



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

*Academic Directors: Ignacio Torterola
Loukas Mistelis**

**BERNHARD VON PEZOLD AND OTHERS v.
REPUBLIC OF ZIMBABWE - AND -
BORDER TIMBERS LIMITED, BORDER TIMBERS
INTERNATIONAL (PRIVATE) LIMITED, AND HANGANI
DEVELOPMENT CO. (PRIVATE) LIMITED v.
REPUBLIC OF ZIMBABWE**

Case Report by **Cristina Viteri****
Edited by **Ignacio Torterola *****

In response to an urgent application for provisional measures filed by the Claimants, regarding the alleged breach of the disclosure regime by the Respondents and due to the impossibility of the Tribunal's members to deliberate as a whole, the President of the Tribunals issued a number of directions to the parties, to preserve the status quo of the arbitrations, pending a final determination on Claimant's application.

Members of the Tribunals: Mr. L. Yves Fortier, C.C., Q.C., President; Professor David A.R. Williams, Q.C., Arbitrator; and Professor An Chen, Arbitrator.

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Cristina Viteri is an attorney at the International Affairs and Arbitration Department of the Attorney General's Office of the Republic of Ecuador. She can be reached at cviteri@pge.gob.ec or +593 84084780.

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL).

Digest

1. Introduction

This summary reflects directions provided by the President of two arbitral Tribunals in ICSID Cases No. ARB/10/15 –and- ARB/10/25 issued on June 12th, 2012 pursuant to paragraph 5.3 of the Joint First Session’s Summary Minutes¹ (“the Minutes”) concerning Claimants’ application for provisional measures in a matter of information disclosure.

2. Facts and Allegations

In a letter dated June 11th 2012, Respondent's Attorney-General requested that by 10 a.m. Thursday June 14th, 2012 (3 days notice) one of the Claimant’s parent companies provide disclosure of assorted documents for use in the Arbitrations.²

According to Claimants, a government lawyer and two policemen delivered the letter directly to Claimants, specifically to one of Border Timbers Ltd’s parent companies, and not to their counsel Steptoe & Johnson and Wiley Rein instead. The tone of the Letter was alleged to be menacing and threatened criminal proceedings if the Claimants were not to follow the disclosure regime proposed by the Respondent.³

Pursuant to Section 116 of the Zimbabwean Companies Act Respondent requested Claimants to make available for inspection by the Civil Division in the Ministry of Justice, all Share Registers of the listed Companies in the Letter and of all other companies having any reference to either of the ICSID complaints.⁴ However, Claimants argued that the Share Registers of twenty-nine of the sixty-six listed entities in the letter were already provided in their Memorial.⁵

Claimants requested an interim order based on the concern of having their staff subject to intimidation and violence by Respondent’s agents, including the

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

² See Claimant’s application ¶ 1.1.

³ *Id.*, ¶ 1.2, 1.3.

⁴ *Id.*, ¶ ¶ 3.2., 3.3.

⁵ *Id.*, ¶ 3.3.

police, given the Respondent's history of intimidating parties to international proceedings in which the government was sued.⁶

As a matter of urgency, Claimants sought an interim order to preserve the status quo of the arbitrations, requesting the Tribunals to order Respondent to comply with paragraph 14 of the Minutes⁷, which relates to the production of documents, and not to invoke its domestic law for procedural advantage in the arbitral proceedings.

3. Legal Issue

The urgent application for provisional measures:

Pursuant to paragraph 5.3 of the Minutes, the President of the Tribunals ruled on the Claimant's urgent application for provisional measures, without consulting the other Members of the Tribunals, due to the urgency and impossibility of deliberating as a whole in such a short time-frame.

With respect to Rule 39(4) of the ICSID Arbitration Rules, it provides that "the Tribunal shall only recommend provisional measures [...] after giving each party an opportunity of presenting its observations." In that regard, the President of the Tribunals held that "[t]he Tribunals were, therefore, not in a position to recommend provisional measures prior to consulting with the parties further."

Nonetheless, the President of the Tribunals, based on paragraph 1.4 of the Claimant's Application, related to the Tribunals' power to render an interim order preserving the status quo of an arbitration pending the further observations of the parties, "[c]onsider[ed] that the Claimants' proposal represent[ed] an appropriate course of action, especially given the potential

⁶ *Id.*, ¶ 1.5.

⁷ Paragraph 14 of the Minutes provides inter alia that "[...] 14.1 Either Party may request the Tribunal to call for the production of documents in accordance with Arbitration Rule 34(2). Before applying to the Tribunal for an order calling for the production of documents, however, the Parties shall make reasonable efforts to reach agreement as to the scope and timing of production. 14.2 To avoid the Parties propounding multiple requests for production of documents during the course of the arbitration, each Party will be permitted a primary request during the time allocated for the preparation of each of its two principal written submissions, and such follow up requests as may be reasonably warranted in the circumstances."

consequences that might result from the Respondent's proposed actions."

The President of the Tribunals adopted the reasoning included in paragraph 1.4. of the Claimant's Application and, "[p]ending a final determination" issued a number of directions to both parties.

4. Analysis

The President of the Tribunals' power to take a decision without consulting the other Members was conferred by paragraph 5.3. of the Summary Minutes of the Joint First Session and not by the ICSID Arbitration Rules. This power was specifically granted to the President of the Tribunals, when a matter is considered to be urgent. Although the President is empowered to take a decision without consulting the other Members, it will be subject to reconsideration by the full Tribunal.

In this particular case, the directions issued by the President of the Tribunals to the parties, are pending a final determination.

In addition, it is necessary to observe that the President's decision was the issuance of a number of directions to both parties, instead of an interim order as requested by the Claimants.

5. Decision

The President of the Tribunals, Mr. L. Yves Fortier, pending a final determination of the Claimants' Application, directed the Respondent not to proceed with the proposed visit to the Claimants' offices; and, not to take further steps in relation to the matters contained in its letter to the Claimants dated June 11th, 2012, without the consent of the Claimants or the prior authorization of the Tribunals.⁸ The President of the Tribunals also requested the Respondent to present any observations on the Application. The Claimants were requested to present observations in reply, following receipt of the Respondent's observations. In addition, leave was reserved for either party to apply at any time for amendment of the aforementioned directions.

⁸ See *Directions to Claimant's application for provisional measures*, ¶ 8.