

**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. 9**

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**Members of the Arbitral Tribunals**

Mr. 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*  
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  
Harare, Republic of Zimbabwe

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

## I. INTRODUCTION

1. On 2 October 2013, the Respondent brought an application in connection with the submissions and evidence that it filed on 9 September 2013 and 26 September 2013 (the “October 2 Application”). Specifically, the Respondent seeks the following relief (see Application, para. 58):

“(i) confirm that all Respondent’s 9 September 2013 submissions are fully on the record and can be relied upon in all regards;

(ii) confirm that all Respondent’s 23 September 2013 Reply, witness statements, authoritative references, legal cases and/or statutory material have been transmitted to the Arbitral Tribunals and are fully on the record;

(iii) confirm that all Respondent’s 9 September 2013 submissions and its 23 September 2013 Reply, witness statements, authoritative references, legal cases and/or Statutory material may be fully argued during the oral phase of these proceedings;

(iv) in particular, confirm that Mr. Moyo’s Fourth Witness Statement (R5080) is fully on the Record and can be relied upon in all regards, in particular its Paragraphs 9(a) and 10 through 15;

(v) in particular, confirm that Mr Onias Masiwa’s Second Witness Statement (R5082) is fully on the record and can be relied upon in all regards;

(vi) in particular, confirm that Mr Grasiyo Nyaguse Second Witness Statement (R5085) is fully on the record and can be relied upon in all regards;

(vii) in particular, confirm that Dr Kanyekanye’s Fourth Witness Statement (R5081) is fully on the record and can be relied upon in all regards, in particular its Page 11 regarding Exchange Control and pages 5, 6, 9, 31 and 32 regarding ZSE Rules;

(viii) in particular, confirm that Dr Kanyekanye’s Fifth Witness Statement (R5093) is fully on the record and can be relied upon in all regards, in particular its Sections D and E;

(ix) authorise Mr Machaya to submit a legal opinion from his Zimbabwe law perspective confirming the content of R5082, R5085, R5093 and Page 11 regarding Exchange Control and pages 5, 6, 9, 31 and 32 regarding ZSE Rules of R5081 and commenting on the two Zimbabwe law documents regarding these Zimbabwe Law issues key to the determination of the BIT access conditions and jurisdiction;

(x) authorise Respondent to submit the Zimbabwe Stock Exchange Act, Chapter 24: 18 of 1973 and the Securities Act, Chapter 24:25 of 2004, as RP097 and as RP098 respectively, to clarify the law applicable to this issue, key to the determination of the BIT access conditions and jurisdiction;

(xi) were the Arbitral Tribunals to consider any of Respondent's September submissions, including those referred to above, not to come within the ambit of Respondent's September 2013 filings, grant this application pursuant to Paragraph 55(i) of PO No. 3, so as to formally submit those documents and to correct the now out dated Request for Relief in Respondent's 14 April 2013 Rebuttal by so amending its pleadings;

(xii) declare the Respondent's pleadings to be amended to conform to the evidence on the record at all times."

2. On 12 October 2013, the Respondent wrote to the Tribunals with a further application (the "October 12 Application"), seeking an order for the following relief (see October 12 Application, para. 10):

"...

Respondent's Request is for a Procedural Order fixing:

(i) Mr Masiwa's R-082 on the record in conjunction with the following,

(ii) Claimants' final opportunity to submit any further approval / illegality exhibits they may have "overlooked," through 10 December 2013 with an unlimited number of pages of accompanying lawyer's pleadings,

(iii) Respondent's right to submit any reply exhibits through 20 December 2013 in response, with a 20-page limit on accompanying lawyer's pleadings,

(iv) Post Hearing Memorials at 15 January 2013, and

(v) Submissions on costs at 31 January 2014."

3. The Arbitral Tribunals have considered the Respondent's October 2 and October 12 Applications and have decided as follows.

## II. PROCEDURAL HISTORY

4. On 6 September 2013, the Secretary of the Tribunals wrote to the Parties on behalf of the Tribunals to confirm the Parties' forthcoming written submissions, including submissions to be filed further to Procedural Order No. 7, dated 8 August 2013 ("PO No. 7"), and to an agreement entered into by the Parties on 22 July 2013 (the "July 22 Agreement"). The July 22 Agreement provided, in relevant part, as follows:

"2. Corrections to Mr Levitt's Damages Calculations

2.1 Respondent does not challenge the admissibility of the updated version of Mr Levitt's corrections to his Second Report (CE-7) and the associated corrected documents submitted on 15 May 2013 including the consequential amendments to Heads of Loss 9, 10 and 13 and the Claimants' request for relief (Mr Coleman addressed these materials to the Arbitral Tribunal by three emails on 15 May 2013). The parties agree that the Respondent shall have a right to respond to Mr Levitt's corrections and the consequential changes and to correct any errors in its own damages calculations, by noon London time on 9 September 2013.

2.2 The Claimants shall have a right to comment on such written response by noon London time on 23 September 2013 (or such later time fourteen days following Claimants' receipt of the entirety of the Respondent's written response should any part be late).

2.3 Further, should the Respondent's written response to Mr Levitt's corrections and the consequential changes or corrections to its own damages calculations go beyond responding to Mr Levitt's corrections and consequential changes or go beyond correcting errors in its own damages calculations, Claimants reserve the right to challenge the admissibility of the Respondent's response, or to respond to any material that is not responsive."

5. On 9 September 2013, the Respondent filed its response to Mr. Levitt's corrections and a Corrected Request for Relief, supported by a third witness statement from Mr. Moyo (R-80) and a fourth witness statement from Mr. Kanyekanye (R-81) further to the Parties' July 22 Agreement ("Respondent's September 9 submission"). In parallel, on this date, the Claimants filed their response to the Respondent's Re-Rebutter further to PO No. 7 ("Claimants' September 9 Response") (see PO No. 7, para. 60).

