

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

BERNHARD VON PEZOLD AND OTHERS (CLAIMANTS)

V.

**REPUBLIC OF ZIMBABWE (RESPONDENT)
(ICSID CASE NO. ARB/10/15)**

- AND -

**BORDER TIMBERS LIMITED, BORDER TIMBERS INTERNATIONAL (PRIVATE)
LIMITED, AND HANGANI DEVELOPMENT CO. (PRIVATE) LIMITED
(CLAIMANTS)**

V.

**REPUBLIC OF ZIMBABWE (RESPONDENT)
(ICSID CASE NO. ARB/10/25)**

PROCEDURAL ORDER NO. 5

Members of the Arbitral Tribunals

Mr. L. Yves Fortier, C.C., Q.C., President
Professor David A.R. Williams, Q.C., Arbitrator
Professor An Chen, Arbitrator

Secretary of the Tribunals
Frauke Nitschke

Assistant to the Tribunals
Alison G. FitzGerald

Representing the Claimants

Mr. Matthew Coleman
Mr. Anthony Rapa
Mr. Kevin Williams
Ms. Helen Aldridge
Steptoe & Johnson, London, United Kingdom

Mr. Charles O. Verril, Jr.
Wiley Rein LLP, Washington, D.C., U.S.A.

Representing the Respondent

The Honorable Johannes Tomana
Advocate Prince Machaya
Ms. Sophia Christina Tsvakwi
Ms. Fatima Chakupamambo Maxwell
Ms. Elizabeth Sumowah
Attorney General's Office
Harrare, Republic of Zimbabwe

Mr. Phillip Kimbrough
Mr. Tristan Moreau
Kimbrough & Associés, Paris, France

I. INTRODUCTION

1. On 8 March 2013, the Claimants brought an urgent application for an order for provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (the “**Application**”).
2. The Application relates to an alleged plan by the Respondent’s Central Intelligence Organisation (“**CIO**”) to kill one of the Claimants, Mr. Heinrich von Pezold. The Claimants seek to have their “right to participate in these proceedings without threats to their lives by the Respondent” preserved through provisional measures.
3. The Arbitral Tribunals have considered the Application and have decided unanimously as follows.

II. PROCEDURAL HISTORY

4. On 8 March 2013, in light of the urgency of the request presented in the Application, the President of the Arbitral Tribunals issued the following interim directions (“**Interim Directions**”) (see Interim Directions, para. 10):
 - “(a) The Respondent immediately take all necessary measures to protect the life and safety of the Claimants, and in particular Mr. Heinrich von Pezold and his family, from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent (the “Protection Measures”); and
 - (b) The Respondent allow the Claimants, and in particular Mr. Heinrich von Pezold and his family, to participate, in so far as it may be possible, in the planning and the implementation of the Protection Measures.”
5. The Interim Directions have remained in force until the issuance of this Procedural Order No 5.
6. The President of the Arbitral Tribunals also directed a briefing schedule in the Interim Directions, reserving leave for either Party to apply at any time to amend the Directions.

7. On 11 March 2013, the Respondent, while submitting that the Arbitral Tribunals did not have jurisdiction to entertain the Application, presented its observations on the Application, supported by a letter from the Chief Legal Officer of the CIO and a Statement by the Assistant Commissioner of the Zimbabwe Republic Police, assuring the Tribunals in effect that the members of these institutions take their roles to ensure the safety of all persons in Zimbabwe seriously and requesting that the Application be dismissed in its entirety or that the Claimants be directed to “submit proof of their outlandish rumour” (“**Respondent’s Observations**”).
8. On 13 March 2013, the Claimants, while asserting that the Arbitral Tribunals do have jurisdiction in relation to the Application, also presented their comments in response to the Respondent’s Observations, supported by several documents, including a letter from the German Ambassador to Zimbabwe, Ambassador Hans Gnodtke, to the Minister of Land and Rural Resettlement raising, *inter alia*, the issue of threats against the life of Mr. von Pezold. The Claimants submitted that they had established there was a very serious threat to Mr. von Pezold and that the assurances given in the Respondent’s Observations did not negate the need for an order on the terms expressed in the Interim Directions (“**Claimants’ Reply**”).
9. On 17 March 2013, the Respondent sought an extension of time to submit its rebuttal observations until 19 March 2013, which the President of the Tribunals granted.
10. On 18 March 2013, the Claimants wrote to the Arbitral Tribunals, clarifying their submissions in respect of the Tribunals’ jurisdiction to order provisional measures (the “**Claimants’ 18 March Letter**”).
11. On 19 March 2013, the Respondent presented its further observations, along with a second letter from the Chief Legal Officer of the CIO and copies of two “Notes Verbales” sent by the German Embassy to the Zimbabwean Ministry of Foreign Affairs relating to the actions of Mr. Muzite and others (see Procedural Order No. 4 dated 16 March 2013). The Respondent urged the Tribunals not to give any credence to what it

