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. 3

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
Frauke Nitschke

Assistant to the Tribunals
Alison G. 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
Harrare, Republic of Zimbabwe

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

I. INTRODUCTION

1. On 20 December 2012, the Claimants brought an urgent application in connection with alleged jurisdictional challenges and new defences pleaded by the Respondent in its Rejoinder filed with the Arbitral Tribunals on 14 December 2012 (the "**Application**").

2. The Claimants seek an order that the alleged jurisdictional challenges and new defences, in so far as they relate to the Claimants' case as pleaded in the Memorial, are inadmissible or, alternatively, an order directing that the jurisdictional challenges be joined to the merits of the cases, that an additional round of briefing on these and the new defences be scheduled, that certain documents in support of the Respondent's Rejoinder be produced, and that new mutually acceptable hearing dates be set.

3. The Arbitral Tribunals have considered the Application and have decided unanimously as follows.

II. PROCEDURAL HISTORY

4. On 14 December 2012, the Respondent filed its Rejoinder with the Arbitral Tribunals. The Respondent simultaneously advised the Arbitral Tribunals in writing that it had retained new external counsel, namely Mr. Phillip Kimbrough and Mr. Tristan Moreau of Kimbrough & Associés, Paris, France.

5. On 20 December 2012, the Claimants filed their Application seeking an order that the Respondent's challenges to jurisdiction and "new" defences pleaded in the Rejoinder are inadmissible and shall be disregarded by the Arbitral Tribunals.

6. On 20 December 2012, the Tribunal Secretary wrote to the Parties on behalf of the Arbitral Tribunals inviting the Respondent to file any observations it may have on the Application by 28 December 2012.

7. On 28 December 2012, the Respondent filed its observations on the Application with the Arbitral Tribunals, requesting that the Tribunals dismiss the order sought by the Claimants in their Application ("**Respondent's December 28th Letter**").

8. On 28 December 2012, the Tribunal Secretary wrote to the Parties on behalf of the Arbitral Tribunals inviting the Claimants to submit their comments on the Respondent's letter of even date by 3 January 2013.

9. On 31 December 2012, the Claimants wrote to the Arbitral Tribunals advising that, in the circumstances, if the Tribunals are minded not to grant the order sought by the Claimants in their Application, an alternative order be granted joining the jurisdictional challenges to the merits and directing an amended timetable for further written and oral procedures ("**Claimants' December 31st Letter**").

10. On 2 January 2013, the Respondent wrote to the Arbitral Tribunals proposing an alternative to the timetable set out in the Claimants' December 31st Letter ("**Respondent's January 2nd Letter**").

11. On 2 January 2013, the Tribunal Secretary wrote to the Parties on behalf of the Arbitral Tribunals advising that the Tribunals consider they have been fully briefed on the Application and require no further submission.

III. THE APPLICATION

12. The Claimants seek an order that (see Application, para. 5.1):

(a) The Respondent's challenges to jurisdiction that have been pleaded in the Rejoinder, in so far as they relate to the Claimants' case as pleaded in the Memorial, are inadmissible and shall be disregarded by the Tribunals; and

(b) The Respondent's defences to the Claimants' case as pleaded in the Memorial, in so far as those defences have not already been pleaded in the Counter-memorial, are inadmissible and shall be disregarded by the Tribunals.

13. Alternatively, in the event the Arbitral Tribunals "are minded to not grant the [above] order", the Claimants propose the following order (see Claimants' December 31st Letter, para. 9.3):

(a) The Respondent within seven days provide the documents which are referred to in the Rejoinder and on which it relies;

(b) The Claimants file their observations, together with any supporting evidence, on the Respondent's Rejoinder within eight weeks of the Tribunals notifying the parties of the new timetable;

(c) The Respondent file its response to the Claimants' observations, together with any supporting evidence, within four weeks of receiving the Claimants' observations and evidence;

(d) The Respondent's challenges to jurisdiction are joined to the merits of the cases; and

(e) (save as to provisional measures) permission to file additional submissions must be sought from the Tribunals in advance by the party wishing to file such submissions.

14. The Claimants additionally propose in connection with the above alternative relief that the Hearing dates presently set for 18-22 February 2013 be vacated and that new mutually acceptable dates be set.