6. On 22 September 2013, the Respondent brought a “procedural request” in connection with its submission due, further to PO No. 7, on 23 September 2013 in reply to the Claimants’ September 9 Response, submitting that the Claimants had raised new arguments in their Response and the Respondent therefore required additional pages beyond the limit set out in PO No. 7 to address those arguments. The Respondent also reserved its right to bring an application objecting to the Claimants’ alleged new arguments.
7. On 23 September 2013, the Respondent wrote to the Secretary of the Tribunals advising that the Parties had agreed that they would file all submissions presently due on 23 September 2013 within 24 hours of the Arbitral Tribunals’ decision with respect to the Respondent’s procedural request of 22 September 2013.
8. The Tribunals dismissed the Respondent’s procedural request in Procedural Order No. 8, dated 24 September 2013 (“PO No. 8”).
9. On 26 September 2013, the Respondent wrote to the Tribunals noting the content of PO No. 8 and confirming that it did not intend to bring an application to exclude any of the Claimants’ arguments contained in the Claimants’ 9 September Response:

“Respondent in its 22 September 2013 letter, reserved the possibility of objecting to Claimants' new arguments.

Procedural Order No 8 makes any such objection unnecessary as the Tribunal states in Paragraph 16:

“the Respondent is also entitled to make submissions on both law and evidence on the record in respect of these objections during the oral hearing, scheduled to commence on 28 October 2013, and in any post-hearing procedures that may be agreed by the Parties and the Tribunals or decided by the Tribunals.”

Thus, Respondent, satisfied by these means to be heard, confirms that it does not make any application to exclude Claimants' arguments.”
10. On 26 September 2013, further to PO Nos. 7 and 8, the Respondent filed its reply to the Claimants’ September 9 Response (“Respondent’s September 26 Reply”), accompanied by almost two dozen documents, a third witness statement of Mr. Masiwa, a second witness statement of Mr. Nyaguse and a fifth witness statement of Mr. Kanyekanye.

11. Also on 26 September 2013, the Claimants filed their response to the Respondent's September 9 submission, further to the Parties' July 22 Agreement, and objected that certain material filed by the Respondent on September 9 falls outside of the Parties' July 22 Agreement. The Claimants submitted that, apart from those specific references to the Respondent's material identified by the Claimants in their 26 September letter as conforming to the Parties' July 22 Agreement, the Respondent's materials should be disregarded by the Tribunals for failing to accord with the terms of PO Nos. 3 and 7. The Claimants confirmed that they did not respond in their 26 September submission to this material which they consider falls outside of the scope of the Parties' agreement.
12. In an e-mail communication to the Tribunals' Secretary, dated 27 September 2013, the Claimants also objected informally to the filing of the Respondent's September 26 Reply on the grounds that it exceeded the page limitation set out in paragraph 60(c) of PO No. 7. The Claimants requested that the Respondent's submission not be forwarded to the Tribunals and that the Tribunals be advised of the "breach" of PO No. 7 (the "27 September request"). However, on 27 September 2013, the Respondent wrote to the Tribunals, foreshadowing the present Application, requesting a right of reply in the event the Tribunals should entertain the Claimants' informal request.
13. The Claimants withdrew their 27 September request in a further letter to the Tribunals sent on the same day, but reiterated their objections as to the admissibility of the "new defences" allegedly raised by the Respondent in its September 9 submission and in its September 26 Reply, averring that they would only respond during the October 2013 Hearing to those defences and challenges to jurisdiction and admissibility that have been raised in the Respondent's pleadings, in accordance with the ICSID Arbitration Rules ("Arbitration Rules") and the Tribunals' Procedural Orders.
14. On 2 October 2013, the Respondent brought its October 2 Application. Further to the Tribunals' invitation to respond to the Application, the Claimants wrote in opposition to the Application on 2 October 2013 that they repeat the arguments made in their 26 September filing and their 27 September letter, among other submissions. The Claimants further stated their position that:

“... all of the evidence that is on the record is only relevant in so far as it relates to the parties’ respective causes of action, defences and objections to admissibility and jurisdiction as stated in the pleadings (as that term is understood in Arbitration Rule 31). The pleadings must of course be within the limits as required by the Arbitration Rules and the Tribunals’ procedural orders. It is completely unreasonable for the Respondent to continue to allege that its evidence forms the basis of defences and objections that have never been pleaded by it in its pleadings.”

15. Further to the Tribunals’ 4 October 2013 invitation for the Parties to seek to agree the points raised in the October 2 Application and, failing agreement, to identify the basis on which they consider each individual request should be sustained or dismissed, as the case may be, the Claimants wrote to the Tribunals on 8 October 2013 (the “Claimants’ October 8 Letter”) to advise, *inter alia*, of their consent to the admission of certain materials filed with the Respondent’s September 9 submission and September 26 Reply. As regards the Respondent’s September 9 submission, the Claimants identified the particular paragraphs and pages in the submission and accompanying evidence to which they maintained an objection. As regards the Respondent’s September 26 Reply, the Claimants similarly identified particular paragraphs and pages of the reply and accompanying evidence to which they objected, consenting to the admission in its entirety of Mr. Nyaguse’s second witness statement (R-85), as well as the following documents: R-83, R-84, R-85, R-86, R-87, R-88, R-89, R-90, R-91, R-92, R-94, R-95, R-96, RLEX-32, RLEX-33, RLEX-34, RLEX-35, RLEX-36 and RLEX-37.
16. The Claimants’ October 8 Letter also contained a concise summary of the Respondent’s position, the accuracy of which was confirmed by the Respondent in writing on the same day. The Respondent noted, *inter alia*, that the Tribunals’ decision as to R-80, R-81, the Corrected Request for Relief and R-82 and R-93 must be analysed separately as they relate to issues that pertain to jurisdiction.
17. On 9 October 2013, the Claimants and the Respondent each submitted a completed “Redfern Schedule”, as directed by the Tribunals, identifying the basis on which the Respondent’s procedural requests (“PRs”) should be granted or denied. The Respondent also submitted a Procedural Statement from Prince Machaya in support of the

Respondent's PR (ix) and PR (x), alleging the existence of exceptional circumstances so as to justify the submission of a further witness statement from Prince Machaya on a discrete aspect of Zimbabwean law.

