

**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. 7

Members of the Arbitral Tribunals

Mr. L. Yves Fortier, C.C., Q.C., President
Professor David A.R. Williams, Q.C., Arbitrator
Mr. Michael Hwang, S.C., Arbitrator

Secretary of the Tribunals
Frauke Nitschke

Assistant to the Tribunals
Alison G. FitzGerald

Representing the Claimants

Mr. Matthew Coleman
Mr. Kevin Williams
Mr. Anthony Rapa
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. Fortune Chimbaru
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 18 July 2013, the Claimants brought an application relating to a “new” objection to the Arbitral Tribunals’ jurisdiction allegedly pleaded by the Respondent for the first time in its pleading filed on 19 April 2013 (the “Rebutter”), and “new” evidence filed in support thereof and in support also of a prior jurisdictional objection raised in the Respondent’s Rejoinder (the “Application”).
2. On 1 August 2013, the Claimants amended their Application by agreeing to the admission of the “new” evidence for a limited purpose and seeking a further written procedure to respond to that evidence.
3. The Claimants seek four orders from the Arbitral Tribunals: (i) an order that the “new” jurisdictional objection based on Article 9(a) of the German BIT and Article 2 of the Swiss BIT (the “Illegality Objection”) is inadmissible and shall be disregarded by the Tribunals; (ii) an order that the “new” evidence filed in support of the Illegality Objection and the prior jurisdictional objection relating to Article 9(b) of the German BIT, namely the witness statement of Mr. Nyaguse, be admitted only for the purpose of the Respondent’s defence concerning Article 9(b) of the German BIT (the “Approval Evidence Objection”); (iii) an order that the Claimants shall file their observations on the Approval Evidence, together with any supporting evidence, by 9 September 2013; and (iv) an order that the Respondent’s letter to the Tribunals dated 8 July 2013 (filed on 4 July 2013) (“Respondent’s July 4 Letter”) and the Respondent’s July 29th Reply to the Application do not serve as additional pleadings in these proceedings.
4. The Arbitral Tribunals have considered the Application, as amended, and have decided unanimously as follows.

II. PROCEDURAL HISTORY

5. On 18 July 2013, the Tribunals' Secretary wrote to the Parties on behalf of the Arbitral Tribunals inviting the Respondent to file a reply to the Application by 29 July 2013.
6. On 29 July 2013, the Respondent filed its observations on the Application ("Respondent's Reply"). Whilst no specific request for relief is clearly stated in the Respondent's Reply, the Respondent appears to seek either that the Application be dismissed in its entirety or, alternatively, that the Respondent have an opportunity to correct any formal discrepancy in its pleadings (see Respondent's Reply, para. 88).
7. On 31 July 2013, the Claimants sought leave to file a response to the Respondent's Reply. Also on 31 July 2013, the Respondent sought a right to submit a further reply to the Claimants' response. The Tribunals' Secretary wrote to the Parties on behalf of the Tribunals allowing (i) the Claimants to respond to the Respondent's Reply by 1 August 2013; and (ii) the Respondent to reply to the Claimants' response by 2 August 2013. Each submission was strictly limited to seven (7) pages.
8. On 1 August 2013, the Respondent sought an extension of time to file its further reply until 5 August 2013. The Tribunals granted the extension subject to the aforementioned page limit.
9. On 1 August 2013, the Claimants filed their observations in response to the Respondent's Reply, amending the relief sought in their Application ("Claimants' August 1 Letter").
10. On 5 August 2013, the Respondent filed its observations in response to the Claimants' August 1 Letter ("Respondent's August 5 Letter").

III. DISCUSSION

A. The Application

11. The Claimants' Application is brought pursuant to several provisions of the ICSID Arbitration Rules, namely Arbitration Rules 26(1), 31(3) and 41(1), and Procedural Order No. 3, dated 11 January 2013 ("PO No. 3").

12. The Claimants summarize their Application relating to the Illegality Objection and Approval Evidence Objection as follows (see Application, paras. 4-5):

“4. In summary, the Respondent's Illegality Objection as pleaded in its Rebutter is as follows. Article 9(a) of the German BIT and the second part of Article 2 of the Swiss BIT provide that the BITs to which they relate only apply to investments made in accordance with the laws of Zimbabwe. The Respondent in the Rebutter alleges that the Claimants' investments into Zimbabwe were not made in accordance with the laws of Zimbabwe and therefore they are not covered by the BITs.