considers to be spurious allegations against the Respondent and its State Entities (the “**Respondent’s Rebuttal**”).

12. On 20 March 2013, the Claimants sought leave from the Tribunals to file further submissions in support of their Application and in response to the Respondent’s Rebuttal. The President of the Tribunals granted the Claimants’ request, extending also an invitation to the Respondent to file any further reply the Respondent wishes to make within 48 hours. The President confirmed that the Interim Directions would continue to remain in place.
13. In their Letter of 20 March 2013, the Claimants provided further details surrounding the diplomatic channels engaged by the German Embassy in Zimbabwe relating to this Application and the application for provisional measures disposed of in Procedural Order No. 4. The Claimants also provided further press reports in support of their allegations relating to police conduct and reiterated their request for relief (the “**Claimants’ 20 March Letter**”).
14. The Respondent filed its final reply on 22 March 2013, describing the Claimants’ evidence in support of their Application as, *inter alia*, “anachronistic”, and reiterating its request that the Tribunals find the Application to be “merely sensational, improbable and unfounded”, that the Application be dismissed and that the Claimants be condemned for abusive proceeding (the “**Respondent’s 22 March Letter**”).

III. THE PARTIES’ SUBMISSIONS

15. Having considered all of the Parties’ submissions, the Arbitral Tribunals will now review in some detail their principal arguments.

A. The Application

16. The Claimants provide the following background in support of their Application (see Application, paras. 2.2 to 2.5):

“On 6 March 2013, Heinrich von Pezold was informed by a reliable source within the Government of Zimbabwe that the Respondent’s Central Intelligence organisation (“CIO”) has been instructed to kill him. The CIO is the Respondent’s “premier” Security Service and is an organ of State.

The position of the source within the Government of Zimbabwe and the disclosure of the specific details of the plan to kill Heinrich have led the Claimants and their advisors to conclude that this information must be taken very seriously. In reaching this conclusion, the Claimants have also taken into consideration the fact that the claimants in the case of *Mike Campbell (Pvt) Ltd & Ors v. Republic of Zimbabwe* at the SADC Tribunal in Namibia were violently assaulted in Zimbabwe during the course of those proceedings. The fact that those assaults occurred is recorded in numerous press articles. Photos of the injuries inflicted on the Campbell claimants are contained in the Respondent’s own evidence filed with its Rejoinder, namely Ben Freeth’s book.

The Claimants are not prone to hysteria. In any event, in order to obtain further reassurance as to their conclusions, the Claimants have passed the information regarding the CIO’s instruction to kill Heinrich von Pezold to the German Embassy in Harare. The German Embassy has also concluded that the source and the threat must be taken very seriously.

The source has informed Heinrich von Pezold that the reason why the CIO has been instructed to kill him is because of the international claims that he has made in regard to the expropriations of his properties. The source has stated that certain people within the Zimbabwean Government want to avoid the negative publicity that his claims are bringing in what is an election year. In these circumstances, the Claimants consider that the instruction to kill Heinrich is a direct challenge to these ICSID proceedings.” [citations omitted]

17. The Claimants state that the purpose of provisional measures, as set out in Article 47 of the ICSID Convention, is to “preserve the respective rights of either party”, and that, through the present Application, they seek to have preserved their right to participate in these proceedings without threats to their lives by the Respondent.
18. The Claimants initially took the position in their Reply that the Arbitral Tribunals may assume that they have jurisdiction for the purpose of making orders for provisional measures (see Reply, para. 2.3). However, the Claimants subsequently clarified in their

letter of 18 March 2013, that this means the Tribunals must satisfy themselves that there is, *prima facie*, a basis upon which the Tribunals' jurisdiction might be established in regard to the merits of the dispute (see Claimants' 18 March Letter, para. 12).

