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. 2

Members of the Arbitral 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
Assistant to the Tribunals
Alison FitzGerald

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

Harare, Republic of Zimbabwe

I. INTRODUCTION

1. On 23 May 2012, the European Center for Constitutional and Human Rights ("**ECCHR**") and four indigenous communities of Zimbabwe (the "**indigenous communities**") (together, the **"Petitioners"**) filed a Petition for leave to make submissions as *amicus curiae* in these conjoined arbitral proceedings (the "**Application**") pursuant to Rule 37(2) of the Rules of Procedure for Arbitration Proceedings (the "**Rules**"). The Arbitral Tribunals have considered the Application and, having deliberated, have decided as follows.

II. PROCEDURAL HISTORY

2. On 14 March 2012, the ECCHR sought information from the Arbitral Tribunals on the provisional timetable applicable to these proceedings with a view to making a request for leave to make submissions as *amicus curiae*, asserting that "these cases … raise critical questions of international human rights law, which engage both the duty of the Zimbabwean state and the responsibility of the investor company, with regard to the affected indigenous peoples."

3. Further to the Arbitral Tribunals' invitation, the Parties provided their comments on the ECCHR's request for information.

4. The Claimants advised by letter dated 29 March 2012 that they objected to the ECCHR's request, submitting that the Parties had agreed during the First Session that no non-disputing party ("**NDP**") submissions would be made. The Claimants took the view that, in light of this agreement, the Arbitral Tribunals had no residual discretion under Article 44 of the ICSID Convention to allow such submissions to be made.

5. The Respondent advised by letter dated 29 March 2012 that while the Parties had agreed during the First Session that Rule 37(2) would not apply to these proceedings, it had not anticipated that there could be any person or organisation with an interest in the matter apart from the Parties. The Respondent stated that it had no objection to the ECCHR being allowed to make submissions provided they fall within the parameters of Rule

37(2) and they do not impinge on or amount to a challenge to the sovereignty and territorial integrity of the Republic of Zimbabwe.

6. On 4 April 2012, the Arbitral Tribunals wrote to the Parties advising that they interpreted the Parties' agreement on the non-application of Rule 37(2) as having been made in a general context. Given the Republic of Zimbabwe's clarification and the interest expressed by ECCHR, there were new circumstances that justified the application of Rule 37(2) and a proper consideration of a potential NDP's application. The Tribunals noted that they had the power to allow the filing of an NDP submission even if one or both of the Parties object so long as the requirements of Rule 37(2) are satisfied. The Arbitral Tribunals therefore stated that they intended to request a detailed application from the ECCHR, enclosing a draft letter to the ECCHR for this purpose, in order to make an informed decision as to whether the ECCHR should be allowed to file a submission.

7. By letter dated 5 April 2012, the Claimants requested that the Arbitral Tribunals elicit specific information from the ECCHR in regard to its connection, if any, with Mr. Rob Sacco and the Nyahode Union Learning Centre ("**NULC**") in Chimanimani, with whom the Claimants are engaged in an "on-going dispute".

8. On 9 April 2012, the Arbitral Tribunals informed the Claimants that there was no need to modify the draft letter to the ECCHR, noting that once the ECCHR had reverted with its detailed application and the Parties had filed their observations, it would be possible to revert to the ECCHR and seek additional information, if necessary. Accordingly, on 9 April 2012, the Secretary to the Tribunals wrote to the ECCHR inviting the ECCHR to file a detailed application by 23 April 2012.

9. On 11 April 2012, the ECCHR requested a one-month extension of time to file its detailed application, explaining that it intended to formulate a submission on legal and factual questions relevant to these arbitrations in collaboration with joint *amici*, including indigenous groups directly affected by the outcome of the arbitrations and experts in relevant fields. The ECCHR stated that, as a result, it required further time to coordinate with its partners.

10. On 12 April 2012, the Claimants wrote to the Arbitral Tribunals opposing the requested extension of time on the ground that the invitation to file a detailed application was extended to the ECCHR alone, and not an invitation for other potential *amici curiae* to file an application to acquire NDP status. The Claimants also stated that if the ECCHR "goes unchecked" it will cause the Claimants to incur unnecessary costs, identifying what constituted, in their view, a "mismatch" in the information requested by the Arbitral Tribunals of the ECCHR and what the ECCHR should provide if it is acting in concert with other potential *amici curiae*.