18. On 11 October 2013, the Chairman of the Tribunals held a telephone conference with the Parties during which the Parties were invited to, and did, make extensive oral representations in respect of each of the requests contained in the Application (the "October 11 telephone conference"). This telephone conference was recorded and transcribed ("Tr. Uncorrected"). The audio recording and the transcript were subsequently provided to the Parties and the Tribunals.
19. On 12 October 2013, the Respondent submitted its further Application. This Application focuses primarily on those aspects of the October 2 Application relating to the admission of the Respondent's jurisdictional defences based on the alleged illegality of the Claimants' investments. The Respondent summarized, from its perspective, the points remaining to be decided following the October 11 telephone conference, as follows:

"4) Thus, following an initial "explosion" on the part of Claimants to "exclude" all of Respondent's submissions, other than R--80 (Mr Moyo – discussion as to damages) and R--81 (Dr Kanye Kanye – discussion as to ZSE and Exchange Control Regulations), there is, in effect, only one question left for the Arbitral Tribunals to decide, that stated in Section 6.2 of R--079, Respondent's 29 July 2013 letter: "To Remove and forget --or not to Remove and forget -- discussion of Exchange Control Regulations ? » In support of the Procedural Requests set out in Paragraph 10) below, Respondent reiterates Section 6.2 of R--079. That question underlies Claimants' 26 and 27 September 2013 procedural "explosion" which is now focussed on the procedural fate of R--082 (Masiwa) and, to a lesser degree, Respondent's Corrected Request for Relief." [emphasis Respondent's]

20. The Respondent also recalled the following points which emerged from the October 11 telephone conference:

"6) The Chairman of the Arbitral Tribunals made clear the duty of the Arbitral Tribunals to ensure both the Respondent's, but no less the Claimants' respective rights to be heard.

7) All parties, including the Respondent, see no reason to postpone Oral Hearings. Respondent writes this Procedural Request with that in mind and with the goal of finding a resourceful solution not unlike that which all parties reached during the 11 October 2013 telephonic conference with respect to Respondent's Requests "ix" and "x."

21. The Respondent stated, in the context of ensuring the Claimants' right to be heard, that there remains a single issue to be decided: the impact of the Exchange Control Regulations on the approval/illegality debate. In this regard, the Respondent cautioned the Tribunals as follows:

"9) The Arbitral Tribunals must not forget that the question of approvals has given rise to at least eight (8) written submissions by Claimants: (i) Urgent Application of 20 December 2013, (ii) 31 December 2012 letter, (iii) 301 pages of 1 March 2013 Surrejoinder, (iv) Mr Coleman's remark "for the record" at the close of the 21 May 2013 telephonic conference, (v) 18 July 2013 Application ... Illegality and Approval Evidence, (vi) 9 September 2013 Response ... approval and Illegality, (vii) Mr Paul's witness statement, C--879 and (viii) C--585, among the most recent and the most important, on which Claimants' found their case both as to approval and legality. Claimants have thus written about "approv" at least 284 times, since Respondent's 14 December 2013 Rejoinder, yet they find it inappropriate for Respondent's expert on this question, Mr Masiwa, to disagree with their conclusion that "only one of their transactions was within the ambit of the Exchange Control Regulations." Disagreement in a contradictory debate is not unusual; what is extraordinary here is that Claimants are attempting to persuade the Arbitral Tribunals to muzzle the Respondent on Exchange Control Regulations and the legal consequence of the absence of relevant "approvals" on the outcome of this arbitration. It must also be recalled that Respondent has "invited" or even "challenged" Claimants to submit any approvals they may have "overlooked", such as in Section 5.4 of Respondent 29 July 2013 letter, R-079." [footnotes omitted]

22. The Tribunals invited the Claimants to respond to the Respondent's October 12 Application. On 13 October 2013, the Claimants wrote to the Tribunals characterising the Respondent's October 12 Application as "abusive" and seeking its dismissal. As regards the Respondent's reliance on a 29 July 2013 letter, the Claimants averred that such letter does not raise the wide jurisdictional challenges regarding the alleged breach of the Exchange Control Regulations raised in the Respondent's September 26 Reply, insisting that such challenges were only made for the first time in the Respondent's 26 September Reply (the "Claimants' October 13 Letter"). Specifically, the Claimants stated as follows (see Claimants' October 13 Letter, paras. 4-6):

“4. In paras 146 and 147 of Section 6.2 of R-79, the Respondent merely makes limited allegations regarding s17 of the 1996 Regulations and its alleged relationship to the ZSE Rules, i.e. the same limited allegations that it made in its Re-Rebutter. Therefore the Respondent is simply wrong when it states in para 4 of its 12 October letter that it is now only requesting through its 26 September 2013 pleading and evidence that there is "only one question left for the Arbitral Tribunals to decide [, which is 1 that stated in Section 6.2 of R-079". It is unacceptable for the Respondent to continue to engage in obfuscation as to what it has done in the past and what it intends to do in the future.

5. In any event, after R-79 was filed, the Respondent was granted, by way of P.O. No. 7, one further opportunity to file a pleading by 16 August 2013 (the Re-Rebutter) in order to state its final case regarding Illegality. It now admits that it failed to do so. Moreover, its Approval Objection was to remain confined to that as pleaded in the Rebutter, which did not raise the wide ranging objection concerning exchange control.