IV. THE PARTIES' SUBMISSIONS

15. The following is a concise summary of the Parties' main submissions in connection with the Application. The Arbitral Tribunals have, however, considered all of the points raised by each Party in their respective submissions in the course of reaching the decisions set out in Part VI of this Procedural Order.

A. The Claimants' Submissions

16. The Claimants submit that the Respondent pleads the following matters, the effect of which is that it considers that the Arbitral Tribunals have no jurisdiction over the claims as pleaded in the Memorial (see Application, para. 3.1):

> "3.1.1 The investments (if any) are not owned by foreign investors (Rejoinder, paras 932 to 942).
>
> 3.1.2 The Claimants' investments (if any) are indirect investments, namely shares in Zimbabwean companies. Indirect investments are not covered investments under the BITs (Rejoinder, paras 963 to 977).
>
> 3.1.3 There has been no "investment" pursuant to Rule 25 of the ICSID Convention because the Claimants have not put anything at risk, their activities are merely commercial, and they have not made any contribution to the Respondent's economic development (Rejoinder, paras 943 to 962).
>
> 3.1.4 The Claimants are claiming for losses on behalf of the Zimbabwean companies as opposed to losses that they have suffered themselves (Rejoinder, paras 964 and 971).
>
> 3.1.5 There has been no "investment" as defined under the German BIT because there was no specific approval of the Claimants' investments by the Respondent during the period 1988 to 2004 (Rejoinder, paras 978 to 981).
>
> 3.1.6 The Claimants have not proven that they have made any investment into Zimbabwe and therefore they are not "investors" (Rejoinder, paras 985 and 986).
>
> 3.1.7 The Claimants have not proven that they are the beneficial owners of their investments and therefore they are not "investors" (Rejoinder, para 987)."

17. The Claimants observe that in the Summary Minutes of the Joint First Session of the Two Arbitral Tribunals, dated 22 March 2011 (the "**Minutes of the Joint First Session**"), the Respondent recorded that it did not intend to challenge jurisdiction. Moreover, the Claimants submit that all of the facts pleaded by the Respondent in support of the above challenges to jurisdiction were known to the Respondent at the time it filed the Counter-Memorial (*i.e.*, on 11 August 2012) and that according to Rule 41(1) of the *Rules of Procedure for Arbitration Proceedings* (the "**Arbitration Rules**"), such challenges were required to have been made "as early as possible" and in any event no later than by the time of the filing of the Counter-Memorial (see Application, paras. 3.3-3.5).

18. The Claimants state that the Respondent has also raised the following defences, which they characterise as "new" defences, for the first time in its Rejoinder (see Application, para. 4.1):

> "4.1.1 A defence of Necessity (based on customary international law, as opposed to the BITs) precluding the wrongfulness of any act of the Respondent during the period 2000 until the time that the proposed new Constitution is put to a referendum in 2013 (Rejoinder, paras 812 to 928).
>
> 4.1.2 A defence that the fair and equitable treatment standard and the full security and protection standard in the BITs do not require treatment beyond that which is required by the customary international law minimum standard of treatment (Rejoinder, para 348).
>
> 4.1.3 A defence that there has been no expropriation of any of the Zimbabwean Properties as the Claimants continue to control the Zimbabwean Properties (Rejoinder, paras 1055 to 1060). This is in spite of the fact that the Respondent in para 125 of its Counter-memorial admitted that the Zimbabwean Properties that were directly subject to the Constitutional Amendment had been expropriated.
>
> 4.1.4 A defence that by reason of the fact that the Claimants have pleaded that the Zimbabwean Courts ruled that all of the Section 5 Notices were invalid, there is no case to answer in regard to the Claimants' claim that the Constitutional Amendment expropriated their investments (Rejoinder, paras 1013 to 1026).
>
> 4.1.5 A defence that the Calvo Doctrine is applicable, i.e. the Claimants are entitled to no greater treatment to that as received by Zimbabweans (Rejoinder, paras 409 to 413). In effect this is an argument that apart from the national treatment standard, none of the other standards in the BITs are applicable.
>
> 4.1.6 A defence that any award of damages must take into account Zimbabwe's ability to pay (Rejoinder, paras 1061 to 1072).
>
> 4.1.7 A defence that "declarations, political speeches and similar acts of communication", all of which were pleaded in the Memorial, are not attributable to the Respondent under public international law (Rejoinder, paras 1082 to 1087)."