11. On 16 April 2012, the Arbitral Tribunals wrote to the Parties indicating that they considered the reasons invoked by the ECCHR in its request for an extension of time to be legitimate. The Arbitral Tribunals averred that there was no "mismatch" between what had been requested of the ECCHR and what the ECCHR should provide, but indicated that the Tribunals would confirm to the ECCHR that the information solicited to be included in their detailed application applied to all of those individuals and groups that may be involved in the preparation of the application.

12. Accordingly, the Secretary of the Tribunals wrote to the ECCHR on 16 April 2012, granting the requested extension and specifying that the information required of the ECCHR in its detailed application, extends to all of those individuals and groups involved in the preparation of the application.

13. As noted above, the Petitioners filed their Application on 23 May 2012. The Claimants filed their observations on the Application on 6 June 2012 ("**Cl. Obs.**"). The Respondent elected not to file any observations.

III. THE NDP APPLICATION

14. The Petitioners seek the following in their Application:

    (a) Permission to make a written submission as joint *amici curiae* in the present arbitration;

    (b) Access to the key arbitration documents; and

(c) Permission to attend the oral hearings when they take place, and to reply to any specific questions of the Tribunals on the written submissions.

15. As regards the request for access to "key arbitration documents", access is requested to the Claimants' request for arbitration, the notice of arbitration and statement of defense; any decisions, orders and directions of the Tribunal; the pleadings and written memorials of the Parties; and relevant witness statements and transcripts of any witness examinations (see Application, p. 8).

Identity

16. The Application is submitted by two groups: the ECCHR and the indigenous communities.

17. The ECCHR is described as an independent, non-profit legal and educational organization dedicated to protecting human rights. The ECCHR "engages European, international and national law to enforce human rights and to hold state and non-state actors accountable for egregious abuses, with a strong focus on strategic litigation in the area of business and human rights". The ECCHR's Board of Directors and Advisory Board are composed of various independent human rights experts from civil society, academia and legal advocacy groups (see Application, p. 4).

18. The indigenous communities are described as follows (see Application, p. 3):

> "Four indigenous communities – the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples – are living in areas in the region of Chimanimani, in South-Eastern Zimbabwe, on which the Claimant's properties are located. In the present Petition, and in accordance with their traditions and customs, Chief Chadworth Ringsai Chikukwa, Chief Phineas Zamani Ngorima, Chief Simon Masodzi Chinyai, and Chief Naison Ndarera Nyaruwa, act with authority as representatives of these four indigenous communities respectively. This authority is evidenced in affidavits available from the Petitioners on the request of the tribunal. The membership of these indigenous groups is determined in accordance with the traditions and customs specific to each." (footnote omitted)

19. The Petitioners received support from NULC, which is described as an NGO based in the Chimanimani region of South-Eastern Zimbabwe. The NULC's facilities "enabled the indigenous communities to communicate with the ECCHR, to produce affidavits and to hold meetings to discuss" the Application (see Application, p. 4).

Significant Interest

20. The Petitioners submit that they respectively and collectively have a significant interest in the outcome of the present arbitrations.

21. The indigenous communities explain that they each have a distinct cultural identity and social history which is inextricably linked to their ancestral lands. They submit that the outcome of the present arbitral proceedings will determine not only the future rights and obligations of the disputing parties with regard to these lands, but may also potentially impact on the indigenous communities' collective and individual rights through the following (see Application, p. 5):

> "the determination of rights and access to land inhabited by indigenous communities, which may impede their enjoyment of their internationally recognized rights to land and to consultation in relation to their ancestral lands; and
>
> the prejudicing of the particular rights of indigenous peoples under international law to be able to access judicial remedies for human rights violations, because the indigenous communities affected in this arbitration, as non-disputing parties, are not able to participate in or contest the decisions of this Tribunal as of right."

22. The ECCHR states that its significant interest in the arbitral proceedings is determined by its mission to develop the strategic use of legal actions for corporate human rights responsibilities. The ECCHR states that the question of access to land by the indigenous communities came to its attention through its participation in a workshop held in June 2011 in Cameroon, in which participants considered several issues, such as possible challenges to cases of corporate abuses, including land grabbing, the precarious existence of displaced people and agricultural contamination on the African continent (see Application, p. 5).

