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Zimbabwe's Hitting the Arbitration Headlines

Chido Dunn (Freshfields Bruckhaus Deringer LLP) · Friday, August 20th, 2010 · YIAG

Following the controversial land reform programme first introduced by President Robert Mugabe in July 2000, Zimbabwe has found itself in hot water of late, with a number of international disputes being brought by dispossessed farmers against the State.

The first of these disputes was mounted at ICSID in 2005 by a group of 13 Dutch farmers who alleged that Zimbabwe, by depriving them of their agricultural landholdings and other property, had breached various provisions of the Netherlands-Zimbabwe bilateral investment treaty (BIT). In April 2009 an ICSID tribunal issued an award in *Funnekotter et al. v Zimbabwe*, finding that Zimbabwe had breached its obligations under Article 6 of the Netherlands-Zimbabwe BIT (which sets out the conditions for a lawful expropriation), and ordered Zimbabwe to pay the Claimants €8,220,000 plus interest as compensation for the lands expropriated by the Zimbabwean Government. (*)

A second dispute was brought before the Southern African Development Community (SADC) Tribunal in October 2007 by Mike Campbell and 77 other farmers who had received compulsory acquisition notices from the Zimbabwean Government. The farmers had initially applied to the Supreme Court of Zimbabwe for a protection order to prevent any forced eviction, but this was denied, with the Supreme Court finding that (i) despite the farmers' submission that they were targeted exclusively because of their race, race was not an issue given that the relevant provisions of the Constitution did not make any reference to race; (ii) the Government had an inherent right to compulsorily acquire property; and (iii) the legislature had full power to change the Constitution to allow agricultural land to be confiscated without compensation 'for resettlement and other purposes'.

However, the Campbell claim before the SADC Tribunal was more successful. In November 2008 the Tribunal held that (i) the Tribunal had jurisdiction to hear the case because the amendments that had been made to the Zimbabwean Constitution had eliminated the farmers' access to the domestic courts; (ii) the farmers had been deprived of their right to a fair hearing before being deprived of their rights to their land; (iii) the actions of the Zimbabwean Government constituted indirect discrimination because it affected white farmers only; and (iv) the farmers were entitled to compensation for the expropriation of their lands.

Most recently, a Swiss-German family has brought a claim before ICSID, seeking damages for the expropriation of three large estates, including forestry and agricultural businesses. In a claim registered at ICSID on 8 July 2010, the von Pezold family alleges that Zimbabwe has breached its

treaty obligations with Switzerland and Germany by failing to provide fair and equitable treatment and full protection and security.

While it is evident that there is some groundswell of resistance to Zimbabwe's land reform programme, what will be telling is whether any awards rendered are actually enforced against the State. In *Funnekotter*, Zimbabwe was ordered to pay the ordered compensation to the farmers within three months. This did not occur, so in January 2010 the Southern District Court of New York, which had jurisdiction under Section 1650a of the United States Code to enforce an ICSID award, confirmed the award for the full amount of US\$25 million. Likewise, the Campbell award was confirmed in the South African High Court in February 2010, and in March 2010 the title deeds to four Cape Town houses belonging to the Zimbabwean Government were handed over to the farmers. Although the houses were due to be auctioned at the end of July 2010, this was postponed following the Zimbabwean Government's challenge to the legality of the sale. Sources close to the case have explained that the Zimbabwean Government is arguing that the properties are protected by diplomatic immunity. Zimbabwe's application will be heard in September 2010.

Perhaps as a result of this resistance, in August 2009, Zimbabwe formally withdrew its SADC membership, stating that it would not be bound by any of the Tribunal's past or future orders. Neither the SADC Treaty nor the Protocol on the Tribunal contain a safeguard mechanism. In a further development, the South African Justice Minister has recently requested a legal opinion on the scope of the SADC Treaty and the enforceability of the SADC Tribunal's rulings in both Zimbabwe and South Africa. As the South African courts are the only courts to have enforced a SADC ruling, South Africa's compliance with SADC is vital to ensuring the enforceability, and thereby legitimacy, of the SADC Tribunal.

(*) The SADC is an economic community in Southern Africa with fifteen member states (Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe). Originally founded in 1980, it gained full legal status with the signing of the SADC Treaty in 1992. It aims to promote economic cooperation and free trade between the member states.

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