

**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. 12

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
Aurelia 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 2 July 2014, the Respondent submitted a “Procedural Statement” (the “2 July Procedural Statement”) in reply to the Claimants’ Statement regarding Inadmissible Material in Respondent’s Post-Hearing Brief, filed on 6 June 2014. In its 2 July Procedural Statement, the Respondent made 10 discrete procedural requests.
2. This Procedural Order No. 12 disposes, in part, of the procedural requests contained in the Respondent’s 2 July Procedural Statement.

II. PROCEDURAL HISTORY

3. In Procedural Order No. 10, dated 24 February 2014 (“PO No. 10”), the Tribunals directed that each party may file a brief statement with the Tribunals within 30 days from receipt of the other party’s Post-Hearing Submission identifying any inadmissible material contained in that Submission (see PO No. 10, para. 42(g)).
4. The parties each filed a Post-Hearing Submission on 7 May 2014.
5. On 6 June 2014, the Claimants filed their Statement regarding Inadmissible Material in Respondent’s Post-Hearing Brief, identifying material in the Respondent’s Post-Hearing Submission alleged to be inadmissible based on the parameters for admissibility set out in Procedural Order No. 3, dated 11 January 2013, Procedural Order No. 7, dated 8 August, 2013, Procedural Order No. 8, dated 25 September 2013; and Procedural Order No. 9, dated 15 October 2013 (the “Claimants’ 6 June Statement regarding Inadmissible Material”).
6. Although not contemplated by the terms of PO No. 10, the Respondent sought leave to respond to the Claimants’ 6 June Statement regarding Inadmissible Material. On 18 June 2014, the Secretary to the Tribunals wrote to the parties to inform them that the Tribunals

had granted the Respondent leave to file a written statement of no more than 30 pages by 2 July 2014.

7. On 2 July 2014, the Respondent filed its 2 July Procedural Statement, along with a copy of its Post-Hearing Submission bearing both the Claimants' indications of inadmissible material and annotations by the Respondent of where certain material can be found in the record of the arbitrations. In its 2 July Procedural Statement, the Respondent also made the following "procedural requests":

(i) Declare that Respondent's 7 May 2014 Post Hearing Brief is on the record for the Arbitral Tribunals' deliberations, and in particular as to; (a) jurisdiction, (b) merits, and (c) damages;

(ii) Confirm Claimants' 9 Sept. 2013 submissions are on the record, and in particular: (a) Claimants' Response on Approval / Illegality including its ¶16, (b) C-858 and (c) C-880 Including its ¶ 5;

(iii) Confirm Claimants' 15 Oct. 2013 Skeleton Argument is on the record, and in particular its ¶60;

(iv) Confirm R-087 is on the record;

(v) Confirm the corrected hearing transcripts are on the record, including in particular (a) Claimant Rüdiger's testimony, (b) Claimant Heinrich's testimony and (c) Mr Schofield's testimony;

(vi) Declare that Claimants' assertions discussed herein constitute "emergence of new evidence";

(vii) Declare that, under Arbitration Rule 26(3) "Special circumstances" exist;

(viii) Note that Claimants freely availed themselves of their Skeleton Argument and Oral Proceedings to muddle and to raise key, new assertions that Zimbabwe Reserve Bank BIT- access-condition approval (a) requirement was known to Claimants at the time of their acquisition of Border; (b) was required for Border; (c) was obtained for Border; (d) was set out in C-858; but note also that (e) R-087 states the condition "there will be no change in the ultimate beneficial ownership of Tanks Investments (Zimbabwe) Limited" and (f) Claimants' submissions have created last-minute confusion and should declare (g) that further limited clarification by Claimants as to Zimbabwe Reserve Bank BIT-access-condition approval for Border is necessary, subject to parallel rebuttal by Respondent;

(ix) Note that Claimants freely availed themselves of Oral Proceedings to raise new assertions that Zimbabwe Reserve Bank BIT-access-condition approval (a) requirement was known to Claimants at the time of their acquisition of Forrester; (b) was required for Forrester; (c) was obtained for Forrester; but also note that (d) Claimants have not provided any name of the party holding any such approval or any documentation of such BIT-access-condition approval of Forrester and (e) Claimants' submission has created last-minute confusion and declare (f) that further limited clarification by Claimants Zimbabwe Reserve Bank BIT-access-condition approval for Forrester is necessary, subject to parallel rebuttal by Respondent; and