23. The ECCHR submits that "[t]hese issues are also of significant public interest beyond the present dispute, to other indigenous communities and individuals living in areas potentially affected by foreign investments, to investors and governments, in Zimbabwe and elsewhere" (see Application, p. 5). It notes that regional and international human rights institutions, including the United Nations and the Inter-American Court of Human Rights, have identified the relationship between investment treaties and indigenous peoples' rights as critical to effect human rights protection, and the application of Bilateral Investment Treaties ("**BITs**") should be in compliance with international human rights law. According to the ECCHR, the present arbitrations touch upon (see ibid., p. 6):

> "issues that have been identified as "the Top Ten Business and Human Rights issues of 2011 and again for 2012 by the Institute for Human Rights and Business: namely, to address the negative impacts of land use and acquisition on communities, to emphasize community consultations within human rights due diligence, and to strengthen legal accountability and redress for alleged human rights abuses by corporations."

24. Finally, the ECCHR reasons that international dispute settlement mechanisms offer *amicus curiae* status as the sole possibility for affected communities to be heard (see ibid., p. 6).

Legal Perspective

25. The Petitioners state that they will argue that both Parties to these arbitrations incur shared responsibility vis-à-vis the indigenous communities who, it is asserted, have rights under international law in relation to lands on which the Claimants' properties are located. In this regard, the Petitioners submit that international human rights law on indigenous peoples applies to these arbitrations in parallel to the relevant BITs and the ICSID Convention (see Application, p. 7):

> "Article 42(1) of the ICSID Convention provides that the 'Tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the parties', and that 'in the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws), and such rules of international law as may be applicable.' Under the BITs entered into by the Republic of Zimbabwe with the Federal Republic of Germany and with the Swiss Federation respectively, the tribunal is mandated to reach its decisions on the basis of the BITs themselves, any treaties in force between the Contracting Parties, such rules of general international law as may be applicable, and the domestic law of the Contracting Party in the territory of which the investment in question is situated."

26. The Petitioners contend that, in light of the "interdependence of international investment law and international human rights law", any decision in these conjoined arbitrations which neglects the content of the international human rights norms will be "legally incomplete" (see Application, p. 7). Accordingly, they urge the Arbitral Tribunals to give due consideration to the duties of States and the responsibilities of companies with respect to the rights of indigenous communities.

27. Specifically, vis-à-vis the Respondent, the Petitioners refer to Article 26 of the U.N. Declaration on the Rights of Indigenous Peoples, adopted in 2007, which provides for the indigenous right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership and other traditional occupation or use, and requires States to give legal recognition and protection to these lands, territories and resources (see Application, p. 7).

28. As regards the Claimants, the Petitioners submit that principles have been developed by several institutions, including the Organisation of Economic Cooperation and Development and the World Bank, which provide that companies should assess whether indigenous people may lay claim to territory in accordance with criteria set out in international rules, and should not assume that the absence of official recognition of indigenous communal ownership rights implies that such rights do not exist (see Application, pp. 7-8).

IV. THE PARTIES' OBSERVATIONS

A. The Claimants' Observations

29. The Claimants oppose the Application in its entirety, including the Petitioners' request for access to documents and to attend hearings, summarizing their position as follows (see Cl. Obs., para. 3):

> "3.1 The Applicants are not independent of the Respondent because of their association with Mr Sacco and the Nyahode Union Learning Centre, and in regard to the Chiefs, because they are State organs appointed and dismissed at the State's will. Alternatively, they do not have the appearance of being independent.
>
> 3.2 The Applicants do not propose to make submissions on legal or factual issues that relate to the proceedings.
>
> 3.3 The Applicants' proposed legal submissions on the law of indigenous peoples does not concern the applicable law.
>
> 3.4 If the applicable law does include the law of indigenous peoples, the Applicants have not proven that the Tribes are 'indigenous' as that term is understood in public international law.
>
> 3.5 The Applicants will not bring a perspective, particular knowledge or insight that is different from that of the Respondent or relevant because they are not independent, and in regard to the ECCHR, it has no expertise in regard to Zimbabwe.
>
> 3.6 The Applicants have no significant interest in these proceedings because they lack independence, their proposed legal submissions are on matters that are outside of the applicable law and their 'mission' concerns corporate human right [sic] responsibilities that are not in issue in these proceedings.
>
> 3.7 Investment treaty tribunals should not adjudicate as to who are indigenous peoples, what are their rights, and what obligations they are owed (if any). States should be the first-line decision makers on these issues." (paragraph references omitted)