19. The Claimants submit that they have pleaded the bases of the jurisdiction in the Request for Arbitration and in the Memorial. Furthermore, the Claimants aver that the fact that the Respondent challenges the Tribunals' jurisdiction does not prevent the Tribunals from making an order for provisional measures, including in respect of procedural rights, relying on Rule 39(1) of the ICSID Arbitration Rules and ICSID case authority (see Claimants' 18 March Letter, paras. 1.3-1.4).

20. The Claimants contend that the urgency and necessity criteria for the grant of provisional measures are met as follows (see Application, paras. 5.2 to 5.4):

“Urgency exists in the circumstances of this application as it is the Claimants’ understanding that the instruction to kill Heinrich von Pezold has already been given. In any event, all allegations regarding a threat to life must – for obvious reasons – be treated as giving rise to urgency.

In regard to the issue of necessity, it will be recalled that necessity exists if irreparable harm or damage will occur in the event that the provisional measures are not ordered. Furthermore, it will also be recalled that provisional measures will usually be ordered in circumstances where the health or life of people are in jeopardy as compensation will not in those circumstances fully remedy the damage suffered.

Compensation will not fully remedy the death of Heinrich von Pezold. Therefore necessity is established.” [citations omitted]

21. On the basis of the foregoing, the Claimants seek an order from the Tribunals that the Respondent (see Application, para. 7.1):

- (a) Immediately instruct the Central Intelligence Organisation, the Police and all other Security Services in Zimbabwe, together with their officers, employees and agents that they are not to harm Heinrich von Pezold or any of the other Claimants, their families and staff;
- (b) Immediately instruct the Police to provide the Claimants with full protection and security; and

- (c) Does not take any further action to aggravate the dispute between it and the Claimants.

B. The Respondent's Observations

22. On 11 March 2013, the Respondent filed its observations on the Claimants' Application. The Respondent takes the position that the Arbitral Tribunals do not have jurisdiction to determine demands of the nature set forth in the Application, reasoning as follows (see Respondent's Observations, pp. 1-2):

“...such jurisdiction is defined by the terms of the ICSID Convention as well as by the terms of the BITs potentially relevant to Claimants' alleged investments. Claimants' presents demands do not concern an investment, but rather the security of a person living on Respondent's territory.

Article 25(1) of the ICSID Convention states that: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment”. This is not the case as the rumours brought forward by Claimants are general in nature, concern a person directly and not its supposed investment.

Article 4.3 of the Swiss/[Zimbabwe] BIT states that “each Contracting Party shall in its territory accord investors of the other Contracting party treatment not less favourable to him than [sic] which it accords to its own investors or to investors of any third State, whichever is more favourable to the investor concerned.”

Article 4 of the German/[Zimbabwe] BIT does not specifically address investors per se but only their investments.

Consequently, Respondent would ask the members of the Arbitral Tribunal to decline to address Claimants' demands and otherwise order Claimants to raise their demands before proper legal forum. Moreover, Respondent respectfully submits that should the Arbitral Tribunal decide to review the claims, it would risk violating the necessary impartiality of the Arbitral Tribunal in this case, as it would demonstrate that it has already implicitly reached a decision as to jurisdiction over alleged investments.

Respondent considers that the best proof that nothing threatens any of Claimants' lives is their future presence at arbitral hearings in Singapore, unless Claimants were to be organising a plan to be absent from hearings in Singapore.”

