

The Proven Benefits of ISDS and BITs -Even for SMEs and Small Claims

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Recently, it was reported that after 14 years since Zimbabwe had illegally evicted Dutch farmers from their farms, it finally agreed to pay the damages awarded under the ICSID award, which dates back in 2009.

In the *Funnekotter et al* case, the arbitral tribunal rejected Zimbabwe's necessity defence, which was based on the claimed need to "correct" the inequality between white farmers and black farmers by expropriating white farmers and it ordered Zimbabwe to pay €8.2 million damages plus 10% compounded interest every six months, which means that the award is now worth about €30 million.

In the context of ISDS disputes, this award is a relatively small claim filed by Small and Medium Enterprises ("SMEs").

Nonetheless, the group of thirteen Dutch farmers have been trying for years to put pressure on Zimbabwe to fulfill its international obligations through all possible avenues (including through the Dutch Government). Indeed, as time passed and the farmers were running out of their financial resources, it looked increasingly unlikely that justice and the Rule of Law would prevail and that they would receive some form of compensation.

The eventual victory of the farmers proves the anti-ISDS critics wrong that ISDS is only actually useful for large corporations claiming large amounts.

It is interesting to note the deafening silence (which I also have highlighted in the tobacco cases) of the anti-ISDS critics regarding this case whereas it should have been acknowledged and appreciated that this case powerfully proves the benefits and the need for ISDS and BITs - also or in particular for SMEs and small claims.

After all, without the Netherlands-Zimbabwe BIT and without access to ICSID arbitration provided for by the BIT, the Dutch farmers would have been left completely empty-handed.

The silence of the anti-ISDS groups could, of course, be explained by the fact that they may actually agree with Zimbabwe's expropriation programme against white farmers as a kind of "correction" of the colonial injustice done to black farmers in the past. However, correcting prior injustice with new injustice should never be found just.

Be that as it may, it is important to underline the fact that Zimbabwe has finally accepted its

responsibility under international law and started to fulfil its international obligations it has entered into under its ten BITs, which are in force, and the ICSID Convention.

Therefore, the chances may have increased now for other German and Swiss farmers, who have also brought arbitration claims against Zimbabwe and who have been awarded damages by international arbitral tribunals for the same illegal acts of Zimbabwe.

These ICSID claims have been brought by the Von Pezolds – a family of Swiss and German farmers – and their forestry company Border Timbers.

In the *Von Pezold et al* and the Border Timbers (which remains unpublished) cases, the arbitral tribunals unsurprisingly also concluded that the so-called “land reform programme” discriminated against white farmers and ordered Zimbabwe to return the estates to the family or to pay damages of around US\$230 million.

The tribunal also ordered the Zimbabwe to pay US\$1 million of moral damages for its failure to protect one claimant from death threats from “settlers” on his land.

However, Zimbabwe has since applied to annul the awards in favour of the von Pezolds. In April 2017, an *ad hoc* Annulment Committee rejected the Zimbabwe’s request to continue the stay of enforcement of the awards, and it ordered it to return the estates to the claimants by 23 July 2017 or to pay compensation by 22 August 2017.

It is unclear whether Zimbabwe has complied with the *ad hoc* Annulment Committee’s order. On 22 August 2017, the *ad hoc* Annulment Committee issued a decision on provisional measures followed by a third procedural order last month.

Meanwhile, a group of white Zimbabwean farmers issued a notice of dispute against Zimbabwe based on the finance and investment protocol drawn up by the SADC. The farmers allege that Zimbabwe violated the protocol and the SADC treaty when Mugabe’s supporters seized their farms. They threaten to file a claim if the dispute is not settled within the six-month cooling off period in the protocol, which provides for ICSID arbitration or *ad hoc* arbitration under UNCITRAL rules.

In conclusion, although Zimbabwe continues to face claims because of its illegal expropriation of white farmers, it at least made a start of accepting its international obligations. This may be a first sign that Zimbabwe may have changed its path of not being an international pariah any longer. It is, of course, too early to say whether that will indeed be the case. For that, Zimbabwe would have to fully comply with all other outstanding awards.

This change of attitude of Zimbabwe would not have been possible without the powerful tools of ISDS and BITs, which is another reason why those who call for the complete demolition of ISDS and BITs should think twice because that would also take away a useful, effective and necessary tool for access to justice and the enforcement of the Rule of Law.