6. The Respondent in its 12 October letter ignores the fundamental issue, which is that the Respondent never pleaded in its pleadings (or indeed stated in its witness statements) before 26 September 2013, the wide jurisdictional challenge regarding the alleged breach of the Exchange Control Regulations and how it may affect the Approval and Illegality Objections. Once again the Respondent seeks a further opportunity to do so by essentially requesting that Mr Masiwa's Third Statement (filed on 26 September 2013) is read as a pleading, and that the Claimants plead to it after the oral hearing, with the Respondent putting in a further round of pleading in response. Although the parties agreed to post-hearing submissions in para 7.1 of their letter of 8 October 2013 (which has been provided to the Tribunals), they did not agree to a further round of pleadings after the oral hearing. It simply will not do for the Respondent to continue to flout the agreements it enters into with the Claimants and the Procedural Orders of the Tribunals. It is obvious to the Claimants that the Respondent will not comply with the new procedural timetable it suggests and which the Claimants oppose.”

23. The Claimants summarized their position as follows (see Claimants' October 13 Letter, para. 12):

“12. In summary, the reasons stated by the Respondent do not establish the exceptional circumstances which it must establish in order to plead additional objections to jurisdiction out of time. Furthermore, the timetable proposed by the Respondent does not address the concerns regarding time that the Claimants indicated would arise if the Respondent was permitted to make its new wide ranging allegations regarding exchange control. It is an enormous task to review, from an exchange control perspective, each and every acquisition that has been made into the Estates over the period 1988 to 2007, if indeed the records remain available. The fact that the Claimants even address the proposed timetable submitted by the Respondent for a further round of pleadings should not be read as any willingness on their part to concede to a further round of pleadings.”

24. Also on 13 October 2013, following the communication by the Claimants of their response to the Respondent’s October 12 Application, the Respondent wrote to the Secretary of the Tribunals by e-mail seeking to respond to the Claimants’ October 13 Letter:

“Respondent would like to respond to Claimants' strongly worded letter regarding Respondent's 12 October 2013 procedural request and time is short. However, as this communication has not been solicited by the Arbitral Tribunals, please do not forward it to them without first seeking their view as to whether they accept to receive this letter. Claimants are receiving copy of this email and the attached letter.”

25. On 14 October 2013, the Secretary of the Tribunals informed the Parties of the Tribunals’ decision that they were sufficiently briefed and that no further submissions were necessary.

### **III. DISCUSSION & ANALYSIS**

#### **A. The October 2 Application**

26. During the October 11 telephone conference, the Chairman of the Tribunals recalled several key provisions of the Tribunals’ Procedural Orders issued to date, in particular Procedural Order No. 3, dated 11 January 2013 (“PO No. 3”), PO No. 7, and PO No. 8. The Tribunals shall not repeat each of these provisions here, save, for emphasis, paragraph 55(i) of PO No. 3, which states 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”. This is reinforced in paragraph 62 of PO No. 7.

27. The Tribunals shall address each PR contained in the October 2 Application in turn, with the exception of several PRs that are logically related and should therefore be addressed together.

**1. PRs (i), (iv) and (vii)**

28. PRs (i), (iv) and (vii) relate to the Respondent’s September 9 submission and accompanying evidence, which the Claimants contend contain material beyond the scope of the Parties July 22 Agreement and/or were raised out of time according to Arbitration Rule 31(3).

**(a) PR (iv) – Mr. Moyo’s Third Witness Statement**

29. Having reviewed the Parties’ July 22 Agreement and the allegedly offending paragraphs of Mr. Moyo’s third witness statement, the Tribunals have determined that, while not strictly in all cases within the boundaries of paragraph 2.1 of the July 22 Agreement, Mr. Moyo’s witness statement appears to be aimed primarily at responding to Mr. Levitt’s corrections and to correcting any errors in the Respondent’s own damages calculations. The Tribunals consider that the latter entitlement may reasonably include addressing omissions and, within limits, disputes as to what constitutes an “error” in the Respondent’s calculations. In the circumstances, the Tribunals have determined that it is preferable to admit Mr. Moyo’s third witness statement and, acknowledging that some of Mr. Moyo’s statements may require a response from the Claimants’ damages expert, allocate an additional period of time to the Claimants to address such matters arising out of Mr. Moyo’s third witness statement as may need to be addressed with Mr. Levitt on direct examination during the October 2013 Hearing. This additional time shall be fixed by the Tribunals following a hearing of the parties’ positions during the pre-hearing teleconference scheduled to take place on 16 October 2013.

30. Based on the foregoing, PR (iv) is granted.

**(b) PR (vii) – Mr. Kanyekanye’s Fourth Witness Statement**

31. As regards Mr. Kanyekanye’s fourth witness statement, the Tribunals note that this statement appears to address both damages and the Respondent’s illegality arguments, although there does not appear to be a clear division of these issues in the statement. The Claimants’ Redfern Schedule response to PR (vii) states, in relevant part, as follows:

“The wording of the Respondent’s request is such that particularly those sections of Mr Kanyekanye’s Fourth Witness Statement that address exchange control and the ZSE Rules are to be relied upon by the Respondent. The Claimants note that such issues are entirely irrelevant to responding to Mr Levitt’s corrections or to correcting Mr Kanyekanye’s damages calculation. Mr Kanyekanye’s Fourth Witness Statement was not an opportunity for the Respondent to make further pleadings on the issue of illegality.”

32. While the Tribunals consider that portions of Mr. Kanyekanye’s fourth witness statement can be considered, on a generous interpretation of the Parties’ July 22 Agreement, to be within the boundaries of that Agreement, portions of Mr. Kanyekanye’s fourth witness statement are clearly not related to damages but to the Respondent’s illegality arguments. As explained in paragraphs 47 to 55 below, the Tribunals have determined that the Respondent’s expanded illegality arguments, as pleaded in its September 26 Reply, are inadmissible.

33. Mr. Kanyekanye’s fourth witness statement, which runs 32 pages in length, does not contain paragraph numbers which would allow the Tribunal to identify with greater precision which portions of his statement are admissible and which are not. Accordingly, the Tribunals direct that any and all material in Mr. Kanyekanye’s fourth witness statement which relates (i) to damages is admissible and (ii) to the Respondent’s illegality arguments is inadmissible. As with respect to Mr. Moyo’s third witness statement, the Claimants shall be allocated an additional period of time to address such matters arising out of Mr. Kanyekanye’s fourth witness statement relating to damages as may need to be addressed with Mr. Levitt on direct examination during the October 2013 Hearing.