23. As regards the facts underlying the Application, the Respondent states that the Claimants had not substantiated their allegations nor disclosed the alleged source of the information that a threat existed. The Respondent further states that Mr. von Pezold did not suffer any harm or threat at all even during the height of the land reform programme, expressing surprise that four years after initiating proceedings he would now perceive himself to be under threat.
24. The Respondent notes that news about the ICSID proceedings has been published and no harm has befallen Mr. von Pezold. The Respondent avers that the fact that 2013 is an election year is “neither here nor there”, noting that 2012 was also considered to be an election year yet no threats against Mr. von Pezold were perceived.
25. The Respondent characterises the Claimants’ Application as “purely speculative and unnecessary”, submitting that it is the constitutional mandate of the Zimbabwe Republic Police and Zimbabwe’s Security Services to protect everyone living in Zimbabwe, therefore it is unnecessary for the Tribunals to order the police and the Security Services to do what they do and have always done.
26. The Respondent also states that had the German Embassy received any report of a threat, it should have communicated with the Zimbabwean Ministry of Foreign Affairs, concluding that in the absence of such action the German Embassy must not have taken the so-called threat seriously.

C. The Claimants’ Reply

27. The Claimants submit that whether or not they are alive by the time of the hearing in Singapore will not determine their existing safety (see Claimants’ Reply, para. 3.1). They aver that previous threats have in fact been made against Mr. von Pezold and his staff, stating that during the height of the land reform programme they were in fact humiliated, threatened with death and assaulted, had firearms put to their heads, and were abducted.

28. The Claimants also contend with respect to the present alleged threat that it is not realistic for the Claimants to disclose their source to the Respondent, as this would put the source's life in danger, but note that the German Government has taken it seriously enough to raise with the Zimbabwean Government (see Claimants' Reply, paras. 4.1-4.2).
29. The Claimants submitted with their Reply a letter from the German Ambassador to the Zimbabwean Minister of Lands and Rural Resettlement, which they called a "Note Verbale" and which adverts to the threat to Mr. von Pezold.
30. The Claimants conclude that they are not reassured by the Respondent's statements regarding the duty of the Zimbabwean police and its security services, providing the details of a recent Zimbabwean High Court judgment which addresses certain events that took place in 2001, heavily critical of the police and other materials critical of the CIO (see Claimants' Reply, paras. 7.1-7.3).

D. The Respondent's Rebuttal

31. In its Rebuttal, the Respondent contended that the Claimants' allegations of a death threat against Mr. von Pezold remain unproven and have not given rise to any Note Verbale, contrary to what the Claimants had stated in their Reply. First, the Respondent reasons that had the Respondent or its police force or any State Entity had the intention to kill Mr. von Pezold, he would have already been killed during the height of the land reform programme (see Respondent's Rebuttal, p. 2).
32. Second, the Respondent provided copies of the two Notes Verbales from the German Embassy to the Zimbabwean Ministry of Foreign Affairs, dated 5 December 2012 and 4 March 2013, respectively, relating solely to the events which are the subject of Procedural Order No. 4.
33. The Respondent characterises the letter attached to the Claimants' Reply from the German Ambassador to the Minister of Lands and Rural Resettlement as a "simple multi-topic letter – not a note verbale", observing that the alleged threat to Mr. von Pezold's life

is mentioned in that letter almost as an aside. The Respondent goes on to state the following (see Respondent's Rebuttal, p. 3 and 4):

“The German Ambassador’s focus in that letter is on the Muzite-Smaldeel need for protecting the ‘freshly harvested macadamia nuts’. Unlike the language quoted above from the two notes-verbales, the 7 March 2013 letter makes no appeal for the Ministry’s intervention. The Germany Ambassador does not even seek the Minister’s intervention for Heinrich’s protection in connection with what it characterises as the ‘very concrete death threat’.

...

Surely, were the German Embassy to have any credible evidence of a death threat, it would not have had recourse to a simple, multi-topic letter discussing various matters and making no appeal to Zimbabwean authorities.”

34. The Respondent concludes therefore that the German Embassy has not attributed any weight to the alleged death threat.
35. Third, the Respondent states that the only support provided by the Claimants for their Application relates to conditions prevailing in Zimbabwe in 2002, which are, in the Respondent’s view, in no way analogous to conditions in Zimbabwe today.

