

**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. 1

Members of the Tribunals

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

Secretary of the Tribunals
Frauke Nitschke

Representing the Claimants

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

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

Representing the Respondent

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

Harrare, Republic of Zimbabwe

1. This Procedural Order No. 1 addresses those requests of the Claimants which are still outstanding as set out in the “Redfern Schedule” for the “Claimants’ First Request to Produce Documents” dated 11 March 2011 (the “First Request to Produce Documents”).
2. In their letter of 13 April 2011, the Claimants set forth the background to their First Request to Produce Documents and the efforts made in this regard to agree with the Respondent on the scope and timing of document production.
3. On 26 and 29 April 2011, the Respondent submitted its response to the Claimants’ First Request to Produce Documents.
4. On 11 May 2011, as directed by the Tribunals, the Claimants submitted their reply to the Respondent’s response to their First Request to Produce Documents.
5. The Respondent made further observations regarding the Claimants’ First Request to Produce Documents on 17 June 2011.
6. On 17 October 2011, as invited by the Secretary to the Tribunals, the Claimants provided the following status report regarding their First Request to Produce Documents:

I refer to your email to the Parties of 10 October 2011. In that email you enquired as to whether or not there have been any further developments in regard to the Claimants’ First Request to Produce Documents, beyond the Claimants’ letter of 11 May 2011 and the Respondent’s response of 17 June 2011.

There has been one further development in that on 24 June 2011, the Respondent provided the Claimants with the following documents:

- part – but not all - of the report(s) of the Presidential Land Review Committee on “The Implementation of the Fast Track Land Reform Programme 2000 – 2002”, 2003 (sometimes referred to as “the Utete Reports”), as requested in Part 1(c) of the Claimants’ Redfern Schedule (the Claimants still require

the full set of “the Utete Reports”, including their attachments); and

- the report(s) arising from the land audits undertaken by Minister Didymus Mutasa, 2008, as requested in Part 1(f) of the Claimants’ Redfern Schedule (in relation to Part 1(f), the Claimants also requested the same reports for the years 2005,2006,2007 and 2009 – these have not been provided, and are still required by the Claimants).

Therefore the position as of today is that the Respondent has:

- refused to provide any of the documents in Part 1 of the Claimants’ Redfern Schedule, except those that have been provided, as indicated above; and
- has agreed to provide the documents in Parts 2,3 and 4 of the Claimants’ Redfern Schedule but has failed to do so (see the Respondent’s email of 29 April 2011, agreeing to provide Parts 2,3 and 4 of the Claimants’ Redfern Schedule).

7. On 21 October 2011, the Respondent confirmed the accuracy of the above status report.

8. The Tribunals recall that pursuant to paragraph 14 of the “Summary Minutes of the Joint First Session of the Two Arbitral Tribunals”, it was agreed that in addition to the relevant provisions of the ICSID Arbitration Rules, the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”) shall guide the Tribunals and the parties regarding document production in these two proceedings.

9. Having deliberated, the Tribunal, using the Redfern Schedule submitted by the Claimants in connection with their First Request to Produce Documents, decides as follows:

No.	Description of documents or category of documents	Reason for the request i.e. how are the Documents relevant to the case and material to its outcome	Agreed / Not Agreed, and if not agreed, a statement of the Respondent's objection	Tribunal's Decision
1.	<p>All Documents (“the Audits”) (that were created by persons, commissions or committees, appointed or constituted by the Respondent in the period 1 January 2000 to date, and which reviewed aspects of the “Land Reform and Resettlement Programme”), which identify members of ZANU-PF, and the officers, agents, proxies, ministers, judges, directors and military and civil servants of the Republic of Zimbabwe (“Government Servants”) who have received or been allocated land pursuant to the “Land Reform and Resettlement Programme”, including – but not limited to - the following documents, of the following approximate dates:</p> <p>(a) The Preliminary Audit Report of the Land Reform and Resettlement Programme, 2003 (see section III, para 4.1 above);</p> <p>(b) The Land Reform and Resettlement Programme National Audit Interim Report, including the</p>	<p>The ostensible purpose of the “Land Reform and Resettlement Programme” was to acquire agricultural land to resettle landless people so they could use that land for agriculture, and in order to correct land ownership imbalances between different ethnic groups (“the Ostensible Purpose”).</p> <p>However, part of the Claimants’ case is that - in practise - a purpose of the “Land Reform and Resettlement Programme” was to expropriate property that was directly or indirectly owned by “Whites” (“the Discriminatory Purpose”).</p> <p>Furthermore, part of the Claimants’ case is that – in practise – a further purpose of the “Land Reform and Resettlement Programme” was to enrich of members of the ruling political party (ZANU-PF) and Government Servants (“the Enrichment Purpose”).</p> <p>Moreover, it is also part of the Claimants’ case that the Discriminatory Purpose and Enrichment Purpose, if proven, will mean that the “Land Reform and Resettlement Programme” was undertaken by the Respondent for a purpose other than a</p>	<p>Agreed with respect to the following two audits report: (i) the Utete Report, and (ii) an audit by the Ministry of Lands.</p> <p>The Respondent objects to the production of the addendum prepared by Ms Flora Bhuka on the basis that this document was for the use of the Executive and was never to be revealed to the public.</p> <p>The Respondent objects to producing all other documents requested under Part 1 on the basis that they are privileged documents which were never intended for circulation, distribution or dissemination to the general public, and that all the documents were classified as “secret documents” intended solely for the guidance of the Executive arm of the Government of Zimbabwe in the implementation of the Land Reform Exercise.</p>	<p>(a) The Respondent is ordered to produce the documents as agreed within seven (7) days from the date of this Procedural Order No. 1.</p> <p>(b) The Respondent is further ordered to produce all other responsive documents within seven (7) days from the date of this Procedural Order No. 1, except such documents subject to a legal impediment or privilege which the Respondent shall explicitly assert with respect to each and every particular document at issue, as guided by Article 9(2) of the IBA Rules, within seven (7) days from the date of this Procedural Order No. 1.</p>