(x) Note that Respondent does not oppose the Arbitral Tribunals authorising Claimants to make, within a reasonable period from receipt of the present Procedural Statement by Respondent, a

short Brief further clarifying, arguing, explaining their position (a) on the key, new assertions discussed above Claimants made in their Skeleton Argument and during Oral Proceedings; (b) as to whether Claimants did obtain valid Zimbabwe Reserve Bank BIT-access-condition for Border; (c) as to whether Claimants did obtain valid Zimbabwe Reserve Bank BIT-access condition for Forrester; and (d) on the related (i) C-858, (ii) C-880 and (iii) R-08 7, provided that Respondent may submit a rebuttal under reasonable conditions.”

8. The Claimants recorded in an email to the Tribunals’ Secretary on 2 July 2014, with particular reference to the annotated Post Hearing Submission appended to the Respondent’s 2 July Procedural Statement, their concern that the approach taken by the Respondent was “greatly inflating the costs of these arbitrations by being unnecessarily repetitive” and their position that the issue is not whether certain facts and law are on the record, but whether the facts and the law have been “legally characterised” (within the time limits) as constituting a defence or objection to jurisdiction or admissibility. The Claimants did not, however, object to the inclusion of the annotated Post-Hearing Submission with the Respondent’s 2 July Procedural Statement.
9. On 3 July 2014, the Secretary to the Tribunals wrote to the parties, on behalf of the Tribunals, to invite the Claimants to file any observations they may have on the Respondent’s 2 July Procedural Statement and the requests contained therein by no later than 9 July 2014. The Claimants were also limited to a written statement of 30 pages.
10. On 9 July 2014, the Claimants filed their Observations on the Respondent’s 2 July Procedural Statement (the “**Claimants’ 9 July Observations**”).
11. On 11 July 2014, the Respondent informed the Secretary to the Tribunals of its intention to reply to the Claimants’ 9 July Observations, “to complete a second-round exchange”. The Respondent requested “equal length and equal time” to reply. The Tribunals disposed of this request in Procedural Order No. 11, dated 15 July 2014, advising the parties that “they are sufficiently briefed on the matter and as a result, no further submissions by the Respondent shall be accepted or considered”.

III. DISCUSSION

12. The Tribunals note that the 10 procedural requests contained in the Respondent's 2 July Procedural Statement may be separated into two classes of requests. Procedural requests (i) to (v) invite the Tribunals to make a declaration or confirm that certain materials are "on the record" in these proceedings, while procedural requests (vi) to (x) invite the Tribunals to declare that certain assertions purportedly made by the Claimants constitute the "emergence of new evidence", which form "special circumstances" within the meaning of Arbitration Rule 26(3), justifying a further round of pleading by the parties.
13. In regard to procedural requests (iii) and (v), the Tribunals observe that they have already decided that both parties' Skeleton Arguments are admitted on to the record provisionally (see PO No. 10, para. 36) and that the corrected transcript shall be the official transcript of the Hearing in these arbitrations (see PO No. 10, paras. 20-22 and 42(d)).
14. The Tribunals also note in respect of procedural request (i) that the Tribunals directed a procedure in PO No. 10, further to the Respondent's urging, to permit the parties to file statements concerning inadmissible material in the other party's Post Hearing Submission, confirming at the same time that matters of admissibility would be considered in the course of the Tribunals' deliberations and the Tribunals' decisions would be set out in the Final Award (see PO No. 10, paras. 40-41 and 42(h)).
15. As the Respondent's procedural requests (i) to (v) appear to pertain to matters of admissibility, even if not stated expressly as such, the Tribunals have decided to remain seized of them. Requests (i) to (v) shall therefore be decided by the Tribunals (to the extent not already decided) in due course and the Tribunals' decisions in respect of these requests will be recorded in the Final Award.
16. Requests (vi) and (vii) cannot be deferred to a Final Award, as they seek, in essence, that the Tribunals make a finding that would lead to a new round of pleadings on certain discrete matters and a potential re-opening of the evidentiary phase of these proceedings in relation to those matters. Requests (viii) to (x) appear to be ancillary to requests (vi)

and (vii), as they relate to the same “new assertions” which the Respondent submits constitute “new evidence”, and are dependent upon on requests (vi) and (vii), in that they seek declaratory relief in respect of the proposed procedure to follow a finding of “special circumstances”.