19. The Claimants contend that such new defences are raised out of time and, pursuant to Rule 31(3) of the Arbitration Rules, should have been raised within the Counter-Memorial. The Claimants submit that unless these defences are ruled inadmissible and disregarded by the Arbitral Tribunals pursuant to Rule 26(3) of the Arbitration Rules, they will be unfairly prejudiced in that they will be unable to present their case in an adequate manner (see Application, paras. 4.3-4.6).

20. In their December 31st Letter, the Claimants submitted that, as a consequence of the Respondent not following the rules and directions concerning the timing of submissions, it is not possible for the Claimants both to prepare for the Hearing and to respond to the jurisdictional challenges and new defences. The Claimants noted that this puts the Claimants and the Tribunals in a difficult position, describing the position as follows: "On the one hand the Claimants do not wish to encourage the Respondent's disruptive behaviour. However, on the other hand, the Claimants do not wish to jeopardise any future award." (see Claimants' December 31st Letter, para. 3.5).

21. The Claimants reject the Respondent's analogy between the situation in the present cases and the situation that would arise under Article 45 of the ICSID Convention and Rule 42 of the Arbitration Rules concerning default proceedings, averring that the issue is not whether the Respondent has failed to appear or present its case, but whether the Respondent should be permitted to advance arguments beyond the time period set by the Arbitration Rules and the Tribunals (see Claimants' December 31st Letter, para. 5.1).

22. The Claimants disagree that the points raised in the Rejoinder go to the merits as opposed to jurisdiction, averring that all challenges as to whether or not the Claimants are "investors" or have protected "investments" are clearly matters of jurisdiction. The Claimants add that joining the jurisdictional challenges to the merits of the dispute does not transform such challenges into issues going to the merits, it simply reflects a decision to hear both jurisdictional and merits issues together, such as where the same evidence is relevant to both (see Claimants' December 31st Letter, paras. 6.1-6.6).

23. As regards the raising of new defences, the Claimants contend that the relevant issue is not whether or not the Respondent draws on facts contained in the Claimants' materials, but whether or not the Respondent responds to those facts in accordance with the time frame and procedure set out in the Arbitration Rules and Minutes of the Joint First Session. The Claimants reason that if the Respondent's position were correct, "it will be free to keep submitting new arguments right up until the proceedings are closed – this cannot be right" (see Claimants' December 31st Letter, paras. 7.1-7.2). In similar vein,

the Claimants note that the Minutes also require that each Party provide the documents on which it relies (see ibid., para. 8.1).

B. The Respondent's Submissions

24. The Respondent urges the Arbitral Tribunals not to disregard its submissions in the spirit of fairness and of proceeding to hearing the matter based on full facts and argument. The Respondent submits that, as a developing country "making an effort to counter a sophisticated and well-resourced adversary", it must be given a chance to be fully heard. The Respondent further submits that the Tribunals should take into consideration that administrative processes within a State multiply the time required to analyse, review and prepare any final binding submission (see Respondent's December 28th Letter, p. 2).

25. The Respondent seeks to draw a parallel between how these cases have proceeded to date, prior to the Respondent's retention of external counsel, and default proceedings, referring the Arbitral Tribunals to several authorities on the Tribunal's role in default proceedings (see Respondent's December 28th Letter, pp. 2-3).

26. As regards the Claimants' submission that the Respondent has raised jurisdictional challenges for the first time in its Rejoinder, the Respondent disagrees with this characterisation of its pleading, averring that the issues identified by the Claimants affect the merits. The Respondent states that it has raised no issue as to the Arbitral Tribunals' jurisdiction over the Parties or over the Claimants' claims, but has rather pleaded that certain of the Claimants' claims do not meet the criteria for a protected investment under the BITs and that the Claimants' own legal argumentation fails to prove that they were expropriated by the impugned legislation (see Respondent's December 28th Letter, p. 4).