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	<p>addendum prepared by Ms Flora Bhuka, 2003 (see Schedule 1, lines 16 to 17; Schedule 8, lines 15 to 17; also see section III, para 4.2 above);</p> <p>(c) The report(s) of the Presidential Land Review Committee on "The Implementation of the Fast Track Land Reform Programme 2000 – 2002", 2003 (sometimes referred to as "the Utete Reports") (see section III, para 4.3 above);</p> <p>(d) The report(s) of the Chiwewe Committee, 2004/2005/2006 (see Schedule 2, lines 7 to 8; Schedule 3, lines 19 to 20, Schedule 9, lines 5, 23, 24);</p> <p>(e) The report(s) of the Committee chaired by Mr John Nkomo, 2004 (see Schedule 2, line 1 to 4; Schedule 3, lines 3 and 8);</p> <p>(f) The report(s) arising from the land audits undertaken by Minister Mutasa, 2005/2006/2007/2008/2009 (see Schedule 7, lines 1 to 6; Schedule 8, lines 1 to 9; Schedule 12, lines 1 to 8; Schedule 13, lines 1 to 4;</p>	<p>public purpose, and was discriminatory. Therefore it is illegal under public international law, and in breach of Article 4 of the German BIT and Article 6 of the Swiss BIT.</p> <p>In such circumstances, the Audits are relevant to the Claimants' case and material to its outcome because they are very likely to provide evidence that the "Land Reform and Resettlement Programme" was not pursued by the Respondent for the Ostensible Purpose, but was pursued by the Respondent for the Discriminatory Purpose and/or the Enrichment Purpose, and it is therefore illegal under public international law and in breach of Article 4 of the German BIT and Article 6 of the Swiss BIT.</p> <p>In particular, the Audits – by definition - are very likely to reveal:</p> <p>(i) the extent to which property directly or indirectly owned by "Whites" was the object of the "Land Reform and Resettlement Programme" in contrast to any other ethnic group; and</p> <p>(ii) the extent to which ZANU-PF (the</p>		<p>(c) In the event the Claimants wish to challenge any assertion of legal impediment or privilege made by the Respondent in accordance with this Procedural Order No. 1, they may do so within seven (7) days of receipt of such assertion. If required, the Claimants shall also be entitled to seek an extension of the due date for their Memorial, currently due by 14 November 2011.</p> <p>(d) The Tribunals also invite the parties to consider the provisions of Article 9(4) of the IBA Rules in this regard.</p>

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	<p>Schedule 15, page 4, lines 31 to 32, and page 5, lines 1 to 14);</p> <p>(g) The reports of Ms Flora Bhuka, 2006/2007 (see Schedule 5, lines 1 to 5; Schedule 6, lines 1 and 9);</p> <p>(h) The report(s) arising from the Land Audit – announced by Minister Ignatius Chombo, 2006/2007 (see Schedule 10, lines 1 and 4; Schedule 11, lines 1 to 3 and lines 9 to 11);</p> <p>(i) the report(s) arising from the Land Audit Commission, 2010, (jointly commissioned by President Mugabe and Prime Minister Tsvangirai and Deputy Prime Minister Mutambara) and which is ongoing (see Schedule 14, lines 5 to 7 and lines 12 to 13).</p>	<p>ruling political party) and Government Servants benefited from the “Land Reform and Resettlement Programme” – in that they were allocated properties that had been expropriated from “Whites” pursuant to the “Land Reform and Resettlement Programme”.</p>		