30. As a preliminary matter, the Claimants deny that they have been involved in any human rights abuses, averring that the Petitioners' allegation that these arbitrations touch upon

redress for alleged human rights abuses by corporations is inappropriate (see Cl. Obs., paras. 6-9).

31. As regards the identity of the Petitioners, the Claimants observe that the ECCHR does not profess to have any experience or prior interest in Zimbabwe or investment treaty arbitration. The Claimants also observe that the rights of "indigenous peoples" under public international law are in their nascent stages of development and that, in any event, the indigenous communities have not established that they have "indigenous peoples" status under public international law. In the Claimants' view, investment treaty tribunals, such as the present Arbitral Tribunals, are likely to be ill-equipped to deal with the issues surrounding the establishment of "indigenous peoples" status under public international law unless significant resources and time are devoted to the issue (see Cl. Obs., paras. 12 and 13).

32. As a historical matter, the Claimants note that their titles have never been subject to, or conditional on, the claims of the indigenous communities. However, the Claimants have "always acknowledged that some parts of the Border Estate are of particular cultural significance" to those communities, and the Claimants have therefore granted access to those parts of the Estate to the communities (see Cl. Obs., paras. 29-30).

33. Turning to the criteria for granting NDP status, the Claimants submit that the Petitioners must be independent and must meet the specific criteria set out in Rule 37(2). The Claimants contend that neither the ECCHR nor the indigenous communities are independent, and therefore the Application should be denied on this basis. Specifically, the Claimants note that the indigenous communities have expressed the desire to occupy parts of the Border Estate, to the detriment of the Claimants. The Claimants contend this represents a conflicting interest with their own interests in relation to the title and occupation of the Border Estate (see Cl. Obs., paras. 34-36).

34. The Claimants argue that the independence of the indigenous communities is further compromised by the fact that the chiefs of the communities are appointed and may be dismissed by the President of Zimbabwe pursuant to the Constitution of Zimbabwe and the *Traditional Leaders Act 1998*. As the *Traditional Leaders Act 1998* prescribes in

detail the functions of the chiefs, the Claimants submit that these functions are in fact functions of the government and the acts/omissions of the chiefs are attributable to the Respondent under Article 4 of the International Law Commission's Articles on State Responsibility. The effect, in the Claimants' view, is that the indigenous communities are either not independent of the Respondent or have the appearance of not being independent of the Respondent (see Cl. Obs., paras. 37-44).

35. The Claimants submit that a further basis for impugning the independence of the Petitioners is their connection with the NULC and Mr. Sacco, its founder and director or otherwise "its alter-ego" (see Cl. Obs., para. 47). The Claimants describe Mr. Sacco as "an activist of the ruling political party ZANU-PF, an organisation that is an organ of the Republic and has been involved, from the outset in the Invasions." (see ibid.). The "Invasions", the Claimants note, are one of the central events giving rise to the Respondent's alleged liability for breaches of the applicable BITs. Among other alleged involvement in the events forming part of the factual matrix of these disputes, the Claimants state that (see ibid., paras. 50-52):

> "Mr Sacco and Nyahode Union Learning Centre have been vehemently opposed to the Claimants owning and operating the Border Estate. They have been frustrated by the Claimants' refusal to run the Border Estate as a 'Joint Forest Management' project. Mr Sacco and the Nyahode Union Learning Centre proposed that they and the Tribes participate in this project, a situation from which Mr Sacco would personally benefit through sourcing timber for his own sawmill.
>
> 'Joint Forest Management' is a byword for handing over the Border Estate without compensation. It is a crude attempt to retrospectively justify the Land Reform Programme as being a policy to advance the 'indigenous peoples'. Nothing could be further from the truth. If the LRP had been a policy to advance the 'indigenous peoples' it would not have received the condemnation that it has from the Respondent's own courts, human rights groups and international tribunals in Africa. From 2000 onward, the real purposes of the Land Reform and Resettlement Programme, and indeed the policy, became to expropriate all of the large scale commercial farms that were directly or indirectly owned by white people, and to enrich senior members of the government, ZANU-PF and military and civil servants. These matters have been documented extensively in the Claimants' Memorial.