E. The Parties’ Further Observations

36. In their letter of 20 March 2013, the Claimants submit that the Respondent seeks to elevate form over substance, as regards the letter from the German Ambassador to the Minister of Lands and Rural Resettlement. The Claimants underscore that the death threat was referred to in the letter and it was on this basis that the Ambassador was recalled to Germany, as explained in the letter, to “report ‘on the ongoing deterioration of the security situation in Zimbabwe’.” (see Claimants’ 20 March Letter, para. 2).
37. As regards the conduct of the Zimbabwean police and Security Service, the Claimants provided additional press reports which support, in their view, that Zimbabwe’s Security Services and police consider themselves to be above the law, thereby rendering any undertakings or promises with regard to the safety of the Claimants unsatisfactory (see Claimants’ 20 March Letter, para. 3.1 to 3.6).

38. The Claimants conclude that, contrary to the Respondent’s assertions, the state of things in Zimbabwe today is not vastly different from what it was in 2002, and therefore they continue to request an order for provisional measures on the terms expressed in the Interim Directions.
39. The Respondent, in its final submission dated 22 March 2013, reiterates its position that the Claimants’ accusations are unfounded and urges the Tribunals to note that the Application is “merely sensational, improbable and unfounded” and to dismiss it in its entirety.

IV. ANALYSIS

A. Authority to Grant Provisional Measures

40. The Tribunals recall that the Claimants’ Application was made pursuant to Article 47 of the ICSID Convention, which provides as follows:

“Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

41. The procedure with respect to provisional measures is outlined in Rule 39 of the ICSID Arbitration Rules:

“Rule 39

- (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[...]"

42. It follows from Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules that the Tribunals have the power to recommend provisional measures at any time after the institution of the arbitration and must give priority to the consideration of such a request.
43. The Tribunals note that, notwithstanding the fact that an objection to jurisdiction is pending, an ICSID tribunal can render a decision on a request for provisional measures. This is borne out by the decisions of numerous ICSID tribunals and is made clear in several legal writings.
44. In particular, Christoph Schreuer comments as follows on Article 47 of the ICSID Convention and the pending issue of jurisdiction (see C.H. Schreuer, *The ICSID Convention: A commentary* (2nd Edition, Cambridge University Press: 2009), at pp. 771-772):

“Giving priority to a request for provisional measures also means that it has to take precedence over any other issues pending before the tribunal. Where a party has raised jurisdictional objections, the tribunal may have to decide on provisional measures before having ruled on its own jurisdiction. As a consequence, a party may be exposed to provisional measures even though it contests the jurisdiction of an ICSID tribunal. On the other hand, the urgency of the matter often makes it impossible to defer provisional measures until the tribunal’s jurisdiction has been fully argued and decided.

This question has arisen frequently before other arbitral tribunals and before the International Court of Justice (ICJ). The case law of the ICJ has adopted the approach that a *prima facie* showing of jurisdiction is sufficient to establish its power to indicate provisional measures. As held in the Judgment in the *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*:

[I]n dealing with a request for provisional measures the Court need not finally satisfy itself that it has jurisdiction on the merits of the case but will not indicate such measures unless there is, *prima facie*, a basis on which the jurisdiction of the Court might be established.

The ICSID Convention has a special feature which is helpful in this regard. Art. 36(3) of the Convention provides that the Secretary-General shall register a request for arbitration unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. Therefore, unlike in other procedures, such as in State-to-State cases brought before the ICJ, there is a preliminary examination of jurisdiction before the case even reaches the tribunal. Although the tribunal is, of course, in no way bound by this preliminary examination of jurisdiction, it provides a useful basis for its power to recommend provisional measures. The Secretary-General's registration of a request, in accordance with Art. 36(3) of the Convention, does not preclude the tribunal from examining the question of jurisdiction before recommending provisional measures. It is equally clear that a party may continue to challenge the jurisdiction after provisional measures have been recommended until the tribunal has formally decided on its competence (see Art. 41, paras. 11-15). It is ultimately with the tribunal whether it will accept the Secretary-General's registration as a sufficient basis or whether it wants to form a *prima facie* opinion on jurisdiction before recommending provisional measures.