34. Based on the foregoing, PR (vii) is dismissed.

**(c) PR (i) – Corrected Request for Relief**

35. As regards the Respondent’s defences relating to distress and *force majeure*, pleaded or otherwise identified in the Corrected Request for Relief filed by the Respondent on 9 September 2013, the Tribunals find that such defences were not properly pleaded by the Respondent in accordance with the Arbitration Rules, the Tribunals’ Procedural Orders or the Parties’ own agreements before their identification in the Corrected Request for Relief, as evidenced by the Respondent’s inability in its October 2 Application or its Redfern Schedule, or during the October 11 telephone conference, to refer the Tribunals to any place in the record where the arguments of distress and/or *force majeure* have been pleaded with sufficient precision so as to understand that there was a case to be met in respect of these defences.

36. The Tribunals refer in particular to Section 1.7 of the Respondent’s October 2 Application, which contains the Respondent’s most extensive submissions in connection with its Corrected Request for Relief as it relates to the defences of distress and *force majeure*. The Respondent states that the inclusion of distress in the Corrected Request for Relief is “founded on numerous passages of the Rejoinder” and that a “substantial number of pages of the Rejoinder and Rebutter concern” the following: “public purpose”, “mobs”, “fires” and “fire” “as in firing guns on the population”, “emergenc(y)(ies)”, “inva(de)(sion)(s)”, “War”, and “ineluctabl(e)(y).” Yet, the Respondent does not point to a single place in the record where the Respondent has pleaded distress as a defence to the Claimants’ claim. Rather, the Respondent takes the position that “both the facts and the law are on the record and the task of legal characterisation of the file is upon the Arbitral Tribunal”. The Respondent, in effect, admits that any facts and law that would support a defence of distress have been on the record since at least December 2012, yet distress has not been pleaded or, put another way, these facts and law have not been legally characterised as constituting “distress”

before the Respondent's Corrected Request for Relief. No new evidence is identified that could justify pleading distress at such a late stage of the proceedings.

37. The Respondent takes the same position with respect to its defence of *force majeure*, submitting that “[t]hese issues have been under serious discussion in this case”. The Respondent points to what it considers to be “expressions of *force majeure*” in the Rejoinder and the Rebutter, such as “uncontainable”, spontaneous”, unavoidable”, uncontrollable”, slaughter”, mob(s)”, “massacre(s)”, among other expressions, upon which the Corrected Request for Relief is founded. The Respondent submits that (see October 2 Application, para. 32):

“[t]his is the vocabulary of force majeure and Respondent maintains the position developed in Sections 4.3 and 7 of Respondent's 29 July 2013 (R-079) that the Arbitral Tribunals must give the proper legal characterisation to the full record before it. The question here is not about procedural “surprise” or “October work schedule” but about the proper legal characterisation directly affecting the outcome of this arbitration.”

38. As with its defence of distress, the Respondent effectively admits that any facts and law that would support a defence of *force majeure* have been on the record since at least December 2012, yet *force majeure* has not been pleaded or, put another way, these facts and law have not been legally characterised as constituting “*force majeure*” before the Respondent's Corrected Request for Relief. No new evidence is identified that could justify pleading *force majeure* at such a late stage of the proceedings.
39. The Tribunals note that the Respondent has had ample opportunity to plead these defences. In addition to its Counter-Memorial and Rejoinder, where any defences based on distress or *force majeure* should have been pleaded and with sufficient specificity to understand, objectively, that such defences have been raised, the Respondent was permitted, pursuant to PO No. 3 and PO No. 7, to submit additional written submissions on 19 April 2013 (the Rebutter) and 16 August 2013 (the Re-Rebutter) in connection with two rounds of late-raised jurisdictional objections, which the Tribunals admitted into these proceedings.

40. It is not sufficient for the purposes of Rule 31(3) of the Arbitration Rules to simply invoke vocabulary that, in the eyes of the Party invoking the vocabulary, is evocative of a legal defence not actually pleaded. Nor is it a sufficient answer to state that this late pleading of the defences of distress and *force majeure* (see Tr. Uncorrected, p. 19):

“... is simply as written throughout the papers this summer a notion of cases ripening, of people understanding the consequences of what has been already documented and proven and it’s something that is clearly without this document is clearly a legal debate that could take place including during oral argument.”

41. The Tribunals recall the guidance provided to the Parties in PO No. 7 at paragraph 57:

“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 Tribunal’s prior consent.”

42. Based on the foregoing, the Tribunals find that the Respondent’s defences of distress and *force majeure*, pleaded in the Corrected Request for Relief, are raised out of time in breach of Arbitration Rule 31(3), paragraph 55(i) of PO No. 3 and paragraph 62 of PO No. 7. Furthermore, the Tribunals do not find any “special circumstances” within the meaning of Arbitration Rule 26(3) so as to warrant their admission at this stage of the proceedings.

43. Accordingly, PR (i), as it relates to the Respondent’s Corrected Request for Relief and, in particular, the Respondent’s pleading of the defences of distress and *force majeure*, is dismissed.

**2. PRs (ii), (v), (vi), (viii), (ix) and (x)**

44. PRs (ii), (v), (vi), (viii), (ix) and (x) all appear to relate to the Respondent's 26 September Reply and accompanying evidence, which the Claimants contend contain material beyond the scope permitted by PO No. 7 and/or raised out of time according to Arbitration Rules 31(3) and 41(1), among other procedural rules.

**(a) PR (vi) – Mr. Nyaguse's Second Witness Statement**

45. The Tribunals note at the outset that PR (vi), relating to Mr. Nyaguse's second witness statement, is agreed (see Claimants' Redfern schedule, p. 5; Respondent's Redfern schedule, p.6; Tr. Uncorrected, p. 63).