> Mr Sacco has stated that he intends to 'internationalise' his dispute with the Claimants. He is now attempting to do so in these proceedings through the ECCHR." (citations omitted)

36. The Claimants contend that the ECCHR has "lost any claim to being independent from the Parties" in circumstances where it is working with the NULC and Mr. Sacco and/or, in circumstances where it is working with the chiefs of the indigenous communities, who themselves are not independent for the reasons stated above.

37. As regards the criteria identified in Rule 37(2), the Claimants submit that the Petitioners either do not satisfy the criteria or additional considerations, identified below, and these weigh against granting NDP status to the Petitioners. First, the Claimants submit that Rule 37(2)(a) is composed of three elements (see Cl. Obs., para. 60):

> "will the non-disputing party's submission be applicable to 'factual or legal issues related to the proceeding' (if not, they cannot possibly help the Tribunal in its determination);
>
> will the non-disputing party's submissions bring a 'perspective, particular knowledge or insight that is different from that of the disputing parties' (it must also be relevant, otherwise it will not be of assistance); and
>
> if the first and second elements have been satisfied, will the submission assist the Tribunal in determining the factual or legal issue?"

38. As regards the first element of Rule 37(2)(a), the Claimants submit that the legal issues on which the Petitioners seek to make submissions are not "legal issues related to the proceeding", because the Parties have not raised the issue of whether the indigenous communities have rights under international law or whether the Parties owe obligations to them under international law, nor have the Parties raised the issue of how such alleged rights and obligations affect the obligations of the Respondent to the Claimants under the applicable BITs. The Claimants also note that the applicable law in these arbitrations is comprised of the BITs, public international law, and the municipal laws of the Republic of Zimbabwe, to the extent that they are not inconsistent with the BITs and public international law, and not international human rights law on indigenous peoples (see Cl. Obs., paras. 61-64).

39. The Claimants aver that reference to "international law" in the applicable BITs does not mean that the whole body of substantive international law is applicable. Rather, the Claimants submit that the context, object and purpose of the BITs indicate that the body of law relating to the protection and promotion of foreign investments applies; by contrast, there is no indication that international human rights law on indigenous peoples applies (see Cl. Obs., paras. 65-75). Even if this latter body of law were to apply, the Claimants contend that it would not advance the position of the Petitioners because they have not established that the indigenous communities have "indigenous peoples" status under international law (see ibid., para. 76). The Claimants conclude that given the non-applicability of the Petitioners' legal submissions, the factual submissions made in support of those legal issues must also be inapplicable.

40. As regards the second element of Rule 37(2)(a), the Claimants submit that the Petitioners will not bring a perspective, particular knowledge or insight that is different from that of the disputing parties because they are not independent. Moreover, the Claimants note that the ECCHR does not profess to have any particular experience in relation to Zimbabwe or investment treaty arbitration, therefore its perspective, knowledge and insight will not be relevant (see Cl. Obs., para. 86).

41. Turning to the third element of Rule 37(2)(a), the Claimants submit that the Petitioners will not assist the Arbitral Tribunals because their submissions will not be applicable to "factual or legal issues related to the proceeding" and because they will not bring "a perspective, particular knowledge or insight that is different from that of the disputing parties" (see Cl. Obs., para. 87).

42. As regards the second criterion set out in Rule 37(2)(b), the Claimants consider that this essentially repeats the first element of Rule 37(2)(a) in that, for a submission to "address a matter within the scope of the dispute", the submission must be applicable to "factual and legal issues related to the proceeding". For the reasons summarized above, the Claimants contend that the Petitioners' proposed submissions fail to meet this criterion (see Cl. Obs., paras. 89-90).

