

**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)**

**DIRECTIONS CONCERNING CLAIMANTS' APPLICATION FOR
PROVISIONAL MEASURES OF 12 JUNE 2012**

Members of the Tribunals

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

Secretary of the Tribunals

Eloïse Obadia

Representing the Claimants

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

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

Representing the Respondent

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

Harare, Republic of Zimbabwe

Introduction

1. By letter to the Tribunals dated 12 June 2012, the Claimants have made an urgent application for provisional measures which appears to have been made under Rule 39 of the ICSID Arbitration Rules (“**Application**”).

2. It has not been possible, due to the urgency of the matter, for the Tribunals as a whole to deliberate. Accordingly, having considered the Application, I issue these Directions as President of the Tribunals pursuant to paragraph 5.3 of the Summary Minutes of the Joint First Session (“**Minutes**”).¹ In accordance with that provision, I will confer with my colleagues as soon as possible regarding the final determination of the Application, including the need, if any, for reconsideration of these Directions.

Nature of the Application

3. Part 1 of the Application states as follows:²

1. INTRODUCTION

1.1 This is an urgent application by the Claimants requesting the Tribunal to order the Respondent to desist in pursuing a course of action that breaches the disclosure regime that was ordered by the Tribunal at the Joint First Session (see paragraph 14 of the Summary Minutes of the Joint First Session (“**the Minutes**”). The Claimants request that an order be made before Thursday of this week.

¹ Paragraph 5.3 of the Minutes provides that: “[...] where the matter is urgent, the President may take the decision without consulting the other Members, subject to the possibility of reconsideration of the decision by the full Tribunal.”

² The Application refers to paragraph 14 of the Minutes which provides *inter alia* that “[...] 14.1 Either Party may request the Tribunal to call for the production of documents in accordance with Arbitration Rule 34(2). Before applying to the Tribunal for an order calling for the production of documents, however, the Parties shall make reasonable efforts to reach agreement as to the scope and timing of production. 14.2 To avoid the Parties propounding multiple requests for production of documents during the course of the arbitration, each Party will be permitted a primary request during the time allocated for the preparation of each of its two principal written submissions, and such follow up requests as may be reasonably warranted in the circumstances.”

1.2 The application arises out of a letter from the Respondent's Attorney-General (Mr Tomana), dated 11 June 2012 (“**the Letter**”) (**tab 1**), which was delivered today to one of Border Timbers Ltd’s parent companies by a government lawyer and - peculiarly - two policemen.

1.3 In the Letter, the Attorney-General insists on the disclosure of documents from the Claimants, for use in these Arbitrations, pursuant to a regime that breaches paragraph 14 of the Minutes and the ICSID Convention. The tone of the Letter is menacing and threatens criminal proceedings if the Claimants do not follow the disclosure regime proposed by the Respondent by Thursday, 14 June 2012, i.e. the day after tomorrow.

1.4 In the circumstances, the Claimants request that the Tribunal (as a matter of urgency) order that the Respondent comply with paragraph 14 of the Minutes and not invoke its domestic law for procedural advantage in these proceedings (**see the full terms of the requested order in para 5 below**). Given the urgency of the matter, the Tribunal may consider it appropriate to issue an interim order to preserve the status quo, pending further observations of the parties.

1.5 The Claimants are concerned that if such an order is not made, and if the Respondent’s agents (including the police) attend the Claimants’ offices on Thursday of this week or at any other time, then the Claimants and their staff are likely to be subjected to intimidation and violence. The Claimants are particularly concerned given the Respondent’s recent history of intimidating parties to international proceedings in which it is a respondent (**see tab 5, BBC article re the Campbell SADC case**).

4. Paragraphs 3.2 and 3.3 provide as follows:

3.2 The Letter is the first communication that the Claimants have had with the Respondent regarding the disclosure of documents by the Claimants in these proceedings. In breach of Arbitration Rule 18 and paragraph 7 of the Minutes, the Letter was sent directly to the Claimants and not to their counsel, Steptoe & Johnson (Matthew Coleman), and Wiley Rein (Charles Verrill).

3.3 In the Letter, the Respondent invokes section 116 of the Zimbabwean Companies Act to request documents in relation to sixty-six entities listed in the Letter. The Letter ignores the fact that the requested documents were provided by the Claimants with their Memorial for twenty-nine of the sixty-six listed entities. The Respondent in the Letter implies that it, not the Tribunal, will be the sole arbiter of what is discloseable. In the Letter the Respondent states:

“In pursuit of Section 116 of the Companies Act, of Zimbabwe, we hereby give you notice that by 10 am on Thursday 14th of June 2012, all Share Registers of the listed Companies, and of all other companies having any reference to either of the ICSID complaints, are to be made available for inspection by the Civil Division in the Ministry of Justice.” (**see tab 1, Letter, para 1**). (Emphasis added.)

5. Part 5 of the Application sets out the specific orders sought by the Claimants by way of provisional measures.

Applicable Rules

6. Rule 39 of the ICSID Arbitration Rules provides that the Tribunal may recommend provisional measures on its own initiative or on the application of a party. Rule 39(4) provides that “the Tribunal shall only recommend provisional measures [...] after giving each party an opportunity of presenting its observations.” The Tribunals are, therefore, not in a position to recommend provisional measures prior to consulting with the parties further.

7. However, as noted above, in paragraph 1.4 of the Application the Claimants also submit that the Tribunals may consider it appropriate to make an interim order preserving the *status quo* pending the further observations of the parties. In the circumstances, I consider that the Claimants’ proposal represents an appropriate course of action, especially given the potential consequences that might result from the Respondent’s proposed actions.

Decision and Directions

8. Pending a final determination of the Claimants’ Application, I direct that:

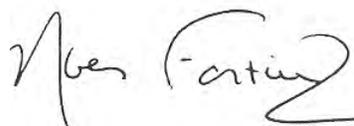
- a. the proposed visit to the Claimants’ offices by the Respondent’s representatives scheduled for 10:00 am on Thursday, 14 June 2012 shall not proceed; and,
- b. The Respondent shall take no further steps in relation to the matters contained in its letter to the Claimants dated 11 June 2012 without the consent of the Claimants or the prior authorisation of the Tribunals.

9. The Respondent is requested to present any observations it may wish to make on the Application by no later than 5 pm on Wednesday, 20 June 2012 (Washington, D.C. time).

10. Thereafter, the Claimants are requested to present any observations in reply no later than 48 hours following receipt of the Respondent's observations.

11. Leave is reserved for either party to apply at any time for amendment of these Directions.

Dated as of 13 June 2012.

A handwritten signature in black ink, appearing to read "L. Yves Fortier". The signature is written in a cursive style with a large, stylized 'L' and 'F'.

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

President