Case Comment

Non-Disputing Parties and Human Rights in Investor-State Arbitration

Bernhard von Pezold and Others v Republic of Zimbabwe, ICSID Case No ARB/10/15, Final Award, 28 July 2015

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Keywords

The vexed question of investor-state arbitration’s sensitivity to the human rights interests of non-disputing parties raised its head again in the case of von Pezold v Zimbabwe, a case conjoined with Border Timbers v Zimbabwe,1

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1 The Border Timbers case was heard by the same tribunal, but rendered a separate Award. Further, the Award in the Border Timbers case is not publically available. See Border Timbers Ltd, Border Timbers International (Private) Ltd and Hangani Development Co (Private) Ltd v Republic of Zimbabwe, ICSID Case No ARB/10/25, Final Award (28 July 2015). The Border Timbers case involved companies incorporated in Zimbabwe but which are under the control of the von Pezold family and therefore claimed Swiss nationality through various members of the von Pezold family (paras 9–14). The cases were heard together, with the parties submitting joint pleadings and evidence, although they were not formally consolidated. The Award in the Border Timbers case remains unpublished at the time of writing and this case comment therefore focusses only on the von Pezold case.
and concerning the escalation of Zimbabwe’s Land Reform Programme, by which the property rights of white-owned estates were acquired, or otherwise rendered valueless, without compensation, in a reversal of past colonial land policies. On 28 July 2015, the Tribunal rendered its Award in favor of the von Pezold family (Claimants) on their claims of expropriation and breach of the fair and equitable treatment (FET) and the full protection and security (FPS) standards under the Germany-Zimbabwe and Switzerland-Zimbabwe bilateral investment treaties (BITs).

In addition to the political and historical import of the Award, Procedural Order 2, dismissing an application by non-disputing party petitioners, is of particular interest. These petitioners asserted indigenous rights over the relevant estates as a matter of international human rights law (IHRL) but, adopting a restrictive approach to Rule 37(2)(b) of the ICSID Arbitration Rules, the Tribunal refused to allow them to intervene in the case. This case therefore provides important insights, and raises vital questions, about the extent to which modern investor-state arbitration can inhabit the universe of IHRL.

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