INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bernhard von Pezold and others v. Republic of Zimbabwe
(ICSID Case No. ARB/10/15) – Annulment Proceeding

- AND -

Border Timbers Limited and others v. Republic of Zimbabwe
(ICSID Case No. ARB/10/25) – Annulment Proceeding

DECISION ON THE APPLICANT'S APPLICATION FOR PROVISIONAL MEASURES

Members of the *ad hoc* Committees
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I. PROCEDURE

1. On 21 October 2015, the Republic of Zimbabwe (the "**Applicant**") filed applications for annulment and requests for stay on enforcement in respect of the awards in the conjoined cases *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Limited and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25) (the "**von Pezold Award**" and the "**Border Timbers Award**," respectively, and together the "**Awards**") pursuant to Article 52 of the ICSID Convention.

2. The *ad hoc* Committees (the "**Committees**") in these matters were constituted on 21 December 2015. The Committees conducted a joint first session with the Parties on 1 February 2016 and issued Procedural Order No. 1 on 11 February 2016, setting out the procedural framework and the timetable for the present annulment proceedings.

3. On 23 February 2016, the Applicant filed an application requesting the order of provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (the "**Application**"). Apart from a request for provisional measures, the Applicant also sought an interim order to preserve the *status quo* pending the Parties' filing of further observations on the matter.

4. By a letter dated 24 February 2016, the ICSID Secretariat wrote to the Parties on behalf of the Committees, informing the Parties of the Committees' decision to deny the Applicant's request for an interim order and inviting Bernhard von Pezold and others and Border Timbers Limited and others (the "**Respondents**" or "**VPB**") to submit their response to the Application by 2 March 2016.

5. On 2 March 2016, the Respondents filed their response to the Applicant's Application (the "**Response**").

6. By letter dated 4 March 2016, the ICSID Secretariat wrote to the Parties advising them that the Committees would rule on the Application on the basis of the record before them.

II. SUMMARY OF THE PARTIES' POSITIONS

A. The Applicant's Application

1.The Factual Basis of the Application

7. The Application arises from the publication of the von Pezold Award on the website of *ITA Law,* an investment arbitration information service, and the subsequent media coverage, including a series of articles on the von Pezold Award published by the *Investment Arbitration Reporter* ("**IA Reporter**") on 11 February 2016.[1] The Applicant contends that

[1] Application, pp. 2-3, paras. 4, 9-12.

it was the Respondents who were responsible for "leaking" the von Pezold Award to the media.[2] The Applicant also claims that the Respondents had previously made the von Pezold Award publicly known by attaching it, on 20 August 2015, to an affidavit filed by Mr Peter Lewis Bailey, the judicial manager of Border Timbers Limited, in public High Court of Zimbabwe proceedings (the "**Bailey Affidavit**").[3]

8. The Applicant contends that counsel for the Respondents "continued to heat the fire" by further commenting on the von Pezold Award in an article published by the *Global Arbitration Review* on 16 February 2016. The Applicant notes that the article was inaccurate insofar as it reported that the arbitral tribunals in the original proceedings had held a five-day hearing, while in fact there were six days of hearings.

9. The Applicant argues that, contrary to what is suggested by the Respondents, the publication of the von Pezold Award on *ITA Law* cannot be attributable to the Applicant as only those Zimbabwe representatives who are on the ICSID mailing list and the Minister of Lands had access to the Awards; all other government officials were only provided with a summary.[4] The Applicant also suggests that it cannot be a coincidence that *ITA Law* published precisely the same material that had been exhibited by the Respondents in the Zimbabwean High Court proceedings.[5] According to the Applicant, the Respondents "could have simply certified to the High Court of Zimbabwe in VPB's court papers that they had won in the ICSID award, summarizing or quoting a particular relevant passage, … instead of having their manager disclose the whole award."[6]

10. The Applicant further contends that "non-disclosure was the agreed rule and practice" in the original proceedings, and that such practice "also constitute[d] an agreement that should not be lifted without both parties' consent."[7] According to the Applicant, this was reflected in the Parties' agreement not to consent to the publication of the arbitral awards, as recorded in procedural order No. 1 issued by the arbitral tribunal in the original proceedings.[8]

