

**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)**

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**PROCEDURAL ORDER NO. 13**

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**Members of the Arbitral Tribunals**

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

*Secretary of the Tribunals*  
Aurélia Antonietti

*Assistant to the Tribunals*  
Alison G. FitzGerald

*Representing the Claimants*

Mr. Matthew Coleman  
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. Fortune Chimbaru  
Ms. Elizabeth Sumowah  
Attorney General's Office  
Harare, Republic of Zimbabwe

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

## I. INTRODUCTION

1. On 20 October 2014, the Arbitral Tribunals invited the parties to provide their views on whether a single award or two separate awards should be rendered in these conjoined proceedings. This Procedural Order No. 13 disposes of this question.

## II. PROCEDURAL HISTORY

2. During the Joint First Session of the Arbitral Tribunals with the Parties, on 7 February 2011, the parties and the Tribunals discussed a procedural approach proposed by the Claimants to hear the two cases together subject to a proviso that separate awards shall be rendered at the end of the proceedings (see Minutes of the Joint First Session, , para. 22):

### “Hearing the Cases Together

22.1. It was noted that in their letter of February 4, 2011, the Claimants stated:

‘22.1 Case Bernhard von Pezold & Ors v The Republic of Zimbabwe ICSID Case No. ARB/10/15, and case Border Timbers Limited & Ors v The Republic of Zimbabwe ICSID Case No. ARB/10/25 shall be heard together (but not formally consolidated).

22.2 The Claimants will submit joint pleadings, but will separately address those issues within a pleading where circumstances distinct to particular Claimants and/or a case necessitate separate treatment.

22.3 Each witness statement and expert report shall state whether it applies to one case or the other case.

22.4 The Tribunal shall issue separate awards in relation to each case but may nevertheless discuss these arbitrations in any award or procedural order as a single set of proceedings, except where circumstances distinct to particular Claimants necessitate separate treatment.”

22.2. At the session, it was agreed to follow the procedural approach in the two proceedings as proposed in the Claimants’ letter.’” [emphasis added]

3. As indicated in the excerpt from the Minutes of the Joint First Session, the parties, at that time, agreed to follow the Claimants’ proposed procedural approach.

4. By letter dated 20 October 2014, sent on behalf of the Tribunals by the Tribunals' Secretary, the parties were invited, in their costs submissions, to confirm their respective positions on the matter of whether a single award or separate awards should be rendered.

5. In their Submissions on Costs, dated 1 December 2014, the Claimants confirmed that, in their view, it is "imperative" that separate awards be rendered, submitting as follows:

"The Tribunals requested that the parties confirm whether Item 22.4 of the Summary Minutes of the Joint First Session (i.e., that the Tribunals issue separate awards in relation to each case) is still standing.

64. On 3 November 2014, Steptoe & Johnson wrote to Kimbrough & Associés stating that "[g]iven that the arbitrations were never formally joined, the Claimants have a right to separate awards for each arbitration and will request the Tribunals to act accordingly". There has not been a response to Steptoe's letter. In any event, the Claimants' position is unchanged to that as expressed in Steptoe's letter.

65. Indeed, the issue of separate awards is not only a right in circumstances where there are separate proceedings, but also an imperative in these cases in order to protect the rights of the von Pezold Claimants, i.e. the claimants in ICSID Case No. ARB/10/15. The imperative arises because in the event of a single award, during the enforcement phase cooperation between all of the Claimants would be necessary. Such cooperation is likely to be impossible in the event that the Respondent takes control of the Border Company Claimants, which it may do in order to jeopardise the enforcement of a single award or for other reasons."

6. In their Reply to the Claimants' Submission on Costs and Fees, dated 18 December 2014, the Respondent requested that a single award be rendered in these proceedings, submitting as follows:

"38. Claimants initiated two proceedings, prepared simultaneously yet filed weeks apart, which have been conducted as a single joint proceeding and which should result in a single award.

39. The discussion has taken place in a unified manner, without any clear distinction in issues, briefing or oral argument. Even the Exhibits were unified and not distinguished as between cases. The matters are so intertwined that it is appropriate to resolve all issues as a single award.

40. Given that single-mass nature of submissions, issues and oral debate, there is no reasonably reliable manner to accurately distinguish the quantum of costs and fees in two separate awards.

...".

### **III. DISCUSSION**

7. The Tribunals have considered the parties' respective positions on whether a single award or separate awards should be rendered in these conjoined proceedings.
8. It is important to note that while these two proceedings have been heard together, they have not been formally consolidated. This is reflected in the Minutes of the Joint First Session.
9. The Tribunals also note that the parties have, during the course of the proceedings, abided by their original agreement as reflected in the Minutes of the Joint First Session, by submitting joint pleadings and evidence but indicating, where appropriate, that certain issues apply or relate to one or the other case.
10. While it is true that the matters in issue in these proceedings are intertwined in that they arise from substantially the same events, many of the claims are advanced on different bases and, as such, require separate treatment. Indeed, it may well be that a claim advanced by one set of claimants prevails while the same or a similar claim advanced by the other set of claimants fails or succeeds only in part by reference to the relief sought.
11. Moreover, the Tribunals do not consider it impossible in these cases to reliably distinguish the quantum of costs and fees associated with each case in two separate awards. Indeed, the Claimants have proposed a method of apportioning costs as between the von Pezold Claimants and the Border Company Claimants (see Claimants' Submission on Costs, Section IV). Any difficulty encountered in apportioning costs is not a reason in itself to refuse to render separate awards when so requested by the Claimants.
12. Finally, whether or not rendering separate awards is likely to enhance enforcement of any eventual award(s), from a practical perspective and as a matter of principle, the von Pezold Claimants and the Border Company Claimants, having filed their claims

independent of each another, should also be able to pursue enforcement of any award independent of each other.

#### **IV. THE ARBITRAL TRIBUNALS' DECISIONS**

13. Having deliberated, the Arbitral Tribunals decide as follows:

- (a) a separate award shall be rendered for each proceeding in ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25.

14. There shall be no order as to costs.

Dated as of 23 December 2014

Signed on behalf of the Arbitral Tribunals

A handwritten signature in black ink, appearing to read "L. Yves Fortier". The signature is written in a cursive, flowing style.

The Hon. L. Yves Fortier, P.C., C.C., Q.C.  
President