27. Alternatively, the Respondent submits that should the Arbitral Tribunals consider the issues pleaded in its Rejoinder as "jurisdictional" issues, then they should be joined to the merits of the dispute and reviewed as or with merits issues (see Respondent's December 28th Letter, pp. 4-5).

28. As regards the Claimants' objection to the introduction of allegedly "new" defences, the Respondent avers "on ne voit pas où est le problème", arguing that the Claimants'

complaints concerning documents not provided with the Rejoinder are without merit, being available in the public domain, and that their surprise regarding the defences pleaded in the Rejoinder, such as State of Necessity, is disingenuous given the Claimants' own description of the events underlying their claims and documents submitted in support of their cases (see Respondent's December 28th Letter, pp. 6-7).

29. The Respondent notes that the need to fix and extend time limits was envisaged in paragraph 6.3 of the Minutes of the Joint First Session and that, despite the Arbitral Tribunals' power under Rule 26(3) of the Arbitration Rules, the following should also be taken into account (see Respondent's December 28th Letter, p. 8):

> "i) the liberty Claimants took in amending and resubmitting their Memorial to include new claims almost one year after the date of their Memorial;
>
> ii) the absence of "new" facts or documents with Respondent's Rejoinder;
>
> iii) Respondent's offer in its letter of 4 December 2012 that Claimants comment on any issue by 7 January 2012 and Respondent reply by 14 January 2012."

30. The Respondent confirms that, as set out in its letter to the Claimants dated 4 December 2012, it does not object to the Claimants being given an opportunity to comment on any "possibly relevant points" contained in the Rejoinder with a final opportunity for the Respondent to provide its comments in reply in advance of the Hearing presently scheduled to take place in February 2013 (see Respondent's December 28th Letter, p. 9).

31. The Respondent submits that the Claimants do not contradict the fact that they must prove their case, that the information of which they complain is of a nature that the Arbitral Tribunals can take judicial notice, or that the conclusions the Respondent draws from the documents that the Claimants themselves have submitted are legal rather than factual. The Respondent avers that the real issue is the application of the law, and that this matter can indeed be discussed and applied up until the proceedings are closed (see Respondent January 2nd Letter, p. 2).

32. As the Claimants seek an eight week period to respond to the Rejoinder, the Respondent also requests a parallel period to give its final response "given the probability that Claimants are very likely to communicate new exhibits in addition to more than 4,000 already communicated to cover the issue of the German BIT". The Respondent notes that "[i]t is well established that Governments are slower to decide than are private individuals, so it would be unfair not to give the Respondent equal time." (see Respondent January 2nd Letter, p. 2).

33. In response to the proposed revised timetable set out in the Claimants' December 28th Letter, the Respondent makes the following counter-proposal (see Respondent January 2nd Letter, p. 2):

> "Respondent advises that it will, by 15 January 2013, provide paper copies or extracts or relevant passages of the documents it submitted electronically with its 14 December 2012 Rejoinder.
>
> Eight weeks from that date would, taking a Friday, bring the date for Claimants' submission to 11 March 2013.
>
> In turn, the Friday eight weeks from then would bring the date for Respondent's submission to 17 May 2013.
>
> To leave at least one month between the last exchange and the commencement of hearings in Singapore, this new timetable would bring the date for such hearings to mutually acceptable dates in July 2013."

V. ANALYSIS

34. The Arbitral Tribunals note that during the Joint First Session, the Respondent, represented at that time by five advisers (Advocate Prince Machaya, Deputy Attorney-General, Civil Division; Ms. Sophia Christina Tsvakwi, Permanent Secretary, Ministry of Lands; Ms. Fatima Chakupamambo Maxwell, Director, Civil Division, Attorney-General's Office; Ms. Elizabeth Sumowah, Legal Adviser, Ministry of Lands; and Mr. Colin Chiutsi, Officer, Ministry of Foreign Affairs), stated that it did not intend to file any objections to jurisdiction (see Minutes of Joint First Session, pp. 3 and 13, para. 13.1). This statement of intention does not, of course, preclude the Respondent from

raising jurisdictional objections at a later stage of the proceedings, subject to the time limits fixed by the Tribunals and the applicable rules.