5. The Respondent's Approval Evidence is pleaded extensively in the Rebutter. In brief, the Respondent's Approval Evidence is that the Claimants' investments were not approved in accordance with the procedure as detailed in Mr Nyaguse's witness statement (filed with the Rebutter). As a consequence, the Respondent asserts that the Claimants' investments do not comply with either Article 9(a) of the German BIT or Article 2 of the Swiss BIT and hence it seeks to raise the Illegality Objection in the Rebutter. Further, the Respondent alleges that the failure to comply with this procedure means that the Claimants are not compliant with Article 9(b) of the German BIT (the Respondent in its Rejoinder raised the Approval Objection, which asserts that Article 9(b) states that the German BIT only applies to investments “specifically approved” at the time of admission).” [citations omitted]

13. The Claimants submit that the Illegality Objection should be ruled inadmissible on the ground that Arbitration Rule 41(1) requires that jurisdictional objections be made “as early as possible”, unless the facts on which the objection is based are unknown to the party at that time. The Claimants submit that all of the facts that the Respondent pleads to support the Illegality Objection in relation to the claims pleaded in the Claimants' Memorial were known to it at the time that it filed its Counter-Memorial and should therefore have been pleaded no later than the time fixed for the filing of that submission

(i.e., by no later than 11 August 2012). Similarly, the Claimants submit that all of the facts that the Respondent pleads to support the Illegality Objection in relation to the ancillary claims pleaded in the Claimants' Reply were known to it at the time that it filed its Rejoinder and should therefore have been pleaded no later than the time fixed for filing of that submission (i.e., by no later than 14 December 2012) (see Application, paras. 57-59).

14. The Claimants contend that the effect of failing to comply with Arbitration Rule 41(1) is established in Arbitration Rule 26(3), which requires that any step taken after expiration of the applicable time limit be disregarded unless the Tribunal decides otherwise on the basis of "special circumstances". Referring to the Tribunals' analysis of special circumstances in PO No. 3, the Claimants argue that none of the "special circumstances" identified by the Tribunals in PO No. 3 exist so as to warrant departing from the general rule that steps taken out of time ought to be disregarded (see Application, para. 60).
15. The Claimants state that the issue of whether the Respondent pleaded reliance on Article 9(a) of the German BIT and Article 2 of the Swiss prior to the Rebutter "is not a mere technical point", but a matter of pleading with some precision so that each party knows the case that it has to answer. The Claimants further state that their position would not be a cultural shock in Zimbabwe, noting that they "have been involved in numerous cases in the Zimbabwean courts, where the pleading style is skeletal in nature, but precise" (see Claimants' August 1 Letter, paras. 2.5 and 2.9).
16. Despite their initial position that Mr. Nyaguse's evidence should be excluded entirely, the Claimants have subsequently agreed to its admission subject to the following conditions (see Claimants' August 1 Letter, para. 3.2):
 - 3.2.1 Mr Nyaguse's evidence is only admissible in support of the Respondent's alleged defence under Article 9(b) of the German BIT;
 - 3.2.2 the Claimants shall file their observations on Mr Nyaguse's Witness Statement, together with any supporting evidence, by 9 September 2013;

- 3.2.3 the Claimants' observations and supporting evidence referred to in para 3.2.2 above will cover the following matters (which are referred to in Mr Nyaguse's statement) - the functions, powers and status of the Foreign Investment Committee (FIC), the Zimbabwe Investment Centre (ZIC), the Investment Committee (ZIC Investment Committee), the Reserve Bank and the Exchange Control Review Committee, in so far as they relate to the issue of the approval of foreign investment; and
- 3.2.4 the Claimants' observations and supporting evidence referred to in para 3.2.2 above will also cover the Claimants' interaction (if any) with the entities referred to in para 3.2.3 above.