43. With respect to the criterion set forth in Rule 37(2)(c), the Claimants submit that the Petitioners cannot have "significant interest in the proceeding" because they are not independent. Even if they were considered to be independent, the Claimants reason that as they only want to make submissions in regard to international human rights law on indigenous peoples, their submissions are irrelevant because this does not form part of the applicable law. The Claimants add that these arbitrations do not concern "corporate human rights responsibilities", they concern the responsibility of the State for breaches of the BITs. As such, the ECCHR's stated mission does not translate into a significant interest in the proceedings (see Cl. Obs., paras. 91-94).

44. Finally, the Claimants observe that the criteria set out in Rule 37(2) are non-exhaustive and that the Arbitral Tribunals have the discretion to consider other matters when determining whether or not to allow an NDP to make a submission. The Claimants therefore submit that, in addition to the foregoing, the Arbitral Tribunals should consider whether it is appropriate for an investment treaty tribunal to adjudicate on whether the indigenous communities are "indigenous peoples" under public international law and on the content of the Parties' obligations to them, if any. In the Claimants' view, it was never anticipated that investment treaty tribunals established pursuant to the ICSID Convention would opine on the rights of indigenous peoples to land or to classify peoples as being indigenous or not. The Claimants aver that a mechanism has been established under the U.N. Declaration on the Rights of Indigenous Peoples for such a purpose, and that States, not international investment treaty tribunals, should be the "first-line decision makers" in regard to indigenous peoples (see Cl. Obs., paras. 97-100).

45. The Claimants note that the Rules are silent on the issue of access to documents by NDPs, but they object to the disclosure of any of the requested documents on the grounds that they contain personal and commercial information that is confidential, none of which was filed in anticipation of it being viewed by third parties (see Cl. Obs., paras. 103-105).

46. Finally, the Claimants object to persons other than the Parties attending the hearings. They contend that pursuant to Rule 32(2), their objection in this regard constitutes a bar to the Petitioners attending any hearings (see Cl. Obs., para. 106).

B. The Respondent's Observations

47. On 8 June 2012, the Respondent confirmed that it has no observations on the Application, other than those observations set out in its letter of 29 March 2012 (see paragraph 5 above).

V. ANALYSIS

48. The Arbitral Tribunals have the discretion, upon consulting with the Parties, to allow an NDP to make a submission pursuant to Rule 37(2), provided that certain minimum criteria are met. Specifically, Rule 37(2) states as follows:

> "(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

49. The Arbitral Tribunals agree with the Claimants' observation that an NDP should also be independent of the Parties. This is implicit in Rule 37(2)(a), which requires that the NDP bring a perspective, particular knowledge or insight that is different from that of the Parties. Other ICSID tribunals have also considered this to be a requirement of to admit *amicus* submissions (see eg. *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad*

General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, Cl. Obs. Tab 11):

> "The Suitability of Specific Nonparties to Act as Amici Curiae. The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, and expertise and perspectives that the parties may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case. …". [At para. 23]

50. The Claimants have raised concerns about the independence of the Petitioners from several perspectives. First, the Claimants contend that the interests of the indigenous communities are adverse to their own and aligned with those of the Respondent. Second, they claim that the indigenous communities are effectively organs of the State and therefore cannot be independent of the Respondent. Third, they claim that the connection between the Petitioners and Mr. Sacco or the NULC undermines their independence. The Claimants also argue that whether or not the Petitioners are in fact independent, these circumstances give the appearance that they are not independent.

51. The Claimants' first contention is based on the allegation that members of the indigenous communities invaded parts of the Border Estate in 2000 and following, as part of the Respondent's Land Reform Programme ("**LRP**"). The Claimants allege that the indigenous communities "wish to permanently occupy parts of the Border Estate," an intent that runs counter to the Claimants' request for relief in these arbitrations, namely that full unencumbered legal title and exclusive control to the Border Properties be restored to them. In the Application, the Petitioners assert that both Parties have responsibilities towards the indigenous communities relating to their alleged rights over or in relation to their ancestral lands. The Arbitral Tribunals are not persuaded, on the basis of the indigenous communities' desire to have their claimed rights recognized by the Parties or indeed by these Tribunals, that they are "aligned" with the Respondent; however, as the indigenous communities appear to lay claim over or in relation to some of the lands in respect of which the Claimants assert a right to full, unencumbered legal

title and exclusive control, they appear to be in conflict with the Claimants' primary position in these proceedings.