35. Rule 41(1) of the Arbitration Rules provides generally that objections to jurisdiction should be raised as early as possible and, in any event, no later than the expiration of the time limit fixed for the filing of the Counter-Memorial or, in the case of jurisdictional objections relating to ancillary claims, no later than the time limit fixed for the filing of the rejoinder. Rule 41(1) provides as follows:

> "**Rule 41**
> **Preliminary Objections**
>
> (1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.
>
> …". (emphasis added).

36. Rule 31(3) of the Arbitration Rules also provides that the rejoinder shall contain, *inter alia*, an admission or denial of facts contained in the reply and a statement of law in answer to the statement of law contained in the reply. In other words, the legal and factual case pleaded in a rejoinder is to be responsive to the legal and factual case pleaded in the reply. Rule 31(3) provides as follows:

> "**Rule 31**
> **The Written Procedure**
>
> …
>
> (3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions." (emphasis added)

37. The Arbitral Tribunals nevertheless retain the discretion pursuant to Rule 26 of the Arbitration Rules to, in special circumstances, extend any time limit that has been fixed and to accept any step taken after the expiration of a time limit. Rule 26 provides as follows:

> "**Rule 26**
> **Time Limits**
>
> (1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.
>
> (2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.
>
> (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." (emphasis added)

38. The Claimants contend firstly that the Respondent has raised jurisdictional challenges out of time and that the criteria set out in Rule 41(1) to admit such challenges are not met. The Respondent avers that the pleadings identified by the Claimants are not of a jurisdictional nature but are rather matters that "affect" the merits of the disputes before the Arbitral Tribunals. Whilst the Respondent states that it does not challenge the Tribunals' jurisdiction over the Parties to these disputes (an issue in respect of which the Tribunals make no ruling herein), at the very least it does appear to challenge the Tribunal's jurisdiction over the subject matter of the disputes. This is implicitly acknowledged by the Respondent in the following response to the Application (see Respondent's December 28th Letter, p. 4):

> "The Arbitrators will note that Respondent raises no issue as to the Arbitral Tribunal's jurisdiction over the Parties to this dispute or over certain of Claimants' claims. However, Respondent does point out that certain of Claimants' claims do not meet the criteria for a protected investment under the BITs and that Claimants' own legal argumentation fails to provide that they were expropriated by the 2005 Amendment to the Constitution of the Republic of Zimbabwe."

39. The Arbitral Tribunals agree that the matters pleaded in the Rejoinder and identified by the Claimants in their Application are jurisdictional challenges. In so far as those challenges relate to the ancillary claims pleaded by the Claimants at the time the Claimants filed their Reply, they are timely pleaded in the Respondent's Rejoinder pursuant to Rule 41(1). This does not appear to be contested by the Claimants. However, in so far as the jurisdictional challenges relate to the Claimants' case as pleaded in the Memorial, they should have been pleaded no later than in the Counter-Memorial (*i.e.*, no later than 11 August 2012), unless the facts on which the challenges are based were unknown to the Respondent at that time.

40. The Respondent does not argue that the facts underpinning its jurisdictional challenges in so far as they relate to the Claimants' case as pleaded in the Memorial were unknown to it at the time that it filed its Counter-Memorial. To the contrary, the Respondent states that the jurisdictional challenges are "logical conclusions drawn from the documents which Claimants themselves have submitted" and that "there are no new facts and no new legal bases" raised therein (see Respondent's December 28th Letter, p. 4). Nor does the Respondent appear to argue that the jurisdictional challenges are solely in response to the ancillary claims pleaded by the Claimants with their Reply on 12 October 2012.

41. The Respondent's position appears to be that the jurisdictional objections are "issues affecting the merits" and, to the extent the Tribunals consider them to be jurisdictional issues in the sense advocated by the Claimants, they ought to be joined to the merits of the disputes. In effect, the Respondent does not argue that it is in compliance with Rule 41(1) but rather that, should the Arbitral Tribunals consider that the issues raised in the Rejoinder are jurisdictional in nature, whether they are timely raised or not they should be admitted into the proceeding and heard with the merits. The Respondent invokes Article 41(2) of the ICSID Convention in support of its position.

42. Article 41(2) of the ICSID Convention states that:

> "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to joint it to the merits of the dispute."