- 17. The Claimants state that they can plead to these matters within a limit of 25 pages, and keep the supporting evidence to within 20 pages (see Claimants' August 1 Letter, para. 3.3).
- 18. The Claimants appear to maintain their objection to the admissibility of Mr. Nyaguse's evidence in respect of the Illegality Objection on the ground that it is not responsive to the legal and factual case pleaded by the Claimants in their 1 March 2013 submission (i.e., the Surrejoinder) (the Claimants not having put into issue in that pleading the compliance of their investments with Article 9(a) of the German BIT or Article 2 of the Swiss BIT). The Claimants rely on Arbitration Rule 31(3), arguing that "the Respondent has put in issue a detailed approval procedure, which the Claimants have no opportunity to answer", and unless the evidence is ruled inadmissible (for the purpose of the Illegality Objection) the Claimants will be unfairly prejudiced (see Application, paras. 67-73; Claimants' August 1 Letter, para. 2.6).
- 19. The Claimants summarize their Application relating to the Respondent's July 4 Letter as follows (see Application, para. 6):

"On 4 July 2013, in advance of and in anticipation of this application, the Respondent submitted to the Tribunals the 4 July letter. In that letter the Respondent asserts that the Illegality Objection and the Approval Evidence should be admitted into these proceedings, although it did not request such permission from the Tribunals. The 4 July Letter is 30 pages in length and its paragraphs are not numbered. For ease of cross-referencing, this application includes a copy of the 4 July Letter to which the Claimants have added paragraph numbers down the left hand margin of each paragraph. At the end of this application the Claimants have endeavoured to deal with the points raised in the 4 July Letter."

20. The Claimants also invoke Arbitration Rule 26(3) and PO No. 3 in support of their request that the Respondent's July 4 Letter be disregarded, while at the same time setting out a detailed response to the letter in their Application (see Application, paras. 78-165).
21. In their August 1 Letter, the Claimants added the Respondent's Reply to their above request that these materials not serve as additional pleadings, although no specific submissions were made in this regard.

B. The Respondent's Position

22. The Respondent submits that the Application is not grounded in fact, procedure or law, arguing that the Claimants demand a level of specificity by the Respondent in pleading its defence to the Claimants' case that is not normally required by arbitral procedure (see Respondent's Reply, para. 27). The Respondent argues that the Claimants seek to confer upon Arbitration Rule 31(3) "the greatest rigidity of any national court pleading rules", noting that "International Arbitration must be flexible as to form given the cultural diversity of the parties involved" (see Respondent's Reply, paras. 56-57).
23. In their August 5 Letter, the Respondent draws heavily from a text published by an American law professor titled *The Law of Federal Courts* (1983) to support its position that procedural rules relating to pleading in both civilian and common law jurisdictions "illustrate procedural concepts that are generally recognised and that are applicable here", even though they do not apply directly to the proceedings. The Respondent also relies on select arbitral cases and a case of the International Court of Justice in support of its position that questions of jurisdiction are questions of law for the Arbitral Tribunals to decide, irrespective of issues relating to a legal representative's skill or experience, "emotions", "credibility", "timing" or "strategy" (see Respondent's August 5 Letter, para. 14).
24. The crux of the Respondent's position is, however, contained in the following paragraphs of its Reply, which summarize the relief the Respondent seeks in the event the Tribunals identify any "formal discrepancy" to date (see Respondent's Reply, paras. 88 and 135-136):

“88. Should the Arbitral Tribunals consider that at any stage Respondent has not followed the form required or that its submissions need to be clarified, Respondent stands ready to respond and hereby petitions the Arbitral Tribunals for an opportunity (i) to correct any formal discrepancy or (ii) to provide any clarifications that the Arbitral Tribunals may require, if any were to be identified.

...

135. Claimants in Paragraph 73 pretend that their right to be heard will not been guaranteed unless their Application-to-Exclude-National-and-International-Requirement-of-Compliance-with-the-Law-and-Specific-Approval is upheld. As is now clear, Claimants have had ample chance and incentive to submit whatever approvals they obtained. However, should they have ideas about any additional approvals they might have overlooked, they will have had from 21 April 2013 receipt of Respondent’s 19 April 2013 Response to Claimants’ Observations on Respondent’s Rejoinder through 28 October 2013 to think back to that key paper they might have overlooked. The truth is everyone knows, as is discussed in Section 5.2.1.2 above, that Claimants have dug deep into their approval barrel, scrapping up such minute and or extraneous details as they “pay corporate tax,” “pulp waste, coffee effluent and industrial effluent” charges, and have “fire arms certificates.” Were they to have had actual foreign investment approval or even an application for same, there is every reason to conclude that they would have produced it by now.

