

Transnational Governance: The Zimbabwe Farm Cases



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Penn State International Arbitration Day
March 11, 2016

The Zimbabwe Farm Cases

- ▣ Mike Campbell Pvt Ltd, SADC 2008

- ▣ Funnekotter, ICSID 2009, under Dutch BIT
 - ▣ Award of c. €8MM + 10% interest for c. 8 landowners
 - ▣ Award confirmed in NY for \$25MM
 - ▣ Enforcement actions pending in DC and NY

- ▣ Von Pezold, ICSID 2015, under German & Swiss BITs
 - ▣ Award of c. \$200MM for c. 9 landowners
 - ▣ Annulment proceeding pending
 - ▣ **Award just released**

Common Fact Pattern

- ▣ Rhodesia - Land concentrated among whites
- ▣ Zimbabwe - Land reform program
 - ▣ Slow start (Phase 1, 1992)
 - ▣ Accelerated (Phase 2, 1998)
 - ▣ “Fast Track” (starting 2000)
- ▣ Constitutional amendments:
 - ▣ 2000 - No compensation for land, only for improvements
 - ▣ 2013 - Compensation for “indigenous Zimbabwean” only
- ▣ In 1980, 39% of all land was owned by c. 6000 white farmers
→ Now, 0.3% of land farmed by c. 400 white farmers

Land Invasions

- ▣ Started 2000
- ▣ Originally disorganized, later supported by GOZ
- ▣ Anti-white racial rhetoric
- ▣ Violence

Heinrich Von Pezold Testimony:

“I along with my staff were humiliated, threatened with death and assaulted, had firearms put to our heads, and were kidnapped.... The sense of terror was heightened by the fact that the Police in most instances were not willing to protect us.... We knew that farmers and farm workers had been killed ... and that there were a number of instances of rape....”

Von Pezold Case

Part 1

Von Pezold Background



- ▣ European family, Swiss and German nationals
- ▣ Invested in Zimbabwe starting in 1988
 - ▣ After independence
 - ▣ Before BITs
- ▣ Investment continued as late as 2007
- ▣ Properties formally expropriated in 2005
 - ▣ No compensation (very minor exceptions)

Von Pezold's Holdings

- ▣ GOZ violated BITs, including:
 - ▣ Expropriation without Compensation
 - ▣ Fair and equitable treatment denied
 - ▣ Full protection and security denied

- ▣ Not excused by Necessity

Von Pezold Relief

- ▣ Restitution plus c. \$65MM, or c. \$195MM
- ▣ Includes moral damages of \$1MM
- ▣ Interest
- ▣ 92% of fees and costs

Von Pezold Provisional Relief

- Found “sufficient prima facie evidence” that GOZ intended to kill Heinrich Von Pezold
- Ordered GOZ to “take all necessary measures to protect the life and safety of the Claimants”
- Claimants sought order for security against Invasions
- GOZ gave assurances, so Tribunal found order not necessary – but reserved right to reconsider in light of changed facts

Governance

- ▣ Broad purview
- ▣ Broad powers
- ▣ Substantial overlap with other concerns
 - ▣ Human rights
 - ▣ Eliminating racial discrimination
 - ▣ Police protection
- ▣ Granted both injunctive and monetary relief for human rights violation (in investment clothes)

Example of concern

- Dicta: “[I]t is still arguable as to whether [the prohibition of racial discrimination] has evolved to the level of *jus cogens* This is evident from ... the commentary to the US Restatement in Section 712, which states that ‘classifications, even if based on nationality, that are rationally related to the state’s security or economic policies might not be unreasonable’.”
- §712 addresses nationality, not race
- Misses §702(f) and cmt n, which expressly says that “systematic racial discrimination” is *jus cogens*
- Omits the past 30 years

Concerns

- ▣ The right forum for human rights issues?
 - ▣ Questions of culture and expertise
 - ▣ View human rights through investment prism
 - ▣ Rejected amicus brief
 - ▣ Not a comprehensive, careful treatment
 - ▣ Disproportionate remedies?

- ▣ Limited to foreign investors

Senator Warren's Objections to TPP



- If the tilt toward **giant corporations** wasn't clear enough, consider who would get to use this special court: only international investors, which are, by and large, **big** corporations.

