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An update on moral damages in investment treaty arbitration

Luke Eric Peterson (Investment Arbitration Reporter) · Thursday, May 7th, 2009

In a post [last month](#), I offered a few thoughts on the future of moral damages in investment treaty arbitration. One arbitration where I thought we might see an award of moral damages is a case pitting a group of Dutch farmers (Funnekotter, et.al.) against the Government of Zimbabwe.

By way of update, I wanted to mention that an award was rendered in that case late last month. A panel of ICSID Arbitrators held Zimbabwe to have breached the Netherlands-Zimbabwe bilateral investment treaty, and ordered compensation for the loss of various farms and assets. However, the tribunal declined to award moral damages to the claimants.

In the tribunal's view, the moral damages claim (for 100,000 Euros per claimant) was raised at too late a stage of the arbitration proceedings. The tribunal also noted, by way of partial apology, that it had ordered a "disturbance indemnity" to each claimant – awarding them 20,000 Euros, which overlapped to some extent with the moral damages sought by the claimants.

However, as reported in an article in my newsletter, *IAReporter*, counsel for the claimants subsequently clarified that the moral damages claim was intended to be wholly distinct from the disturbance indemnity. The latter was meant to compensate for tangible expenses incurred by individuals who were forcibly uprooted from their homes and farms, and obliged to flee Zimbabwe.

Conversely, the moral damages claim was intended to compensate for pain, anxiety and other indignities visited upon the claimants – some of whom were subjected to threats and violence.

As a consequence of the moral damages claim being time-barred, the arbitrators did not need to grapple with the approach to moral damages taken in the earlier *DLP v. Yemen* case at ICSID. (See [earlier blog post](#) for some discussion of this case and its approach).

However, it is highly likely that a new set of claims by other dispossessed farmers will be brought to the ICSID in the coming months. Many others who were forcibly removed from Zimbabwe have been biding their time, waiting to see how the initial ICSID test-case turned out.

As such, the moral damages question is likely to be raised again – and from the outset – in any Round Two battle between Zimbabwe and some of its former farmers.

In the interim, moral damages claims may be plead in other ongoing investment treaty arbitrations – and we will likely see arbitrators grappling with this type of claim prior to the resolution of any

future claims against Zimbabwe.

Stay tuned.

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