136. Nevertheless, Respondent does not oppose Claimants making a submission on or before 9 September 2013 in this regard, with Respondent having the possibility to respond 14 days latter [sic], on 23 September under the same conditions agreed between the parties in their Agreed Points Letter of 23 July 2013.” (emphasis added)

25. The Respondent identifies several procedural considerations that it considers relevant to the Tribunals’ disposition of the Application, including the Respondent’s right to have the full record considered without “censorship”, the Claimants’ right to be heard (which, in the Respondent’s view, has already been respected), any unfairness or prejudice to the Claimants of the “on-going ‘approval’ debate” (which the Respondent denies exists) and the Claimants’ ability “to contribute to the debate any further approval item they might have overlooked” (see Respondent’s Reply, paras. 89-138).
26. With respect to the Claimants’ request that the Respondent’s July 4 Letter be disregarded, the Respondent requests that no submission to date be “set aside”, but rather that “each hold its place on the record, as all written exchanges in this arbitration”. The Respondent

reiterates this request in its August 5 Letter with respect to “each of the exchanges and submissions to date” (see Respondent’s August 5 Letter, para. 18).

27. The Respondent notes that as its July 4 Letter reiterates the approval requirements that must be met for the Claimants’ investments to be considered to have been made “in accordance with the law”, as the German and Swiss BIT require, the Claimants have already had another opportunity to submit their observations on this argument in their Application. The Respondent incorporates its July 4 and July 17 Letters into its Reply as exhibits thereto (see Respondent’s Reply, paras. 158-159).
28. The entirety of the Parties’ written submissions, identified above, have been considered by the Tribunals and are incorporated herein by reference without further summary.

IV. ANALYSIS

29. The Arbitral Tribunals begin their analysis by noting that the Hearing in these proceedings is a scant three months away, and has been postponed three times. The Tribunals recall that the first postponement was further to the Parties’ agreement, following the resignation of Professor Peter Mutharika from the Tribunals and the Tribunals’ reconstitution with Professor An Chen in place of Professor Mutharika. The Hearing dates, originally set for 28 May to 2 June 2012, were postponed by approximately nine months to 18-22 February 2013.
30. The second postponement of the Hearing was occasioned by the filing of certain jurisdictional objections by the Respondent, as set out in PO No. 3. The Tribunals found “special circumstances” to exist at that time sufficiently compelling so as to warrant admitting the late-filed jurisdictional challenges, vacating the Hearing dates programmed for 18-22 February 2013 and fixing new time limits for the remaining steps in the proceedings, including new Hearing dates from 10 to 14 June 2013 (see PO No. 3, paras. 50-53).
31. PO No. 3 stipulated that, save as to provisional measures, “permission to file additional submissions must be sought from the Arbitral Tribunals in advance by the party wishing

to file such submissions.” (see PO No. 3, para. 55(i)). This reflected the Tribunals’ intention to ensure that despite the delay caused by the late introduction of jurisdictional objections, the proceedings would progress as efficiently and expeditiously as possible toward a final Hearing.

32. The vacation of the June 2013 Hearing dates, following the resignation of Professor An Chen from the Tribunals on 19 May 2013, required a further postponement of the Hearing to the week of 28 October 2013, almost one and one half years from the date the Hearing was originally scheduled to commence. The Tribunals are unanimously of the view that the matters raised in the Application cannot, under any circumstances, lead to a further postponement of the Hearing of these conjoined cases.

A. The Illegality Objection

33. With this premise in mind, the Tribunals turn now to consideration of the Claimants’ first request, that the so-called “Illegality Objection” be ordered inadmissible and disregarded. The Tribunals understand the Claimants’ position to be that the Illegality Objection was specifically pleaded for the first time in the Rebutter – the last written pleading filed in these proceedings–, thus precluding the Claimants from defending against this Objection. The Claimants acknowledge that the Respondent cited the entirety of Article 9 of the German BIT in its Rejoinder at paragraph 979, but aver that the ensuing argument “draws the reader to the Claimants’ alleged noncompliance with Article 9(b)” (see Application, para. 32). The Claimants also note that there are no references to, let alone argument concerning, Article 2 of the Swiss BIT in the Rejoinder, reasoning that if the Respondent had intended to rely on Article 9(a) of the German BIT it would also have sought to rely on Article 2 of the Swiss BIT (see Application, para. 34).