43. The Arbitral Tribunals do not consider the above provision assists the Respondent in the circumstances of the present Application, as the primary issue is not whether to join the jurisdictional challenges to the merits of the disputes in order that they may be heard together, but whether the jurisdictional challenges were timely brought under the Arbitration Rules. Moreover, the Arbitration Rules are adopted pursuant to the Convention to establish a more detailed procedural framework that ensures the efficient conduct of arbitral proceedings. General principles set out in the ICSID Convention should not be seen as vehicles to escape procedural time limits set forth in the Rules. To invoke Article 41(2) of the ICSID Convention as the Respondent proposes would run counter to the afore-mentioned understanding of the relationship between the Convention and the Rules.

44. The Arbitral Tribunals consider that the jurisdictional challenges contained in the Rejoinder, in so far as they relate to the Claimants' ancillary claims pleaded with its Reply, are timely raised. However, in so far as the challenges relate to the Claimants' case as pleaded in the Memorial, those challenges should have been brought at an earlier stage of the proceedings, consistent with Rule 41(1) of the Arbitration Rules. The consequences of these findings shall be dealt with below.

45. The Claimants' second contention is that certain defences contained in the Rejoinder are "new" in so far as they have not already been pleaded in the Counter-Memorial and that, pursuant to Rule 31(3), such defences should have been raised in the Counter-Memorial as they constitute observations and statements of law in relation to the cases pleaded in the Claimants' Memorial.

46. The Respondent again does not appear to argue that it has pleaded its case in the Rejoinder in strict compliance with Rule 31(3) of the Arbitration Rules. Indeed, it takes the position in its January 2nd Letter that the real issue in connection with the alleged raising of "new" defences is the application of the law and that the law can be "discussed

and application" up until the proceedings are closed. This position is contradicted by the plain language of Rule 31(3) and fails to acknowledge the Tribunals' role in ensuring a fair and efficient procedure.

47. In its letter to the Claimants of 4 December 2012, the Respondent acknowledges that the Rejoinder might contain information requiring a further response from the Claimants and proposes a further round of pleading following the filing of the Rejoinder. The Respondent observes in this letter that new issues were raised in the Reply and indicates that new information might also be contained in the Rejoinder, although it is unclear whether one is a consequence of the other and, if so, to what extent. The letter states, in relevant part, that (see Respondent's December 4th Letter, pp. 1-2):

> "The Claimants' Reply was submitted with amendments and clarifications to the claims. New issues were raised in the Reply.
>
> We are seeking your consent to us sending the outstanding documents with the Rejoinder and amending the timetable to allow for your reply to the new issues that you had not had opportunity to respond to. The Rejoinder might also contain some information that you might need to respond to. Our proposal is that after we file our Rejoinder on the 14th of December 2012 you have up to 7th January 2013 to reply and then we will respond by the 14th of January 2013."

48. In its January 2nd Letter, the Respondent reiterated its above offer, proposing extended timelines for the further round of briefing, in the spirit of permitting the Respondent "to be fully heard" and to "avoid Claimants challenging due process for such right to be heard" (see Respondent's January 2nd Letter, p. 2). Despite this effort to achieve a compromise in order to preserve the Parties' respective due process rights, the fact remains that certain defences raised in the Rejoinder appear to relate to statements and observations of fact and law contained in the Claimants' Memorial and, in so far as they were not already pleaded in the Counter-Memorial, are raised beyond the time for doing so pursuant to Rule 31(3).

49. The Arbitral Tribunals therefore find that the Respondent has raised certain jurisdictional challenges and new defences after the time limits set for doing so in these cases and under the Arbitration Rules. The question remains whether "special circumstances"

exist, within the meaning of Rule 26(3), so as to engage the Tribunals' discretion to admit these challenges and defences after the time when they ought to have been pleaded.

50. The fact of external counsel having been retained at a late date is not, in the Arbitral Tribunals' consideration, sufficient in itself, in the circumstances of these cases, to justify a finding of "special circumstances" within the meaning of Rule 26(3). The Tribunals do not find the analogy to default proceedings to be apposite for the same reasons articulated by the Claimants. That is, the issue is not the Respondent's right to be heard, but rather the Parties' equal right to due process and a fair proceeding, which includes respect for the time limits fixed by the Tribunals for each step in the proceedings.