11. The Applicant argues that the Respondents, by commenting on the Awards in the public domain, have exacerbated the dispute. The Respondents have also thereby diverted the Applicant's attention from its pleadings on the stay, and converted the legal debate into a political public debate.[9] Indeed, a disruption of the Applicant's work on its pleadings appears to be the "strategic goal" of the Respondents.[10] Even assuming the Respondents had not "leaked" the von Pezold Award, the Applicant submits that they have "legitimized" it by way of their legal counsel taking the initiative of commenting on the von Pezold

[2] Application, pp. 4 *et seq.*, paras. 13 *et seq.*
[3] Application, pp. 4-5, paras. 15-17; p. 7, para. 27.
[4] Application, p. 4, paras. 13-14.
[5] Application, p. 8, para. 30.
[6] Application, p. 5, para. 17.
[7] Application, pp. 5-6, paras. 19-23.
[8] Application, pp. 5-6, paras. 19-23.
[9] Application, p. 7, para. 25.
[10] Application, p. 9, para. 39.

Award in the media and subsequently issuing a press release, while the annulment proceedings are still underway.[11] According to the Applicant, the Respondents' conduct is likely to continue if not stopped by the Committees.[12]

2.The Legal Basis of the Application

12. In support of its Application, the Applicant relies on Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.[13] Quoting the decision on provisional measures in *Occidental Petroleum et al v. Ecuador,* the Applicant argues that, "in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm."[14]

13. As to the rights to be preserved, the Applicant argues that it seeks to preserve its right that the dispute between the Parties not be aggravated by the Respondents; that the dispute between the Parties not be transformed from a legal to a public, political forum; and that the Applicant's representatives not be harassed or their attention not be diverted from preparation of their pleadings in these annulment proceedings.[15]

14. The Applicant argues that the requirements of urgency and necessity are also met. According to the Applicant, the matter is "urgent" as it is "likely" that the Respondents will take further action prejudicial to the rights of Zimbabwe before a final decision is issued in these annulment proceedings."[16] Moreover, as the Applicant's right not to be intimidated during the course of these proceedings "can never be fully remedied by compensation," there is also a risk of irreparable harm if the Applicant's request is not granted.[17]

15. The Applicant also stresses the importance of "keeping the debates and documents among the parties and ICSID," citing various provisions of the ICSID Convention, ICSID Arbitration Rules and ICSID Administrative and Financial Regulations, which address *inter alia* the confidentiality obligation of the members of ICSID tribunals and *ad hoc* committees, secrecy of deliberations, and the publication of ICSID awards.[18] The Applicant also cites to a series of decisions in other ICSID cases, including *Biwater Gauff v. Tanzania*, in which the arbitral tribunal recommended provisional measures to protect confidentiality and integrity of the proceedings, and in order to avoid aggravation of the

[11] Application, pp. 7-8, paras. 26 and 34.
[12] Application, p. 9, para. 38.
[13] Application, p. 2, para. 2.
[14] Application, p. 16, para. 59 (quoting *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 61.)
[15] Application, p. 16, para. 60.
[16] Application, p. 18, para. 71.
[17] Application, pp. 18-19, paras. 72-75.
[18] Application, pp. 10-14, paras. 41-53.

dispute.[19] However, while the Applicant refers to, and "reiterates," its requests to the Committees in its annulment application of 21 October 2015, its formal request for relief in the Application does not contain requests relating specifically to confidentiality.[20]

16. In conclusion, the Applicant requests that the *ad hoc* Committees "order and declare" that the Respondents and their counsel:

    a. "have not respected the *status quo;*

    b. cease and desist arguing issues subject to these Annulment Proceedings in the press;

    c. not further aggravate the dispute or the Applicant;

    d. not frustrate the eventual annulment decision; and

    e. maintain the *status quo*."[21]

B. The Respondents' Response

1.Response to the Applicant's Factual Allegations

17. The Respondents suggest that the only dispute between the Parties as to facts is whether the publication of the von Pezold Award on 10 February 2016 was made possible by the disclosure of this award by the Applicant or the Respondents. However, according to the Respondents, this issue is irrelevant because ICSID awards are not confidential.[22]