34. The Tribunals understand the Respondent’s position to be that, whilst the Illegality Objection may not have been expressly pleaded or pleaded with the level of specificity expected by the Claimants until the Rebutter, it was at least foreshadowed and supported by evidence at an earlier stage of the pleadings. Should the Tribunals find this to be inadequate as a foundation for the Illegality Objection, the Respondent petitions the Tribunal for the opportunity to “correct any formal discrepancy or ... provide any

clarifications that the Arbitral Tribunals may require” (see supra at paragraph 24; Respondent’s Reply, para. 88).

35. In its August 5 Letter, the Respondent claims that it stated in paragraph 173 of its Counter-Memorial that it “denied liability as it did not consider itself to be in breach of the German BIT or the Swiss BIT and at that time informed Claimants that they were in violation of Zimbabwe Stock Exchange Rules as to acquisition of Border shares.” (see Respondent’s August 5 Letter”). However, paragraph 173 of the Counter-Memorial, contained in the “Relief Sought” section of the Counter-Memorial, states only as follows:

“The Respondent reiterates that it did not breach any terms of the BITs as was fully explained in relation to the lawful taking. All the declarations sought by the Claimants are therefore opposed.”

36. The Tribunals can find no reference in the Counter-Memorial to the Stock Exchange Rules, let alone an argument pleaded in the nature of a jurisdictional objection on the basis of those Rules. Whatever gloss the Respondent may now wish to impose on this paragraph cannot fill the gaps between the words on the page to transform the portent and meaning of that paragraph.

37. Moreover, it does not appear to be contested that the Respondent only refers to Article 9(a) of the German BIT, in the context of a general quotation of Article 9 of the German BIT, for the first time in its Rejoinder at paragraph 979. Similarly, it does not appear to be contested that a reference to Article 2 of the Swiss BIT only appears for the first time in the Rebutter. Finally, it is also uncontested that the Respondent’s invocation of these provisions is in the nature of a jurisdictional objection. The question remains whether the absence of specificity in pleading and/or the timing in which these objections have been raised render them inadmissible and, if so, whether the Respondent’s alternative plea to cure any defect in its pleading should be granted.

38. Arbitration Rule 41(1) provides that, in principle, jurisdictional objections are to be made as early as possible:

“Rule 41

Preliminary Objections

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.” (emphasis added)

39. Arbitration Rule 26(3), which establishes the procedure for the Tribunal to set time limits for the completion of steps in a proceeding and the potential repercussions of failure to respect those time limits, provides as follows:

“Rule 26

Time Limits

...

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.”

40. Neither Arbitration Rule 41(1) nor Article Rule 26(3) provides any guidance as to what threshold of pleading is required to make out a jurisdictional objection. Setting aside the hyperbole contained in the Respondent’s Reply, the Tribunals agree that arbitral procedure must be flexible enough to accommodate divergent approaches to pleading. However, there are limits to this flexibility. A Party is entitled to know the case it has to meet with a reasonable degree of certainty and within a reasonable time to respond.

41. Arbitration Rule 31(3) establishes the sequence in which the written procedure shall unfold as follows:

“Rule 31

The Written Procedure

...

(3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.”

42. The Summary Minutes of the Joint First Session of the Two Arbitral Tribunals, dated 22 March 2011 (“Summary Minutes”), establish in greater detail the modalities of the written phase, including a schedule for submission of pleadings. The Summary Minutes do not address the level of specificity required in a party’s pleadings* but do provide at paragraph 15.1 that:

“[i]n accordance with the practice in international arbitration, it was agreed at the session that each party shall submit together with its respective pleading all evidence, in whatever form, including written witness statements and expert reports, upon which it relies in support of the respective pleading.”

43. The Summary Minutes also provide at paragraph 15.9 that:

“Introduction by a party of evidentiary materials following the filing of the Reply or Rejoinder respectively, will be permitted only at the discretion of the Tribunal, upon a showing of extraordinary circumstances.”

44. These provisions reinforce the Parties’ agreement, as of an early stage of the proceedings, to each present their case in an orderly manner and within the Tribunals’ overall control of the procedure.

45. It is clear to the Tribunals that the Respondent, in pleading the Illegality Objection, has not adhered strictly to the above provisions of the Arbitration Rules or Summary Minutes, nor to the directions in PO No. 3 relating to new submissions. The Tribunals are nevertheless loathe to declare inadmissible a jurisdictional objection raised (imprecisely) by a sovereign state unless to do so would jeopardize the Tribunals’ starting

* The Claimants’ reference to paragraph 13.3.2 of the Summary Minutes is noted, although this provision appears to address the specificity with which a party refers to a document in a pleading, not the specificity with which a party pleads its case or, for example, the relevance of that document.

premise articulated in paragraph 31 above, that is to result in a postponement of the Hearing of these cases.

