted that "the Claimants applied unilaterally for the discontinuance of the proceedings" and that this was an "application opposed by" the Government. The tribunal further noted that the very fact that the question of costs was before it "calls into question the idea that there is an agreed settlement terminating these proceedings".

The tribunal said that foreign investors who start international investment arbitrations "cannot expect to leave respondent States to carry the costs of defending claims that are abandoned".

This award terminates the case, and the claimants may not revive the dismissed claims.

The MPRDA, which came into force in 2004, established a new dispensation designed to redress historical inequities in the mining sector and to promote the efficient development of the sector into the future. As part of the transition to this new dispensation, holders of existing "old order" mining rights were entitled to have those rights converted into "new order" MPRDA rights.

Most old order rights holders, domestic and foreign, pursued the conversion process. A group of investors in the granite industry chose to bring an international arbitration, claiming that the MPRDA and the Mining Charter violated international law. However, as the April 2009 deadline for conversion approached, the claimants'

South African operating companies did lodge their old order rights for conversion, and the decision to convert them was made in terms of the MPRDA and the Mining Charter. It was then that the Claimants sought to withdraw their claims.

As has been the case with other mining companies, the conversion process has enabled these claimants to continue their operations uninterrupted. Protecting security of tenure was one of Parliament's stated purposes in adopting the MPRDA, and this result shows that the MPRDA succeeds in that aim.

The Government welcomes the tribunal's recognition that the claimants and the Government have put the adversarial process behind them and started "rebuilding the relationship of trust and mutual commitment between investor and host Government". The government continues to welcome and to work with all responsible mining companies in the country, both foreign and domestic.

The Government also welcomes the claimants' commitment to beneficiate granite in South Africa. Beneficiation is the refinement into a useable product of an extracted mineral. It has long been Government policy to promote beneficiation in this country before export, rather than seeing South African raw materials exported for beneficiation elsewhere. The claimants took advantage of the Mining Charter's provision allowing for beneficiation activities to offset a certain percentage of the equity ownership requirements. In particular, the Mining Charter calls for Historically Disadvantaged South Africans (HDSAs) to own at least 26% of the equity of companies that hold MPRDA mining rights, but the unique nature of the dimension stone industry meant that the claimants operating companies have been able to reduce that percentage to either 11% or 5%, depending on the circumstances, by using beneficiation offsets. Domestic beneficiation contributes to the South African economy in general, results in employment for HDSAs, and promotes opportunities for businesses owned or managed by HDSAs that provide services that are part of the beneficiation process.

Issued jointly by the Department of Trade and Industry and the Department of Mineral Resources [5 August 2010]

Notes for editors:

The Foresti and others v Republic of South Africa case was brought on 1 November 2006 by several Italian individuals and a Luxembourg corporation that they own. The claimants indirectly own South African operating companies, which in turn own mining rights in terms of the MPRDA.

The claims were brought under two bilateral investment treaties, one between South Africa and Italy and another between South Africa and the Belgo-Luxembourg Economic Union. Those treaties allow foreign investors to commence international arbitration proceedings against host States.

The proceeding was administered by the International Centre for the Settlement of Investment Disputes (ICSID), which is associated with the World Bank. The arbitrators were Professor Vaughan Lowe QC (president of the tribunal), Judge Charles Brower and Mr Joseph Matthews. Professor Lowe is a British national, and Judge Brower and Mr Matthews are US nationals.

After the claimants sought to discontinue the proceeding, and the Republic of South Africa sought its costs, a hearing on those subjects was held in the Peace Palace, at The Hague, in April 2010.

The tribunal noted that the claimants' decision to consent to the dismissal of their claims meant that the tribunal had had "the merits ... withdrawn from its consideration". The tribunal thus expressed no view on the merits of the claimants' claims or the government's defence.

The version of the Mining Charter involved in this case was the Mining Charter promulgated in 2004. The Mining Charter has recently been revised and updated following consultation with stakeholders.

All parties have agreed that ICSID may publish the award, and it has done so on its website <http://icsid.worldbank.org>. The Government also intends to make public the 450-page counter-memorial it filed in opposition to the claims on 27 March 2009, redacted to protect confidential information relating to the claimants.