52. The Arbitral Tribunals are not persuaded on the basis of the materials before them that the functions of the chiefs of the indigenous communities are functions of the government. Indeed, a finding that the acts of the chiefs of the indigenous communities are attributable to the Republic of Zimbabwe as a matter of international law, with all of the consequences that may flow from such a finding, would be premature in light of the abbreviated nature of a Rule 37(2) inquiry.

53. In the Application, the chiefs attest and affirm that "they have no relationship, direct or indirect, with any party to this arbitration which might give rise to any conflict of interest" (see Application, p. 6). The Respondent's constitutional power to appoint and dismiss the chiefs of the indigenous communities arguably constitutes such a relationship. However, it does not follow that because the President of Zimbabwe has the power to appoint and dismiss the chiefs that the indigenous communities are not independent for the purposes of a Rule 37(2) application. The Arbitral Tribunals note in this regard that the power to appoint and dismiss the chiefs is not absolute, but constrained through detailed criteria set out in the *Traditional Leaders Act 1998*.

54. As regards the Claimants' third challenge to the Petitioners' independence, the Petitioners state that they have received support from the NULC in the nature of facilitating communications between the ECCHR and the indigenous communities, the production of affidavits and the holding of meetings to discuss the Application. It is unclear from the Application what, if any, involvement Mr. Sacco may have had. The details provided in respect of the NULC confirm that Mr. Sacco is Director of this organization, and that the focus of its activities is "Awareness Raising/Development Education and Development Cooperation Projects". The NULC also apparently serves as a "resettlement agency", providing "pre and post settlement training". Funding for the NULC is provided primarily through private donation (75%), with only 10% coming from the Government of Zimbabwe (see Cl. Obs., Tab 10). The NULC itself does not, therefore, appear to be closely linked with either Party.

55. The Claimants have, however, alleged that the NULC is the "alter-ego" of Mr. Sacco and that he has threatened to "internationalise" his dispute with them regarding the Border Estate's refusal to enter into a Joint Forest Management Project (see Cl. Obs., Second Witness Statement of Heinrich Bernard Alexander Josef Von Pezold, Tab 34, para. 8-9). Mr. Sacco's 2005 paper titled "Peasant Revolution in Zimbabwe" leaves little doubt as to his support for the resettlement of land in Zimbabwe and the Respondent's land reform policies. This paper also confirms that the NULC is Mr. Sacco's creation and that he is a central figure in its activities (see Cl. Obs., Tab 8).

56. Based on the foregoing, the Arbitral Tribunals consider that the circumstances of their Application give rise to legitimate doubts as to the independence or neutrality of the Petitioners. The apparent lack of independence or neutrality of the Petitioners is a sufficient ground to deny the NDP Application. In addition, having considered the Application in light of all of the criteria set out in Rule 37(2), the Arbitral Tribunals are not persuaded that the Petitioners should be permitted to make a submission in these proceedings because they have not satisfied any of the criteria in Rule 37(2).

57. The Petitioners do not propose to make submissions that would assist them "in the determination of a factual or legal issue related to the proceeding", as is required by Rule 37(2)(a). The Petitioners, in effect, seek to make a submission on legal and factual issues that are unrelated to the matters before the Arbitral Tribunals. The Arbitral Tribunals agree in this regard with the Claimants that the reference to "such rules of general international law as may be applicable" in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs. Moreover, neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings.

58. The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete. The Petitioners contend that the

Arbitral Tribunals' mandate derives from "powers delegated to it by Contracting Parties with concrete human rights obligations under international law" (see Application, p. 7). The Petitioners refer in particular to Article 26 of the UN Declaration on the Rights of Indigenous Peoples, which they say requires States to give legal recognition and protection to lands, territories and resources possessed by indigenous peoples by reason of traditional ownership or other traditional occupation or use, and other unspecified customary international law norms which they claim are binding.