46. Article 26(1) of the Arbitration Rules requires that the Tribunals disregard any steps taken after the time for doing so unless “special circumstances” exist. As the Tribunals noted in PO No. 3, the fact of external counsel having been retained at a late date is not, in itself, sufficient to justify a finding of special circumstances (see PO No. 3, para. 50), although it is relevant to the exercise of retrospectively reviewing the pleadings for the point at which certain defences have been pleaded and why defences may not have been timely raised.
47. While not stated expressly in PO No. 3, the Tribunals also consider the jurisdictional nature of the defences the subject of the Application to be a factor in determining whether special circumstances exist. The Tribunals recall the concern expressed by the Claimants regarding the enforceability of any future award in the event the Tribunals had exercised their discretion to exclude the Respondent’s late-raised jurisdictional objections in PO No. 3 (see PO No. 3, paras. 20 and 53). The Tribunals consider that, while not raised as a concern by the Claimants in the present Application, failure to admit the jurisdictional defences, could ultimately jeopardize the enforceability of any award these Tribunals may render.
48. Finally, based on the review the Tribunals have conducted for the purpose of deciding the Application, the so-called Illegality Objection appears to be sufficiently limited in scope that a supplemental written procedure may be accommodated within the remaining timetable without jeopardizing the Hearing dates.
49. It is therefore not without some hesitation that the Tribunals have decided to dismiss the Claimants’ request that the Illegality Objection be ordered inadmissible and disregarded, and grant the Respondent’s petition, subject strictly to the directions set out in Section V below.

B. The Approval Evidence Objection

50. As regards the Claimants' Approval Evidence Objection, the Tribunals understand the Claimants' amended position to be that the witness statement of Mr. Nyaguse, filed as Exhibit R-56 with the Rebuttal, is admissible (although having been filed out of time) but only for the purpose of supporting the Respondent's jurisdictional objections relating to Article 9(b) of the German BIT. As such, it is no longer necessary to consider whether "extraordinary circumstances" exist within the meaning of paragraph 15.9 of the Summary Minutes (see supra paragraph 43).
51. As the Tribunals have dismissed the Claimants' first request, that the Illegality Objection be ordered inadmissible and disregarded, there is also no longer a basis on which to limit the purpose for which Mr. Nyaguse's evidence may be used as proposed by the Claimants in their amended request for relief. Accordingly, the Claimants' amended Approval Evidence Objection (i.e., that Mr. Nyaguse's witness statement only be admitted for the purpose of the Respondent's alleged defence concerning Article 9(b) of the German BIT) is also dismissed.

C. The Request for a Further Written Procedure

52. The Claimants' request for a further written procedure to allow the Claimants to file observations on Mr. Nyaguse's witness statement, together with any supporting evidence, by 9 September 2013, is granted in part, subject to the directions set out in Section V below.

D. The Request that the Respondent's July 4 Letter and Reply not be considered as "Pleadings"

53. As regards the Claimants' request that the Respondent's July 4 Letter and the Respondent's Reply be disregarded, the Tribunals note that the July 4 Letter is stated to be in response to statements made by counsel for the Claimants during the telephone conference of the President of the Tribunals with counsel for the Parties on 21 May 2013 in which the Illegality Objection was foreshadowed. Although no application was made

at that time by the Claimants, it is now apparent that the matters raised in the Respondent's July 4 Letter anticipated the Claimants' formal Application to disallow the Illegality Objection. Notwithstanding that the Claimants seek to exclude the July 4 Letter as a "pleading" in these proceedings, a substantial portion of the Claimants Application is dedicated to responding to the contents of the July 4 Letter (see Application, paras. 76-165).

54. The Tribunals also note that the Respondent does not seek to have its July 4 Letter or Reply stand as formal submissions or pleadings on the merits of the cases but to remain as they are, part of a written exchange on the record (see Respondent's Reply, para. 158; Respondent's August 5 Letter, para. 18).