Washington Post, 2015.02.25

Academic Objections 1

- ▣ Judith Resnik, et al: Our legal system rests on the conviction that every individual, regardless of wealth or power, has an equal right to bring a case to court. To protect and uphold the rule of law, our ideals of fairness and justice must apply in all situations and equally to everyone. ISDS, in contrast, is a system built on **differential access**. ISDS provides **a separate legal system available only to certain investors** who are authorized to exit the American legal system. Only foreign investors may bring claims under ISDS provisions. **This option is not offered to nations, domestic investors, or civil society groups** alleging violations of treaty obligations. Under ISDS regimes, foreign investors alone are granted legal rights unavailable to others – freed from the rulings and procedures of domestic courts.

Academic Objections 2

- Erwin Chemerinsky, et al: ISDS grants foreign corporations a **special legal privilege**.
- Gus Van Harten: **[O]nly foreign investors** can bring an ISDS claims [sic] to protect their assets.... The actors that typically have the most valuable foreign-owned assets, and the deepest pockets to fund litigation, are **transnational corporations and individual tycoons**.... ISDS discriminates in favour of foreign investors and against all other actors whose rights may be affected by state decisions.

Campbell Case

Part 2

Campbell Background



- ▣ Citizens of Zimbabwe
- ▣ Not foreign nationals, no applicable BIT
- ▣ Challenged 2005 amendment for racial discrimination and denial of judicial review

SADC Tribunal

- Southern African Development Community
- Court with jurisdiction over “disputes between natural or legal persons and States,” regardless of the claimant’s nationality.
- Cases concerning “interpretation and application” of the SADC Treaty, which specified only a few general principles, including “human rights, democracy, and the rule of law” and a ban on racial discrimination
- *Campbell* was the Tribunal’s first case

Campbell's Holdings & Remedies

- Denied access to courts
 - De facto racial discrimination
 - Dicta: A better land program would not have been discriminatory
- All necessary measures to protect landowners' rights to the land
 - Pay fair compensation for expropriated land

Zimbabwe's Responses

- ▣ Violence against Campbell and family
- ▣ Mugabe: Called SADC decision “nonsense” and “of no consequence”
- ▣ Apparently persuaded SADC countries to abolish private access to the SADC Tribunal
 - ▣ Reaction: Challenge to SADC's action under Banjul Charter. Unsuccessful, because the applicable right is limited to national courts not regional courts.

Desmond Tutu

- ▣ [S]outhern Africa was building a house of justice, a place where ... victims of injustice could turn with confidence. That house is now in grave danger...
- ▣ [I]ndividual access to the SADC court constitutes a key legal instrument that has brought hope to victims of the abuse of power in SADC countries....
- ▣ Without it, the region will lose a vital ally of its citizens, its investors and its future.



Jan Paulsson, Enclaves of Justice

- ▣ Explicitly rejects the view that increasing FDI is needed to make the case for ISD
- ▣ Recounts a litany of problems with courts of the world
 - ▣ Not limited to poor countries
- ▣ Advocates “build[ing] **enclaves of justice** where we can”
- ▣ “The error is to think that injustice is abnormal. It may be more realistic to think that ... justice is a surprising anomaly.”

Equalization of access

- ▣ Let's build more enclaves of justice:
 - ▣ Small businesses (SMEs)
 - ▣ Domestic investors
 - ▣ Claimants other than investors
 - ▣ Other creative uses of arbitration

- ▣ Let's equalize up, not equalize down

Common Ground

- ▣ Common cases
- ▣ Common concerns:
 - ▣ Property rights
 - ▣ Rule of law
 - ▣ Constraints on illegal and arbitrary government actions
 - ▣ Access to fair and independent tribunals
- ▣ Common support for neutral, transnational tribunals empowered to grant effective remedies

Thank you!

For more information, please see Perry Bechky, “Microinvestment Disputes” in *Vanderbilt Journal of Transnational Law* (2012) and “International Adjudication of Land Disputes: For Development and Transnationalism” in *Law & Development Review* (2014). Please do not hesitate to contact me:



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