59. The Arbitral Tribunals are not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs. The Respondent has not yet filed a substantive pleading in these proceedings. However, it was afforded the opportunity to make observations on the Application, including any observations as to the perspective the Petitioners propose to bring to the factual and legal issues in these proceedings. The Respondent affirmed its initial observations that any NDP submission must fall within the parameters of Rule 37(2) and must not impinge on its territorial integrity. Whether or not the proposed NDP submission would have the effect of impinging on the Respondent's territorial sovereignty is unclear. However, the Respondent has neither raised as a defence in these proceedings that it has obligations towards the indigenous communities under international law nor has it indicated that a submission from the Petitioners based on their Application may be relevant to factual or legal issues in these proceedings.

60. The Arbitral Tribunals similarly do not consider that the proposed NDP submission would "address a matter within the scope of the dispute". The disputes in these conjoined arbitrations arise out of the allegedly unlawful measures taken by the Respondent against the Claimants and their investments pursuant to the LRP. As noted above, the Petitioners propose to make a submission on the putative rights of the indigenous communities as "indigenous peoples" under international human rights law, a matter outside of the scope of the dispute, as it is presently constituted. Indeed, as the Claimants have noted, in order for the Arbitral Tribunals to consider such a submission, they would need to consider and decide whether the indigenous communities constitute "indigenous peoples" for the purposes of grounding any rights under international human rights law. Setting aside

whether or not the Arbitral Tribunals are the appropriate arbiters of this decision, the decision itself is clearly outside of the scope of the dispute before the Tribunals.

61. Finally, the Arbitral Tribunals find that the Petitioners do not have a "significant interest in the proceeding". This requirement must be interpreted in light of the proceeding as constituted, not as the NDP would prefer the proceeding to be constituted. The Arbitral Tribunals note that the ECCHR's expertise is focused on corporate responsibilities for human rights abuses. The Claimants have strenuously objected to the suggestion that they have committed or are responsible for any such abuses. The Arbitral Tribunals do not understand the Petitioners' statement that the Application "touches upon … redress for alleged human rights abuses by corporations" to be an allegation that the Claimants in these cases have committed or are responsible for human rights abuses. Indeed, the reference for this statement is to a general list of business and human rights issues compiled by the Institute for Human Rights and Business, and the statement itself, read in its entirety, identifies other concerns of this organization, including the negative impacts of land use and acquisition on communities and community consultation relating to land use and acquisition (see Application, p. 6). However, the ECCHR's mission and experience do not, in the context of these proceedings, as presently constituted, satisfy the requirement of a "significant interest in the proceedings".

62. As regards the indigenous communities, the Claimants themselves recognize that they have some interest in the land over which the Claimants assert full legal title and therefore have historically granted them access to parts of the Border Estate (see Cl. Obs., paras. 29-30). It may therefore well be that the determinations of the Arbitral Tribunals in these proceedings will have an impact on the interests of the indigenous communities. However, as noted above, the Arbitral Tribunals have reservations as to the independence and/or neutrality of the Petitioners, including the chiefs of the indigenous communities. There is a latent tension in the Rule 37(2) criteria which require that an NDP be independent yet also possess a significant interest in the proceedings. Regardless of whether one or both of these criteria are met, however, Rule 37(2) also provides that an NDP submission must not unfairly prejudice either party. In this case, the Arbitral Tribunals are of the view that the circumstances surrounding these Petitioners are such

that the Claimants may be unfairly prejudiced by their participation and the Application must therefore be denied.

63. In light of the Arbitral Tribunals' conclusions above with respect to the Petitioners' request to make a written submission, it is unnecessary for the Arbitral Tribunals to consider their subsidiary requests for access to documents and to attend the hearings in these proceedings. For further certainty, however, the Arbitral Tribunals note that under Rule 32(2), where a Party objects to the request of an NDP to attend the hearings in a proceeding, a tribunal has no discretion to grant such a request over that party's objection. Accordingly, the Petitioners' request to attend the hearings in these proceedings must be denied in any event because the Claimants' objection constitutes an absolute bar to granting the request.

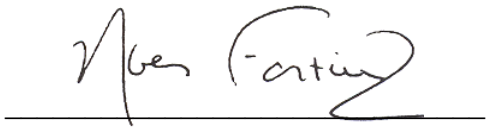
VI. THE ARBITRAL TRIBUNALS' DECISION

64. Based on the foregoing, the Arbitral Tribunals deny the Application.

65. There shall be no order as to costs.

Dated as of 26 June 2012

Signed on behalf of the Arbitral Tribunals



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