55. The Tribunals confirm that the Respondent's July 4 Letter is on the record of these proceedings, as is the Claimants' response to the July 4 Letter, but neither constitutes a "pleading" in the sense of those pleadings contemplated by Arbitration Rule 31(1) and the further procedures agreed by the Parties for the conduct of these proceedings. This same reasoning applies in respect of the Parties' exchanges relating to the present Application.

56. Finally, the Tribunals note with some concern the following paragraph from the Respondent's Reply (see Respondent's Reply, para. 191):

"Claimants seem to want to ignore one key procedural reality: the proceedings are not closed and Respondent has every right during the oral phase of proceedings, during both cross-examination and oral argument, to draw the arbitrators' or the witnesses' attention to any document on the record and to draw any conclusion and make any suggested characterisation is wishes to make with respect to any issue related to the file."

57. Whilst it is correct that the proceedings are not closed and that both Parties are entitled to a full and fair hearing of the case, fairness requires that each party know with a reasonable degree of certainty the other party's case in order to respond to it in writing and during the oral procedure. The time limits fixed by the Tribunals in these proceedings and the procedural rules agreed by the Parties are not merely formalities but also serve the important purpose of ensuring the equality of the Parties and a fair

procedure. Accordingly, any “characterisation” that a Party wishes to make with respect to “an issue related to the file” must nonetheless remain within the bounds of what has been pleaded to be in issue. Similarly, no new argument nor any new evidence may be introduced during the oral procedure without the Tribunals’ prior consent.

58. The Tribunals reiterate the imperative stated at the beginning of this Procedural Order, that the Hearing scheduled to commence on 28 October 2013 must proceed as planned, and urge the Parties to direct their energies to preparing, as the Members of the Tribunals must also do, for the Hearing.

V. THE ARBITRAL TRIBUNALS’ DECISIONS

59. Based on the foregoing, the Members of the Arbitral Tribunals have deliberated and decided unanimously as follows:

- (a) The Claimants’ Illegality Objection is dismissed;
- (b) The Claimants’ Approval Evidence Objection is dismissed;
- (c) The Respondent’s petition is granted within the limits of paragraph 60(a) below;
- (d) The Claimants’ request to file observations on Mr. Nyaguse’s witness statement, together with any supporting evidence, by 9 September 2013, is granted in part;
- (e) The Claimants’ request that the Respondent’s July 4 Letter and the Respondent’s Reply not serve as additional pleadings in these proceedings is granted.

60. The Parties are ordered and directed as follows:

- (a) The Respondent shall file no later than 16 August 2013 an addendum to its Rebutter containing a concise statement of its jurisdictional objection on the basis of Article 9(a) of the German BIT and Article 2 of the Swiss BIT, limited to the law and evidence already on the record of these proceedings, and not to exceed 15 pages (the “Re-Rebutter”). In particular, the Re-Rebutter shall include specific references to the Respondent’s relevant pleadings (i.e., the Rejoinder and the Rebutter) and any relevant documents on the record, consistent with paragraph 13.3.2 of the Summary Minutes;
- (b) The Claimants shall file no later than 9 September 2013 their response to the Re-Rebutter and to the Respondent’s jurisdictional objection based on Article 9(b) of the German BIT as pleaded in the Rebutter (“Claimants’ 9 September Response”),

including any responding evidence, the Claimants' response not to exceed 30 pages;

- (c) The Respondent shall file no later than 23 September 2013 any reply to the Claimants' 9 September Response ("Respondent's 23 September Reply"), including reply evidence, the Respondent's Reply not to exceed 10 pages; and
 - (d) The pleadings directed in subparagraphs 60(a) to (c) above shall have numbered paragraphs; spacing shall be 1.5 lines with font no smaller than 11 points.
61. The Tribunals are mindful of the summer holiday period and the short delays within which the above pleadings have been directed to be filed. However, in light of the approaching Hearing dates, this timeline is unavoidable.
62. Any further or other submissions filed with the Tribunals shall be disregarded unless permission is first sought on application from the Tribunals as required by paragraph 55(i) of PO No. 3.
63. There shall be no order as to costs. However, the Tribunals wish to record that the Respondent's failure to adhere to the terms of PO No. 3, which required that the Respondent seek permission to file additional submissions (such as a new jurisdictional objection), shall be considered by the Tribunals in assessing the costs of the Application.

Dated as of 8 August 2013

Signed on behalf of the Arbitral Tribunals



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