

**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. 8

Members of the Arbitral Tribunals

Mr. L. Yves Fortier, P.C., C.C., Q.C., President
Professor David A.R. Williams, Q.C., Arbitrator
Mr. Michael Hwang, S.C., Arbitrator

Secretary of the Tribunals
Frauke Nitschke

Assistant to the Tribunals
Alison G. FitzGerald

Representing the Claimants

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

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

Representing the Respondent

The Honorable Johannes Tomana
Advocate Prince Machaya
Ms. Sophia Christina Tsvakwi
Ms. Fortune Chimbaru
Ms. Elizabeth Sumowah
Attorney General's Office
Harrare, Republic of Zimbabwe

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

I. INTRODUCTION

1. On 22 September 2013, the Respondent brought a “procedural request” in connection with its submission due on 23 September 2013 in reply to the Claimants’ 9 September 2013 submission (the “Procedural Request”). Specifically, the Respondent seeks the following relief:

“(a) extend the current page limit for a single submission to 13 pages (endnotes included, but cover page and table of contents page excluded), 14 pages if footnote presentation is preferred (footnotes included, but cover page and table of contents pages excluded);

or

(b) maintain the 10-page limit for Respondent's Reply (endnotes included, but cover page and table of contents pages excluded) on all matters and permit a separate 4 page submission (endnotes included, but cover page and table of contents pages excluded), 5 pages if footnote presentation is preferred (footnotes included, but cover page and table of contents pages excluded) to permit Respondent's response to these three new items:

- a. MFN clause to remove Article 9b of the German [BIT]
- b. Admissibility, not jurisdiction and
- c. Amendment of Claimants' Surrejoinder on estoppel to remove Article 9b.”

2. On 23 September 2013, the Respondent wrote to the Secretary of the Tribunals advising that the Parties had agreed that they would file all submissions presently due on 23 September 2013 within 24 hours of the Arbitral Tribunals’ decision with respect to the Respondent’s Procedural Request.
3. The Arbitral Tribunals have considered the Procedural Request and have decided unanimously as follows.

II. PROCEDURAL HISTORY

4. On 8 August 2013, the Tribunals issued Procedural Order No. 7 which disposed of an application brought by the Claimants in connection with a new objection to jurisdiction,

based on Article 9(a) of the Germany-Zimbabwe BIT (the “German BIT”) and Article 2 of Switzerland-Zimbabwe BIT (the “Swiss BIT”), pleaded by the Respondent for the first time in its pleading filed on 19 April 2013 (the “Rebutter”), and new evidence filed in support thereof and in support of a prior jurisdictional objection relating to Article 9(b) of the German BIT raised in the Respondent’s Rejoinder.

5. In Procedural Order No. 7, the Tribunals allowed the Respondent’s new jurisdictional objections and evidence and directed a further limited briefing schedule to ensure that each Party had a reasonable opportunity to plead its case in writing prior to the hearing in relation to those objections.
6. Consistent with the Tribunals’ directions, the Respondent filed an addendum to its Rebutter on 16 August 2013, setting out its new jurisdictional objections (the “Re-Rebutter”). The Claimants filed their response to the Re-Rebutter on 9 September 2013 (“Claimants’ 9 September Response”). The Respondent was due to file its reply to the Claimants’ 9 September Response on 23 September 2013 (“Respondent’s September 23 Reply”). The Respondent’s 23 September Reply was to have been the last written pleading in connection with this issue, a scant month before the merits hearing is scheduled to commence.

III. DISCUSSION

7. The Respondent states that the Claimants raised three new arguments in their 9 September Response, namely (see Respondent’s Procedural Request, p. 1):

“(i) the German MFN clause to rely on provisions of Swiss and Danish BITs, which would according to the Claimants, not require approval to fulfill or remove Article 9b of the German BIT from the debate (cf Section I.F “ MFN”, para. 25); (ii) admissibility, not jurisdiction (cf Section I.B, para. 2) and (iii) amendment of Claimants’ Surrejoinder pleading on estoppel to remove Article 9b of German BIT (cf Section II.F, para. 80).”
8. In order to address these “new” arguments, the Respondent states that it requires additional pages to expand in writing on case law references included in its 23 September

Reply, failing which the Respondent considers that its right to be heard will not be respected (see Procedural Request, p. 2):

“After Respondent drafted and edited its 23 September Reply, it appears that the new issues Claimants just raised for the first time, particularly regarding MFN to remove Article 9b of the Swiss BIT, and to a lesser [sic] degree admissibility versus jurisdiction, involve discussion of case law, which would not have been necessary but for Claimants' new amendments I arguments. Respondent's 23 September Reply discusses 14 cases, principally in this regard. To merely list the reference to the case to come within the 10-page limit, without a couple of sentences to explain Respondent's view as to how each case enlightens the debate, does not serve due process, either for the Respondent or for the Claimants. Failing the three or four page expansion of the page-limit, Respondent will consider that its right to be heard will not be respected if Claimants' new theories stand. Further, Claimants will benefit from Respondent's explanation over one month before hearings begin to better advance their preparation of oral proceedings.”