18. In any event, the Respondents deny that they "leaked" the von Pezold Award.[23] The Respondents accept that the von Pezold Award was exhibited to the Bailey Affidavit on 20 August 2015, but claim that this was consistent with the "best evidence rule" that applies in Zimbabwe. Moreover, there was no wider publication of the von Pezold Award at the time, and the Applicant did not complain about this particular disclosure until six months later, on 23 February 2016.[24]

19. The Respondents explain that their lead counsel, Mr Matthew Coleman, was contacted by two different journalists in September and October 2015, but refused to disclose the Awards.[25] In February 2016, he was again approached by a journalist who informed him that the von Pezold Award had been published on *ITA Law*, and that a series of articles on the Award were to be published on the *IA Reporter*. Mr. Coleman informed the Applicant's

[19] Application, pp. 12-13, para. 49. *See Biwater Gauff (Tanzania) Ltd. v. Republic of Tanzania,* ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 Sept. 2006.
[20] Application, pp. 19-20, para. 79.
[21] Application, p. 1 and p. 20.
[22] Response, p. 2, para. 4.
[23] Response, p. 2, para. 4.
[24] Response, p. 2, para. 5.
[25] Response, p. 2, para. 6.

lead counsel, Mr Philip Kimbrough, of these developments, adding that "it was someone in the Zimbabwean Government that provided the von Pezold Award to third parties."[26] According to the Respondents, this was consistent with the fact that material from the original arbitration proceedings had been previously published by settlers opposing the Respondents in local court proceedings, which suggested that someone in the Zimbabwean Government was providing materials to third parties.[27] In the circumstances, once the von Pezold Award had been published, there was no bar for the Respondents to comment on it as it was already in the public domain.

20. The Respondents contend that the quotes their counsel supplied were measured and fully accurate, and the one rhetorically charged phrase attributed to them (the reference to an "outright land-grab" in the article appearing in *The Times of London*) was not a quote actually made by the Respondents' counsel.[28] Similarly, while there were minor inaccuracies in the articles published in the *Global Arbitration Review* and *Law360*, these were "not the fault of the VPBs."[29]

2.Response to the Applicant's Legal Argument

21. The Respondents note that *ad hoc* committees do not have power under Article 52(4) of the ICSID Convention to order provisional measures, as Article 47 is not one of the provisions of the ICSID Convention that apply to annulment proceedings. However, they nevertheless accept that annulment committees have the power to issue provisional measures pursuant to Article 44 of ICSID Convention (which is referred to in Article 52(4) of the Convention) and, alternatively, based on their inherent power to ensure the integrity of the proceedings.[30] According to the Respondents, the supporting rule in both circumstances is Rule 39 of the ICSID Arbitration Rules.[31]

22. The Respondents state that they accept that, in order for the Committees to order interim relief, the Applicant must:

    a. "identify the substantive and procedural right that requires protection;

    b. establish that the measures proposed are urgent; and

[26] Response, p. 3, para. 9.
[27] Response, p. 3, para. 9.
[28] Response, p. 5, para. 14.
[29] Response, p. 6, para. 17.
[30] Response, p.7, para. 19. Under Article 44 of the ICSID Convention, "[a]ny arbitration proceedings shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."
[31] Rule 39 deals with provisional measures.

c. show that there is necessity, i.e., if the provisional measures are not ordered, there will be irreparable damage to the rights that Zimbabwe seeks to protect."[32]

23. The Respondents also argue that, in order to be in a position to recommend provisional measures, the Committees must have jurisdiction over the Applicant's annulment applications; however, the Respondents accept that this is the case here.[33]

24. The Respondents argue that the interim relief sought by the Applicant is neither urgent nor necessary. There is no urgency because the Applicant did not seek interim relief as soon as it filed the annulment applications, even if the von Pezold Award (exhibited to the Bailey Affidavit) had been submitted already on 20 August 2015.[34]