In *Holiday Inns v. Morocco*, the question of jurisdiction was still disputed when the Tribunal gave its decision on provisional measures. The Tribunal said:

The Tribunal, ...considers that it has jurisdiction to recommend provisional measures according to the terms of Article 47..., the Parties still having the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspects of the dispute.

..." [citations omitted]

45. Moreover, as the ICSID Tribunal in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11 stated (see Decision on Provisional Measures, para. 55):

“Whilst the Tribunal need not definitely satisfy itself that it has jurisdiction in respect of the merits of the case at issue for purposes of ruling upon the requested provisional measures, it will not order such measures unless there is, *prima facie*, a basis upon which the Tribunal’s jurisdiction might be established.”

46. In their two Requests for Arbitration, the Claimants invoke several bases for jurisdiction. The Request for Arbitration related to ICSID Case No. ARB/10/15 (the “**von Pezold RfA**”) was brought by nine members of the von Pezold family, eight of whom are allegedly nationals of both, Germany and Switzerland, and one Claimant, Bernhard Friedrich Arnd Rüdiger von Pezold, is a national of Germany only.
47. According to the von Pezold RfA, the von Pezold Claimants rely on Zimbabwe's advance consent to ICSID jurisdiction contained in (i) the 1996 Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection (the “**Switzerland/Zimbabwe BIT**”) which entered into force on 14 April 2000 and remains in force today, and on Zimbabwe's advance consent to ICSID jurisdiction contained in (ii) the 1995 Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (the “**Germany/Zimbabwe BIT**”), which entered into force on 9 February 2001, and which also remains currently in force (see von Pezold RfA, para. 91). Specifically, the von Pezold RfA states that Claimant [Bernhard Friedrich Arnd Rüdiger von Pezold] relies on the Germany/Zimbabwe BIT, while all other von Pezold Claimants rely on Zimbabwe's consent to ICSID jurisdiction in both the Germany/Zimbabwe BIT and the Switzerland/Zimbabwe BIT. (Id.)
48. Article 11 of the Germany/Zimbabwe BIT states in relevant part:

“(1) Disputes between a Contracting Party and a national [...] of the other Contracting party concerning an investment of such national in the territory of the former Contracting Party shall as far as possible be settled amicably between the parties concerned.

(2) If the dispute is not settled within six months of the date when it is raised by one of the parties in dispute, it shall, at the request of the national concerned, be submitted to arbitration. Each Contracting Party hereby consents to submit the dispute to arbitration. Unless the parties in dispute agree otherwise, the dispute shall be submitted for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March, 1965. [...]"

49. Article 10 of the Switzerland/Zimbabwe BIT reads in relevant part:

“(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party [...] consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes. [...]"

50. According to the von Pezold RfA, the written consent to ICSID arbitration for each of the nine Claimants is contained in a letter of 9 November 2009 addressed to the Minister of Economic Planning and Investment Promotion (see von Pezold RfA, para. 105), except for Claimant Adam Friedrich Carl Leopold Franz Severin von Pezold, who allegedly consented to ICSID arbitration by letter dated 2 March 2010, which was also addressed to the Minister of Economic Planning and Investment Promotion (see von Pezold RfA, para. 106).

51. The von Pezold RfA further states that each von Pezold Claimants "restates and ratifies his/her consent to submit this legal dispute to arbitration administered by ICSID." (see von Pezold RfA, para. 106).

52. In the Request for Arbitration related to ICSID Case No. ARB/10/25 (the “**Border Timbers RfA**”), the Claimants rely on Zimbabwe's advance consent to ICSID jurisdiction as set forth in the ICSID arbitration provision of Article 10(2) the Switzerland/Zimbabwe BIT (see above). The written consent to ICSID arbitration for each of the three Claimants is contained in the Border Timbers RfA itself (see Border Timbers RfA, para. 95).