46. Accordingly, PR (vi) is granted.

**(b) PR (ii) – Respondent's 26 September Reply relating to Illegality**

47. PR (ii) relates, broadly speaking, to the admission of argument and evidence concerning the legality of the Claimants' investments. The Respondent takes the position that the issue of "approvals" has been "on the table" since December 2012, when it filed its Rejoinder, which included certain objections to jurisdiction. The Respondent suggests that the materials to which the Claimants object simply reflect a ripening of the case and that they do not raise any issues of surprise. Moreover, the Respondent submits that as the Claimants bear the burden of demonstrating jurisdiction, it was for the Claimants to bring all evidence potentially relevant to the issue of approval of their investments and/or their illegality and to have done so by their 1 March 2013 pleading (see Tr. Uncorrected, pp. 18-22).

48. The Claimants reject the premise that the illegality arguments raised by the Respondent in its September 26 Reply and accompanying materials have previously been raised, arguing that the Respondent extensively expands its illegality and approval objections in this submission. The Claimants stated their position as follows (see Redfern Schedule, p. 3):

“The Claimants object to all of paras 25 and 26 of the Respondent’s 23 September 2013 Reply. They also object to some parts of paras 15, and 27. The objections are made on the basis that the Respondent raises new challenges to jurisdiction/admissibility in those paragraphs. In particular, it alleges that none of the Claimants’ investments in the three Estates comply with the 1977 or the 1996 Exchange Control Regulations (“the Exchange Control Regulations”), i.e. it extensively expands the Illegality and Approval Objections. In particular, in the Re-Rebutter the Respondent only alleged that the 2003 investment into Border breached the 1996 Regulations by reason of the ZSE free float rule being breached, and that the Forrester Loans breached an unidentified regulation of the 1996 Regulations, and directive RE277 (the Claimants’ in their 9 September 2013 Response carefully analysed the content of the Re-Rebutter). The Rebutter did not allege any breach of the Exchange Control Regulations in support of the Approval Objection. The expansion of the Respondent’s argument is extensive, because in effect it covers each and every share purchase, between the period 1988 and 2005 that the von Pezold’s made in the Zimbabwean Companies that make up the three Estates. In addition, it greatly expands upon those parts of the Exchange Control Regulations which it alleges are breached (previously it limited itself to s17 of the 1996 Regulations, which it mistakenly considers to refer to the ZSE free float rule). It would take several months to analyse each of those purchases and collate the necessary evidence to respond. If it had been raised in the Re-Rebutter of 15 August 2013, the Claimants would have responded to it, but would have required an extension.”

49. The Tribunals also note the following summary of the Claimants’ position as to the effect of introducing the arguments and evidence the subject of PR (ii) at this stage of the proceedings (see Claimants’ 9 October Redfern Schedule, p. 3):

“The Claimants object to all of paras 25 and 26 of the Respondent’s 23 September 2013 Reply. They also object to some parts of paras 15, and 27. The objections are made on the basis that the Respondent raises new challenges to jurisdiction/admissibility in those paragraphs. In particular, it alleges that none of the Claimants’ investments in the three Estates comply with the 1977 or the 1996 Exchange Control Regulations (“the Exchange Control Regulations”), i.e. it extensively expands the Illegality and Approval Objections. In particular, in the Re-Rebutter the Respondent only alleged that the 2003 investment into Border breached the 1996 Regulations by reason of the ZSE free float rule being breached, and that the Forrester Loans breached an unidentified regulation of the 1996 Regulations, and directive RE277 (the Claimants’ in their 9 September 2013 Response carefully analysed the content of the Re-Rebutter). The Rebutter did not allege any breach of the Exchange Control Regulations in support of the Approval Objection. The expansion of the Respondent’s argument is extensive, because in effect it covers each and every share purchase, between the period 1988 and 2005 that the von Pezold’s made in the Zimbabwean Companies that make up the three Estates. In addition, it greatly expands upon those parts of the Exchange Control Regulations which it alleges are breached (previously it limited itself to s17 of the 1996 Regulations, which it mistakenly considers to refer to the ZSE free float rules). It would take several months to analyse each of those purchases and collate the necessary evidence to respond. If it had been raised in the Re-Rebutter of 15 August 2013, the Claimants would have responded to it, but would have required an extension.” [emphasis added]

50. The Claimants further explained as follows during the October 11 telephone conference in response to the Respondent’s position that the question of approvals has been “on the table” for nine months, since 14 December 2012, when it was raised in the Respondent’s Rejoinder (see Tr. Uncorrected, pp. 23-26):

“Mr. Fortier: Okay. Mr. Coleman, would you please reply to what Mr. Kimbrough’s main submission is, that this information has, in fact, been in your hands since December, 2012.

Matthew Coleman: Yes, certainly. Well December 2012 is the date that the rejoinder is filed. And with the rejoinder comes from the first allegation that approval is needed. No approval procedure is set out.

And secondly, there is no allegation regarding illegality. So that point we're not answering anything in illegality. We then get the rebutter, which says that the approval procedure is that as set out by Mr. [sounds like: Nigussi], which is appearing before the foreign investment committee and [UI] the investment committee formed under the 1993 act. And then he also says that you may need to get permission from the reserve bank if you engage the exchange control regulations and you may also need to appear before the review committee. And then in that pleading in the rebutter, there is an allegation regarding illegality. But the allegation regarding illegality is simply that the failure to appear before the foreign investment committee or its successor, the investment committee, makes the investment illegal.

The next point is a very important point. There is no allegation in the rebutter that the exchange control regulations have been breached. In particular, there is no allegation that each and every purchase into the 3 estates is a breach of either the 1977 and 1996 exchange control regulations. We then get the re-rebutter, which, of course, is the result of procedural order number 7 where the respondent is asked to give a concise statement as to illegality. And it does so, and it does so in the following terms. And I'll set out what [UI] in relation to each of the 3 estates, Forester, Border and McCandy.

First, in relation to Forester, it says the investment is illegal because no permission was obtained from the foreign investment committee. It also says that the loans are illegal because they breach some unidentified provision of the 1996 regulations and a further provision which we've never been provided, which is RE277, which we believe may be a directive of the reserve bank. But there is certainly no allegation that the purchases of shares in regard to Forester breach the exchange control regulations.