17. The “new evidence” identified by the Respondent by its 2 July Procedural Statement relates to the oral evidence of Rüdiger von Pezold during the October/November 2013 Hearing that the investments made by himself and Elisabeth von Pezold in the Forrester Estate in 1988 and in the Border Estate in 1992 required approval from the Reserve Bank (and, in the case of Forrester, obtained such approval).
18. Resolution of this issue turns on whether there is indeed “new evidence”, and whether that new evidence is significant enough to warrant exercise of the Tribunals’ power under Arbitration Rule 26(3). It is recalled that Arbitration Rule 26(3) provides that:

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.

19. Having reviewed the relevant portion of the Hearing transcript where this “new evidence” was allegedly advanced, it would seem to be inconsistent with the surrounding context of the cross-examination (which concerned the family motives for making the Forrester investment) to find that Rüdiger von Pezold was then discussing whether approval was needed to make the investment itself. This line of questioning was separate from questions about whether Rüdiger von Pezold knew there was a procedure for specific approval (which were put to him in cross-examination a few minutes later) (see Tr. Day 3, 680: 19-22 and 681:1-2, 5-13).
20. Although it is not specifically stated, the Tribunals are nonetheless satisfied that the approval referred to by Rüdiger von Pezold during his cross-examination was the

approval granted for the conversion of leasehold into freehold title. This is borne out by Rüdiger von Pezold's oral evidence on re-direct (see Tr. Day 3, 700:12-20).

21. The Tribunals note that Rüdiger von Pezold's written evidence on this matter was filed on 1 March 2013 and is materially the same as his oral evidence.
22. In regard to the Border Estate, the issue is whether the transaction Rüdiger von Pezold referred to in his oral evidence was one between the von Pezolds and the Reserve Bank, or, as the Claimants submit, between the previous owners and the Reserve Bank. Mr. von Pezold stated in his oral evidence that (see Tr. Day 3, 691:12-18):

Saxonian Estate as we acquired from the Société de General ... had various company boxes, but the beneficiary owner was Société de Generale in Brussels, and they had put the Zimbabwean Tank Assets [i.e. Franconian] into Saxonian Limited with approval of Reserve Bank, and afterwards, Saxonian Estate Shares were acquired by us.
23. The Claimants have explained that Rüdiger von Pezold had mistakenly interpreted a letter from the Reserve Bank as referring to his own investment, when in fact the letter was addressed to the previous owners of the estate (and was dated prior to Rüdiger von Pezold's investment) (see Claimants' 9 July Observations, para. 27). The letter itself is dated 12 November 1992, and clearly does not relate to Rüdiger von Pezold's investment (see Exh. C-858). It therefore seems likely that Rüdiger von Pezold simply misconstrued the letter, as stated by the Claimants.
24. The Tribunals also note that Mr. von Pezold's written evidence on this point, along with a copy of the letter in question, were filed on 9 September 2013, and Mr. von Pezold's evidence was corrected by the Claimants in their Skeleton Argument filed on 15 October 2013.
25. Accordingly, the Tribunals find that there is no "new evidence" that would warrant allowing the Respondent to enter pleadings out of time.
26. The Tribunals also note that the Respondent has been granted numerous opportunities to amend its pleadings during the course of these arbitrations. As the Claimants have noted,

there is a degree of unfairness to allowing Respondent to submit a new pleading when Claimants will not be able to address this at a hearing.

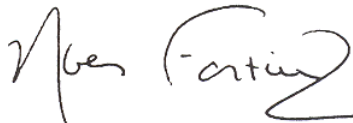
27. Procedural requests (vi) and (vii) are therefore denied.
28. As procedural requests (viii) to (x) are ancillary to and dependent upon procedural requests (vi) and (vii), the Tribunal also denies procedural requests (viii) to (x).

IV. THE ARBITRAL TRIBUNALS' DECISIONS

29. Based on the foregoing, the Arbitral Tribunals have decided as follows:
 - (a) Procedural Requests (vi), (vii), (viii), (ix) and (x) are denied; and
 - (b) Procedural Requests (i), (ii), (iii), (iv) and (v) are hereby reserved and shall be disposed of in the Tribunals' Final Award.
30. There shall be no order as to costs.

Dated as of 5 September 2014

Signed on behalf of the Arbitral Tribunals



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