9. The Arbitral Tribunals have elected not to invite comment on the Procedural Request from the Claimants, as they consider it unnecessary in the circumstances. Moreover, the Claimants have not requested an opportunity to reply to the Procedural Request.
10. The relevant provisions of the Claimants' 9 September Response, as identified in the Procedural Request, are reproduced below. The Claimants' arguments relating to the MFN clause in the German BIT are as follows (see Claimants' 9 September Response, para. 25):

“The Swiss BIT and the Danish BIT do not contain any provisions that (in the words of Article 9(b) of the German BIT) require Swiss investments and Danish investment to be ‘specifically approved by the competent authority [of Zimbabwe] at the time of their admission’ in order for the Swiss BIT and Danish BIT to apply. In the circumstances, the Swiss BIT and Danish BIT are more favourable than the German BIT. Therefore to the extent that the von Pezold Claimants' investments have not been approved for the purpose of Article 9(b) of the German BIT, the von Pezold Claimants invoke the German MFN clauses to rely on the more favourable provisions of the Swiss BIT and Danish BIT, which do not require such approval.”

11. The Claimants' arguments relating to admissibility are as follows (see Claimants' 9 September Response, para. 2):

“For the reasons stated in **paras 30 to 31 below**, the issue regarding the approval of the Claimants' investments pursuant to Article 9(b) is one of admissibility, not jurisdiction. Therefore there may be an investment for the purpose of the BITs, whether or not it has been approved for the purpose of Article 9(b) of the German BIT.”

12. The Claimants' arguments relating to estoppel are as follows (see Claimants' 9 September Response, para. 80):

“The Claimants pleaded estoppel in the Surrejoinder in regard to the Approval Objection. The Claimants hereby amend their Surrejoinder pleading on estoppel so that the estoppel argument also applies to the Illegality Objection. In particular, all of the evidence and legal arguments cited in that pleading in regard to estoppel as applied to the Approval Objection are also equally applicable to the Illegality Objection.”

IV. ANALYSIS

13. The Tribunals do not consider the Claimants’ 9 September Response to be inconsistent with or contrary to the directions issued to the Parties in Procedural Order No. 7 such that the Tribunal’s directions must be re-considered or amended. The arguments in question are clearly responsive to the Respondent’s new jurisdictional objections, admitted by the Tribunals in Procedural Order No. 7 and pleaded fully for the first time in the Respondent’s Re-Rebutter. The Claimants are entitled to defend those jurisdictional objections, even if this means raising a defence or defences that have not previously been pleaded. This is a consequence of raising new jurisdictional objections at this stage of the proceedings.
14. The Respondent has been afforded ample opportunity to present its case and to defend the Claimants’ claims. In Procedural Order No. 3, all of the Respondent’s challenges to jurisdiction, as pleaded for the first time in the Rejoinder, were admitted. In Procedural Order No. 7, the Respondent was permitted to raise additional jurisdictional objections at an even later stage of the proceedings, was given an opportunity to present those objections cogently in a supplemental pleading to its Rebutter, and was given a right of reply to the Claimants’ 9 September Response. The Respondent now seeks additional pages for this last submission to expand on how, in its view, certain cases cited in its Reply in response to the arguments raised by the Claimants in their 9 September 2013 Response “enlighten the debate” between the Parties in respect of the Respondent’s jurisdictional objections.
15. The Tribunals are not persuaded that it is necessary or appropriate at this stage to re-open the directions set out in Procedural Order No. 7 so as to afford the Respondent additional

pages to plead its reply to the Claimants' 9 September Response. The Respondent's Procedural Request is therefore denied.

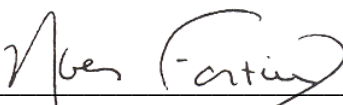
16. The Tribunals are of the view that in so denying the Procedural Request, the Respondent's right to be heard is not in any way impinged. In addition to the multiple opportunities afforded to the Respondent to plead its jurisdictional objections in relation to Article 9(a) and 9(b) of the German BIT and Article 2 of the Swiss BIT in writing, the Respondent is also entitled to make submissions on both law and evidence on the record in respect of these objections during the oral hearing, scheduled to commence on 28 October 2013, and in any post-hearing procedures that may be agreed by the Parties and the Tribunals or decided by the Tribunals.
17. The Tribunals note the Respondent's reservation of right to "develop its subsidiary position (which is not part of the present request) that Claimants' new arguments be excluded". As the Tribunals are not at this time seized of such a request, it shall not be considered further here.

V. THE ARBITRAL TRIBUNALS' DECISIONS

18. The Respondent's Procedural Request is dismissed.
19. There shall be no order as to costs.

Dated as of 25 September 2013

Signed on behalf of the Arbitral Tribunals



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