Moving on to the Border estate, they say that the illegality arises because we failed to appear before the foreign investment committee or the investment committee. And then there is a very limited allegation in regard to the 1996 exchange control regulations. And the allegation of breach in regard to those regulations is they say that in 2003 when we made a further investment, we breached the 1996 exchange control regulations because we did not follow the free float rule as set by the Zimbabwe stock exchange. There's absolutely no other allegation regarding breaches of the exchange control regulations in relation to Border for any of the purchases that were made from 1992 up to 2007.

Moving on to the last estate, the McCandy estate, the only allegation there is that the illegality has been caused by a failure to get permission under the 1993 act; in other words, the investment committee. No allegation saying that the purchase of shares breached the 1996 regulations.

We then move on the latest pleading, which was filed pursuant to procedural order number 7, which is the 23 September 2013 pleading, in fact, filed on 26, 2013 with the agreement of the parties. And this is where the case is greatly expanded and one that's never been made before. And the expansion is that they now say that each and every purchase in all 3 of the estates over a period covering 1988 through to 2007 now breaches the 1977 and 1996 regulations.

There is no specific allegation identifying which specific purchases may have breached and for what reason, it is simply a global challenge. And that greatly expands the case. It's one we've never been asked to answer before, and to do so, we would need to go through each and every share purchase over a 25 year period. We would need to consider the regulations, which are somewhat complex, and then form a position on it. We haven't done so because we haven't been asked to do so.

So when Mr. Kimbrough says it's always been on the table, it simply hasn't been on the table in terms of the pleadings. In terms of our objection, while the basis of the objection is rule 313, it's a non-responsive pleading, 263, it's out of time and because it's a jurisdiction challenge, it's also out of time under 411. [UI simultaneous conversation] my submission on that particular point."

51. The Tribunals find the Claimants' chronology as to the Respondent's jurisdictional objections relating to approvals and illegality to be clear and consonant with the Tribunals' own review of the files. This expansion of the Respondent's jurisdictional objections was done in breach of the Tribunals' Procedural Orders, in particular paragraph 55(i) of PO No. 3 and paragraph 62 of PO No. 7, as well as Arbitration Rules 31(3) and 41(1). The Tribunals do not find "special circumstances" to exist under Arbitration Rule 26(3) to warrant the admission of these expanded defences at this late stage of the proceedings.
52. The Tribunals recall again that the Respondent has been afforded ample opportunities to plead its case, including any objections to jurisdiction, as summarized by the Tribunals in PO No. 8:

“14. The Respondent has been afforded ample opportunity to present its case and to defend the Claimants’ claims. In Procedural Order No. 3, the Respondent’s challenges to jurisdiction, as pleaded for the first time in the Rejoinder, were admitted. In Procedural Order No. 7, the Respondent was permitted to raise additional jurisdictional objections at an even later stage of the proceedings, was given an opportunity to present those objections cogently in a supplemental pleading to its Rebuttal, and was given a right of reply to the Claimants’ 9 September Response. ...”.

53. The Respondent appears to invoke Arbitration Rule 38(2), at least conceptually (as the proceedings are not yet closed), in support of its position that “[c]onfirmation, one month before oral proceedings, of Respondent’s synthesis of its arguments to date is much less intrusive than Rule 38(2), which would be justified given the decisive nature of the access conditions (see October 2 Application, paras. 34-35). Arbitration Rule 38(2) provides as follows:

“Rule 38  
Closure of the Proceeding

- (1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
- (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.”

54. Arbitration Rule 38(2) relates, however, to the emergence of “new evidence” after the closure of a proceeding on the basis of which a Tribunal would be justified in re-opening the proceeding after it had been declared closed. This is not the case with respect to the Respondent’s expanded illegality arguments. These arguments do not spring from evidence that has recently come to light such that the Respondent could not, at an earlier stage of the proceedings, have raised and pleaded its objections within the time required according to the Arbitration Rules and the Tribunal’s Procedural Orders. Accordingly, Arbitration Rule 38(2) cannot assist the Respondent in respect of the admissibility of the expanded illegality objections.
55. Based on the foregoing, PR (ii) is dismissed, save in respect of those documents to which the admission on to the record the Claimants consent, those being R-83, R-84, R-85, R-

86, R-87, R-88, R-89, R-90, R-91, R-92, R-94, R-95, R-96, RLEX-32, RLEX-33, RLEX-34, RLEX-35, RLEX-36 and R-LEX-37 (see Claimants 8 October 2013, p. 4).

**(c) PR (v) - Mr. Masiwa's Second Witness Statement**

56. As regards Mr. Masiwa's second witness statement, consistent with the Tribunals' decision above relating to the inadmissibility of the Respondent's expanded illegality arguments, paragraphs 2, 3, 4, 8, 9, 10 and 11 of Mr. Masiwa's second witness statement are not admissible. Paragraphs 5, 6 and 7 are admissible only insofar as they do not relate to the Respondent's expanded illegality arguments.

57. For the same reasons as articulated above in respect of PR (ii), the Tribunals dismiss PR (v).

**(d) PR (viii) – Mr. Kanyekanye's Fifth Witness Statement**

58. As regards Mr. Kanyekanye's fifth witness statement, the one paragraph to which the Claimants object, paragraph 5 on page 3, relates directly to material in Mr. Kanyekanye's fourth witness statement, which the Tribunals have determined is not admissible on the ground that it relates to illegality.

59. Accordingly, the Tribunals also dismiss PR (viii).

**(e) PRs (ix) and (x) – Prince Machaya's Second Witness Statement and ZSE Act/Securities Act**

60. As regards PR (ix) and PR (x), the Tribunals first note that Prince Machaya's statement submitted by the Respondent on 10 October 2013, together with the Respondent's Redfern Schedule, is on the record. The Tribunals further confirm the agreement reached between the Parties during the October 11 telephone conference, as amended by the decisions contained in the present Procedural Order, that Prince Machaya shall be permitted to confirm orally, during direct examination at the October 2013 Hearing, the content of Mr. Nyaguse's second witness statement. For greater certainty, Mr.