51. The Arbitral Tribunals note the additional factors identified by the Respondent in its December 28th Letter, namely the submission of new, ancillary claims by the Claimants almost one year after the date on which they submitted their Memorial, the absence of "new" facts or documents contained or referred to in the Rejoinder, and the Respondent's offer to agree a further limited round of pleading to ensure that both Parties have the opportunity to fully plead their case. In relation to the Respondent's first point, the Tribunals agree that the delay in which the Claimants' ancillary claims were brought is, practically speaking, partly the cause of the present difficulty of managing the Respondent's late-raised jurisdictional challenges and defences in such close proximity to the Hearing.

52. On a related point, the Tribunals observe that were they to disregard the jurisdictional objections as they relate to the Claimants' case as pleaded in the Memorial, simply as being out of time, but admit, as they must, the jurisdictional objections as they relate to the ancillary claims pleaded by the Claimants with their Reply, a paradoxical situation would result. The absence of any new facts underpinning the jurisdictional objections and defences raised in the Rejoinder, such that no undue evidentiary burden would be placed on the Claimants at this stage of the proceedings, strengthens the case that the late-raised jurisdictional challenges and defences ought to be admitted and heard together with those timely raised jurisdictional challenges and defences.

53. Finally, the Tribunals note the Claimants' own concern regarding the enforceability of any future award rendered in these cases in the event the Respondent is not "fully heard" on its jurisdictional objections and defences, and their proposal, echoing that of the Respondent, to establish further written and oral procedures in order to ensure that each Party has an adequate opportunity to respond to the other Party's case.

54. The Arbitral Tribunals find that the above factors, cumulatively, constitute special circumstances compelling it to exercise its discretion pursuant to Rule 26(3) to admit the late-raised jurisdictional challenges and the new defences and to fix new time limits for the remaining steps in the proceedings.

VI. THE ARBITRAL TRIBUNALS' DECISIONS

55. Based on the foregoing, the Members of the Arbitral Tribunals have deliberated and decided unanimously to deny the Application but to grant, in part, the alternative relief requested in the Claimants' December 31st Letter. Accordingly, the Arbitral Tribunals hereby order as follows:

(a) The Respondent's challenges to jurisdiction which relate to the Claimants' case as pleaded in the Memorial are admitted and all of the challenges to jurisdiction pleaded in the Rejoinder are joined to the merits of the cases;

(b) The Hearing scheduled to take place in Singapore from 18 to 22 February 2013 (with 23 February 2013 being a reserve day) is vacated;

(c) The Hearing shall take place in Singapore from 10 to 14 June 2013 (with 15 June 2013 being a reserve day);

(d) The Respondent shall provide the Claimants and the Arbitral Tribunals with a copy of the documents which are referred to in its Rejoinder and on which it relies, or an appropriate excerpt thereof consistent with the parties' agreement as recorded in paragraph 15.2 of the Minutes of the Joint First Session, by e-mail no later than 18 January 2013 and by courier on the following business day in accordance with paragraph 11.5 of the Minutes of the Joint First Session;

(e) The Claimants shall file their observations on the Respondent's Rejoinder, including their response to the Respondent's observations on the ancillary claims, together with any supporting evidence, by 1 March 2013;

(f) The Respondent shall file its response to the Claimants' observations, including its reply to the Claimants' response on the ancillary claims, together with any supporting evidence, by 19 April 2013;

(g) A Pre-Hearing Telephone Conference of the Parties with the Chairman of the Arbitral Tribunals shall take place during the week of 20-24 May 2013;

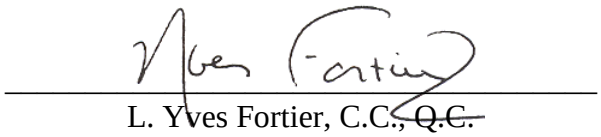
(h) the Parties shall exchange and file with the Arbitral Tribunals skeleton arguments no later than 31 May 2013; and

(i) (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.

56. There shall be no order as to costs.

Dated as of 11 January 2013

Signed on behalf of the Arbitral Tribunals



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