

BIT Deadline with South Africa is 1 November 2013

One year after the end of Apartheid, the Dutch and South African governments signed a bilateral investment treaty, or a BIT. The goal was to expand and strengthen their economic relations, to stimulate the exchange of capital and technology and reinforce the economic growth of both countries. [1] In practice, however, this BIT has not delivered the expected results.

Controversial

BITs are considered controversial these days and that certainly includes the kind of treaty that was signed by South Africa and the Netherlands. [2] The bitter realisation comes from the fact that the BIT affords foreign investors the ability to complain to the few acknowledged arbitration institutions if they feel their interests have been undermined or damaged by government policies in the country where they are investing. This kind of institute has a dubious reputation and the aggressive insurance claims industry that this kind of institute has encouraged has hampered the ability of the involved government to make decisions that favour the public interest. [1] A native investor, meanwhile, has to find his way and fight for his rights via the ordinary courts system.

The BIT between South Africa and the Netherlands covers many topics and the notion of “damaging the interests of the investor” can be very broadly interpreted. In Article 1 of this BIT, an investment is defined as “rights in rem in relation to all sorts of assets and the right to any exploit that may have economic value”. That means that South African investors can hold the Dutch government liable in cases where they believe that their brand name has lost value or any other intangible values have been violated by Dutch government policy. [3]

Enormous far-reaching effects

Whatever applies to South African investors in the Netherlands, of course, also applies to Dutch investors in South Africa. In fact, *every* foreign investor worldwide with representatives in the Netherlands (thus including all sorts of shell or “brass-plate” companies) can exert their rights under this same BIT in South Africa. The investment relationship between South Africa and the Netherlands is asymmetrical. The OECD figures for 2011 shows Dutch interests valued at \$2 billion in South Africa while South African interests total only \$67 million.

The BIT between South Africa and the Netherlands has served as a blueprint for subsequent BITs between other countries and it is no wonder that, as a result of the limitation on a government’s policy freedoms, more and more countries have chosen to either modify or even totally abolish their BITs. Examples include Venezuela (terminated its BIT with the Netherlands in 2008) Ecuador (terminated nine BITs in 2008) Bolivia (discontinued its BIT with the US in 2011; the status of its BIT with the Netherlands remains uncertain [4]).

The BIT between South Africa and the Netherlands is unique

All BITs include an article that addresses how termination of the agreement is regulated. In the case of the South African-Dutch BIT, termination is handled in a special manner. Normally, a BIT can always be terminated, after which the agreement actually ends six months later. But in the case of the South African-Dutch BIT, this is handled totally differently: If South Africa does not terminate the

agreement before 1 November 2013, it is automatically extended for another ten years. That means that the BIT not only protects current investments, but also those made until 2024. And that's not all.

Survival clause

The South African-Dutch BIT also includes a "Survival clause". [5] Article 14.3 states: With respect to investments made prior to the termination of this Treaty, all of the previous articles will remain intact for a period of fifteen years after this date." That means that if the Dutch government does not terminate this agreement before 1 November 2013, the Netherlands will be bound by this treaty until 2039. Whatever decisions The Hague makes in the future, foreign investors can continue to hold the Dutch government liable for damages incurred until 2039. If the Netherlands *does* decide to terminate the agreement, this BIT will still be in effect until 2029.

The notion that BITs are not all that useful is slowly making headway. The real spectre is Belgium, however, which, as a result of its BIT with China, risks being forced to pay a claim worth \$2 billion to a Chinese insurance company. The Chinese have expressed concern that the way the Belgian government rescued the Fortis Bank has damaged its investments. [6]

Of what actual value is it to us?

Maybe the notion that BITs are actually not in anyone's interest has been too slowly realised in the Netherlands, however. That means that the Netherlands will probably not be terminating its treaty with South Africa before 1 November. And meanwhile, what is South Africa planning to do? As opposed to the Netherlands, the South African government, during the period 2007–2010, decided to make comprehensive assessments of its 19 BITs. All of these BITs were negotiated and signed prior to the ratification of the new constitution in 1996, which – like its counterpart in the Netherlands – gives substantial protection to private ownership and investments in South Africa. The decision clearly indicates that BITs have become old fashioned and dangerous for the nation's freedom to issue policy in the public interest. In September of 2012, South Africa announced to both Belgium and Luxemburg that it intended to terminate their BITs and just three months ago Spain received a similar message. It would be nice if South Africa decided to also terminate its BIT with the Netherlands prior to 1 November. [7]

What do Both ENDS think?

The position of Both ENDS is that companies have gained an undesirable dominant position in countries where they invest. This is an especially bleak scenario for developing countries, where companies can file costly claims whenever the government decides to amend its policies, often in an effort to stimulate social development in the country, which these companies claim has a negative impact on their profits. That is precisely why some countries avoid new legislation. In many cases, a handful of law firms have become very wealthy as a result of this construction. The Netherlands plays an essential role here, particularly in how its many BITs allows investors to go "treaty shopping", which only further stimulates the filing of as many costly claims as possible. [8]

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Footnotes

[1] Direct quotation from the Bilateral Investment Treaty between the Netherlands and South Africa. The full text of the treaty was published in the TRACTATENBLAD VAN HET KONINKRIJK DER NEDERLANDEN JAARGANG 1998 Nr. 162 [90 (1995) Nr. 1] and is available online at:

<https://zoek.officielebekendmakingen.nl/trb-1998-162.pdf>.

[2] See, e.g., Both ENDS news item on an international NGO investment meeting in Brussels 2012: “Criticism on international investment treaties”

[http://www.bothends.org/en/News/newsitem/203/NEW-VIDEO-Criticism-on-international-](http://www.bothends.org/en/News/newsitem/203/NEW-VIDEO-Criticism-on-international-investment-treaties-)

[investment-treaties-](http://www.bothends.org/en/News/newsitem/203/NEW-VIDEO-Criticism-on-international-investment-treaties-), R. van Os and R. Knottnerus “Dutch Bilateral Investment Treaties: A gateway to ‘treaty shopping’ for investment protection by multinational companies”;

http://somo.nl/publications-en/Publication_3708 or Cecilia Olivet, “Intra-EU Bilateral Investment

Treaties-A test for European solidarity” <http://www.tni.org/briefing/intra-eu-bilateral-investment-treaties-test-european-solidarity>.

[3] Article 1 of the Dutch Model BIT also protects Investors from a loss of “goodwill”. For an explanation of the scope and meaning of “Goodwill” as an accounting concept see, e.g.,

http://en.wikipedia.org/wiki/Goodwill_%28accounting%29.

[4] <http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html>.

[5] This clause is sometimes also referred to informally as “The Zombie Clause” of BITs because even if a treaty has been terminated, it remains enforceable under international law for a specific period, typically 10-20 years.

[6] For more details on this case that also relates to the rescue of the Dutch ABN AMRO bank, see:

<http://www.wunscharb.com/news/chinese-insurer-files-first-investment-treaty-claim-icsid>.

[7] This is six months prior to it having been in force for 15 years. The Dutch BIT with South Africa was signed on 1 May 1999. See: [http://www.rijksoverheid.nl/onderwerpen/internationaal-](http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html)

[ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html](http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html).

The BIT between South Africa and the Netherlands is not the only one that has these kinds of provisions; there are others that fall under the so-called Dutch Model BIT. These others can be found

here: <http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/convenanten/2004/08/27/ibo-modelovereenkomst.html>.

[8] <http://www.tni.org/briefing/profitting-injustice>.