Machaya's oral evidence shall not extend to the confirmation of the second witness statement of Mr. Masiwa and/or to the fifth witness statement of Mr. Kanyekanye, the content of which as they relate to issues of illegality has been found inadmissible.

61. The Tribunals also note the Parties' agreement that the documents referred to in PR (x), being the Zimbabwe Stock Exchange Act, c. 24: 18 of 1973 and the Securities Act, c. 24:25 of 2004, may be admitted.

62. Accordingly, PR (ix) is dismissed and PR (x) is granted.

*(f) PRs (xi), (xii) and (xiii) – Other Requests*

63. The Respondent's final three procedural requests are related and, consistent with the Chairman's discussion with the Parties during the October 11 telephone conference, shall be dealt with together (see Tr. Uncorrected, pp. 58, 60).

64. The crux of the Respondent's position in respect of these PRs appears to be the following, at least as regards its jurisdictional objections (see Tr. Uncorrected, p. 58):

“On the items of jurisdiction, we have, when I wrote this, we had an objection that it didn't come out of the mouth of the right person so we ask to be able to have the right person speak. We've resolved that to respondent's satisfaction in the arrangement of just doing that at oral argument, that's fine. With respect to the other items, if the debate is whether a certain writing on September 9 does or does not fall into the category of being responsive to what the 22 July procedural agreement was for reasons of interpretation, we ask that it's not because of what piece of paper it was written on, it's because of the idea which is known to all that is directly related to jurisdiction that we wish the record to be uncensored. And so perhaps this is something that we can just put, you know, it's noted until further confirmation but it's important. And so we don't want to get tricked by a question of form in being able to have the right to be heard on the essential elements of jurisdiction. And so that's the purpose of that paragraph.”

65. The Claimants rely on paragraphs 57 and 62 of PO 7, among other principles, in support of their position that these PRs should also be denied.

66. During the October 11 telephone conference, the Chairman of the Tribunals reiterated that the Respondent would need to satisfy the Tribunals that exceptional or special

circumstances exist so as to justify the relief requested. In all the circumstances, and as discussed above, the Tribunals do not find any special or exceptional circumstances to exist so as to warrant granting the relief requested in the final three PRs.

67. Accordingly, PRs, (xi), (xii) and (xiii) are dismissed.

#### **B. The October 12 Application**

68. Although the Respondent's October 12 Application enumerates five grounds for relief, the Tribunals understand the first enumerated ground, (i), to be the Respondent's primary request for relief, the remaining four requests being subsidiary to and flowing from the first request. As the Tribunals have dismissed PR (ii) and PR (v) of the Respondent's October 2 Application, the Respondent's primary request for relief, that Mr Masiiwa's R-082 be fixed on the record, is moot. For greater certainty, the Tribunals find no basis in the Respondent's October 12 Application on which to reverse or reconsider its decision in respect of PR (v) of the October Application.

69. Accordingly, the respondent October 12 Application is dismissed.

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

70. Based on the foregoing, the Arbitral Tribunals have decided as follows with regard to the Respondent's October 2 Application:

- (a) PR (i) is granted in part and dismissed in part:
  - (i) Mr. Moyo's third witness statement (R-80) is admitted in its entirety, subject to paragraph 70(a)(iii) below;
  - (ii) Those portions of Mr. Kanyekanye's fourth witness statement (R-81) that relate to damages and, in particular, Mr. Kanyekanye's response to Mr. Levitt's corrections and corrections to the Respondent's damages calculations, are admitted; those portions of Mr. Kanyekanye's fourth witness statement relating to the Respondent's illegality objections are excluded; all of the foregoing subject to paragraph 70(a)(iii) below;

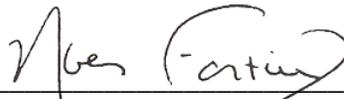
- (iii) The Claimants shall be entitled to additional time to address in direct examination of Mr. Levitt any of the matters addressed in R-80 and R-81, the amount of which time shall be fixed by the Tribunals following the pre-Hearing teleconference of 16 October 2013;
- (iv) The Respondent's request regarding its Corrected Request for Relief, specifically the admissibility of its arguments relating to "distress" and force majeure", is dismissed;
- (b) PR (ii) is dismissed save that R-83, R-84, R-85, R-86, R-87, R-88, R-89, R-90, R-91, R-92, R-94, R-95, R-96, RLEX-32, RLEX-33, RLEX-34, RLEX-35, RLEX-36 and RLEX-37 are admissible;
- (c) PR (iii) is granted in part and dismissed in part (see paragraph 70(a) above);
- (d) PR (iv) is granted (see paragraph 70(a)(i) above);
- (e) PR (v) is dismissed: paragraphs 2, 3, 4, 8, 9, 10 and 11 of Mr. Masiwa's second witness statement are not admissible; paragraphs 5, 6 and 7 are admissible only insofar as they do not relate to the Respondent's expanded illegality arguments;
- (f) PR (vi) is granted;
- (g) PR (vii) is dismissed (see paragraph 70(a)(ii) above);
- (h) PR (viii) is dismissed: paragraph 5 on page 3 of Mr. Kanyekanye's fifth witness statement is inadmissible;
- (i) PR (ix) is denied subject to the Parties' agreement that Prince Machaya shall be permitted to confirm the content of Mr. Nyaguse's second witness statement (R-85) during direct examination at the October Hearing;
- (j) PR (x) is granted further to the Parties' October 11 agreement;
- (k) PR (xi) is denied;
- (l) PR (xii) is denied;
- (m) PR (xiii) is denied.

71. The Respondent's October 12 Application is dismissed in its entirety.

72. There shall be no order as to costs.

Dated as of 15 October 2013

Signed on behalf of the Arbitral Tribunals

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

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