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2.	<p>The quarterly reports of the Monetary Policy Committee, together with supplements, issued in terms of the Reserve Bank of Zimbabwe Act, Chapter 22:15, for the period 1 January 2000 to 31 December 2009, which set out the Respondent's policies (including its various iterations) in relation to foreign exchange, as identified by Mr O.C. Masiwa (Chief Inspector, Exchange Control Inspectorate) in his letter dated 21 February 2011, to Mr A.R. Passaportis, of Messrs Honey & Blanckenberg ("the Inspector's Letter"), (see Schedule 16), including the various policies referred to in the Inspector's Letter as "Upfront Open Market Disposals", "Retention Period Requirements", "Surrender Requirements", "compulsor[y] liquidat[ion]", "Forced Liquidation on Overdue Export Proceeds", and "Liquidations through the Auction System" (collectively "the Foreign Exchange Policies").</p>	<p>It is part of the Claimants' case that the effect of the Foreign Exchange Policies was to (i) deny the Claimants their right to transfer the foreign exchange returns on their investments out of Zimbabwe, and /or (ii) expropriate the Claimants' foreign exchange earnings, in breach of Articles 4(2) and 5 of the German BIT, and Articles 5 and 6 of the Swiss BIT.</p> <p>In such circumstances, the documents requested are relevant to the Claimants' case and material to its outcome because they provide a written record of the Foreign Exchange Policies as applied to the Claimants by the Respondent.</p>	Agreed but not yet produced.	The Respondent is ordered to produce the documents as agreed within seven (7) days from the date of this Procedural Order No. 1.

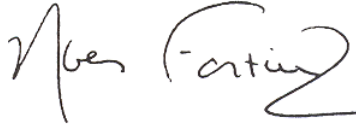
No.	Description of documents or category of documents	Reason for the request i.e. how are the Documents relevant to the case and material to its outcome	Agreed / Not Agreed, and if not agreed, a statement of the Respondent's objection	Tribunal's Decision
3.	All Documents of the Respondent for the period 1 January 2000 to 31 December 2009, that were sent by the Respondent to commercial banks in the Republic of Zimbabwe that (i) stipulate the Foreign Exchange Policies and/or (ii) direct those commercial banks to apply the Foreign Exchange Policies in a particular manner.	As above for Request 2.	Agreed but not yet produced.	The Respondent is ordered to produce the documents as agreed within seven (7) days from the date of this Procedural Order No. 1.
4.	<p>The following legislation and statutory instruments, relating to the Foreign Exchange Policies, referred to in the Inspector's Letter:</p> <p>(a) Exchange Control (Exchange Control Authority) Notice, published under Statutory Instrument 145 of 1997 (see para 5.1.2 of the Inspector's Letter);</p> <p>(b) Exchange Control Directive RC 44, dated 31 July 2001 (see para 4.1.2 of the Inspector's Letter);</p> <p>(c) Exchange Control Directive RD 346, dated 15 November 2002 (see</p>	<p>It is part of the Claimants' case that the effect of the Foreign Exchange Policies was to (i) deny the Claimants their right to transfer the foreign exchange returns on their investments out of Zimbabwe, and /or (ii) expropriate the Claimants' foreign exchange earnings, in breach of Articles 4(2) and 5 of the German BIT, and Articles 5 and 6 of the Swiss BIT.</p> <p>In such circumstances, the documents requested are relevant to the Claimants' case and material to its outcome because they provide a written record of the Respondent's laws.</p>	Agreed but not yet produced.	The Respondent is ordered to produce the documents as agreed within seven (7) days from the date of this Procedural Order No. 1.

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	<p>para 4.2.2 of the Inspector's Letter);</p> <p>(d) Exchange Control Directive RE 511, dated 24 December 2003 (see para 4.2.4 of the Inspector's Letter);</p> <p>(e) Exchange Control Directive RF 223, dated 29 July 2004 (see para 4.2.4 of the Inspector's Letter);</p> <p>(f) Exchange Control Directive RF 307, dated 11 October 2004 (see para 4.2.2 of the Inspector's Letter);</p> <p>(g) Exchange Control Directive RG 87, dated 31 January 2005 (see para 4.2.4 of the Inspector's Letter);</p> <p>(h) Exchange Control Directive RG 255, dated 15 June 2005 (see para 4.3.3 of the Inspector's Letter);</p> <p>(i) Exchange Control Directive RH 139, dated 8 May 2006 (see para 4.2.4 of the Inspector's Letter);</p> <p>(j) Exchange Control Directive RI 303, dated 2 October 2007 (see para 4.2.3 of the Inspector's Letter); and</p> <p>(k) Exchange Control Directive RK 52, dated 20 March 2009 (see para 4.1.3 of the Inspector's Letter).</p>			

10. There shall be no order as to costs.

Dated as of 31 October 2011

Signed on behalf of the Tribunals

A handwritten signature in black ink, appearing to read "L. Yves Fortier". The signature is written in a cursive style with a large, sweeping flourish at the end.

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

President