53. The Tribunals note, moreover, that there is no manifest reason for excluding their jurisdiction on a *prima facie* basis.
54. Since the other requirements of Article 25 of the ICSID Convention (investment, parties and legal dispute) are not in issue, the Arbitral Tribunals are therefore satisfied that *prima facie* jurisdiction has been established and the Tribunals are thus empowered to decide the present Application.

B. Criteria for the Grant of Provisional Measures

55. The Parties do not appear to dispute the substantive criteria required for the grant of provisional measures, to wit, that provisional measures should only be granted where they are necessary to preserve a party's rights and urgent in order to avoid irreparable harm. The Parties do dispute however whether these criteria are satisfied in the present case, including whether a right exists within the context of these investment proceedings capable of protection by provisional measures recommended under Article 47 of the ICSID Convention.
56. It is well established that Article 47 of the Convention is based on Article 41(1) of the ICJ Statute*. It is also well established that an ICSID tribunal may, in certain circumstances, have recourse to the jurisprudence of the ICJ for guidance.
57. The Tribunals note that, in the *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order dated 29 July 1991[†], the ICJ unanimously determined that a measure is urgent when “action prejudicial to the rights of either party is likely to be taken before such final decision is given”.

* Article 41(1) of the ICJ Statute reads as follows : “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”

[†] 1991 I.C.J. Rep. 12 at page 17

58. The Tribunals also note that in *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order dated 11 September 1976[‡], President Jiménez de Aréchaga in a separate opinion opined that a provisional measure is necessary when the actions of a party “are capable of causing or of threatening irreparable prejudice to the rights invoked”.
59. The Tribunals will accordingly be guided by those decisions which they find apposite in the circumstances of the present cases.
60. In their Application, the Claimants assert that the right to be preserved is the Claimants’ “right to participate in these proceedings without threats to their lives by the Respondent” (see Application, para. 4.1).
61. The Tribunals find that the Claimants have adduced sufficient *prima facie* evidence that instructions to kill Mr. Heinrich von Pezold have been issued to the Respondent’s Central Intelligence Organization.
62. Accordingly, the measures which the Claimants seek, in the view of the Tribunals, are urgent and necessary since any action of any member, organ or agent of the Respondent or any person or entity instructed by the Respondent which could endanger the life and safety of the Claimants, in particular of Mr Heinrich von Pezold, is capable of causing irreparable prejudice to their right to participate in the present proceedings.
63. The Tribunals are also of the view that any prejudice caused to the Respondent by issuing an order for provisional measures in this respect is far lesser than the risk to the life and safety of Mr Heinrich von Pezold if the Tribunals declined to issue an order.
64. Therefore, after having considered the extensive submissions of both Parties and the circumstances which obtain in Zimbabwe at the moment, the Tribunals have decided to confirm, by this Order, the Interim Directions issued on 8 March 2013, and, in addition,

[‡] 1976 I.C.J. Rep. 3 at page 11

to order the Respondent to report to the Tribunals periodically on the protection measures adopted in compliance with the present Order.

V. THE ARBITRAL TRIBUNALS' DECISIONS

65. Based on the foregoing, the Members of the Arbitral Tribunals, having deliberated, unanimously direct that:

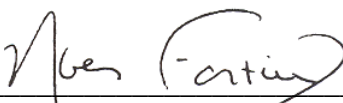
- (a) The Respondent immediately take all necessary measures to protect the life and safety of the Claimants, and in particular Mr. Heinrich von Pezold and his family, from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent (the “**Protection Measures**”);
- (b) The Respondent allow the Claimants, and in particular Mr. Heinrich von Pezold and his family, to participate, in so far as it may be possible, in the planning and the implementation of the Protection Measures;
- (c) The Respondent report in writing to the Tribunals on the Protection Measures adopted in compliance with the present Order on 15 April 2013; and
- (d) The Respondent also report in writing to the Tribunals on the Protection Measures adopted on 15 May 2013.

66. This Order is without prejudice to all substantive issues in dispute between the Parties and should not be considered as prejudging any issue of fact or law concerning jurisdiction or the merits of these cases.

67. There shall be no order as to costs.

Dated as of 3 April 2013

Signed on behalf of the Arbitral Tribunals



L. Yves Fortier, C.C., Q.C.
President