25. The Respondents agree that "[i]t is well-established that there is a right to the preservation of the *status quo* and the non-aggravation of the dispute," however this right, which is "a single right," is limited in scope.[35] It is established in ICSID jurisprudence that this right "only applies in respect of actions that would render the resolution of the dispute by the tribunal more difficult."[36] Provisional measures may therefore only be ordered "in regard to those aspects of a party's behavior that aggravate the dispute to such an extent that it would make resolution of the dispute by the tribunal more difficult: in other words, mere aggravation of the dispute between the parties … or a mere change in the *status quo* is not enough."[37] According to the Respondents, no such circumstances exist in this case. The Respondents also confirm that they "have no intention of aggravating the dispute between the parties to such an extent that it would make resolution of the dispute more difficult."[38]

26. The Respondents accept that the Parties have the right for the dispute to be resolved before the Committees and not in some other manner. However, they deny that the comments made by the Respondents' counsel in the press bear any connection to the issues before the Committees. Nor have they transformed, or risk transforming, the dispute before the Committees from a legal to a public, political forum.[39]

27. The Respondents also accept that, in order to ensure the integrity of the proceedings, the Parties have the right not to be harassed by each other.[40] However, they deny that the mere publication of articles in the press on an award that has been published online can constitute harassment.[41] Moreover, while speaking to the press, the Respondents "merely exercised

[32] Response, p. 7, para. 20.
[33] Response, p. 7, para. 21.
[34] Response, pp. 18-19, para. 49.
[35] Response, pp. 20-21, paras. 52, 55.
[36] Response, p. 21, para. 58.
[37] Response, p. 21, para. 58.
[38] Response, p. 28, para. 76.
[39] Response, p. 28, paras. 78-79.
[40] Response, p. 29, para. 80.
[41] Response, p. 29, para. 81.

their right to free speech in a reasonable, calm and respectful manner."[42] The Respondents also claim that, if the publication of the articles diverted the Applicant's attention from preparing its pleadings on the stay, this was not as a result of the Respondents' actions or even the media coverage of the von Pezold Award, but rather a consequence of the Applicant's decision to make its Application when, in the Respondents' view, it had no basis for doing so.[43]

28. The Respondents also deny that the provisional measures sought by the Applicant are necessary. According to the Respondents, "[t]o the extent that Zimbabwe has the rights which it has pleaded (which the VPBs deny), the VPBs accept that the breach of those rights could not be remedied by the payment of damages."[44]

29. Finally, although the Applicant does not specifically request in its prayer of relief that the annulment proceedings be kept confidential, the Respondents have assumed so for purposes of their submission, given the many references to confidentiality in the Application. In this connection, the Respondents clarify that "it is not the VBPs' intention to disclose during the course of the Annulment Proceedings the pleadings or other documents filed by the parties during the course of the Arbitrations or the Annulment Proceedings."[45] The Respondents also deny that there has been any agreement between the Parties as to confidentiality, and that the various provisions of the ICSID Convention, ICSID Arbitration Rules and Administrative and Financial Regulations cited by the Applicant do not establish a general obligation of confidentiality binding on parties to ICSID arbitration or ICSID annulment proceedings, nor is there support for any such obligation in ICSID jurisprudence.[46] According to the Respondents, "[t]ailored confidentiality requirements have only been imposed to maintain the integrity of the proceedings and/or to prevent the aggravation of the dispute in extreme circumstances."[47]

III. THE *AD HOC* COMMITTEES' ANALYSIS

30. The Applicant's Application raises an issue that has also arisen before other *ad hoc* committees, but which has not yet been decided, as to whether an ICSID *ad hoc* committee is competent to recommend provisional measures in the first place.[48] The issue arises because Article 47 of the ICSID Convention, which deals with ICSID tribunals' power to recommend provisional measures, is not among the provisions listed in Article 52(4) of the ICSID Convention which "shall apply *mutatis mutandis*" to proceedings before ICSID annulment committees. The omission of Article 47 from the list of the relevant provisions in Article 52(4) suggests that the power of ICSID annulment committees to recommend

[42] Response, p. 29, para. 81.
[43] Response, p. 30, para. 84.
[44] Response, p. 31, para. 86.
[45] Response, p. 8, para. 24.
[46] Response, pp. 9-18, paras. 25-48.
[47] Response, p. 17, para. 45.
[48] *See generally* Mallory Silberman, "Annulment: What Are the Rules on the Rules," 10 June 2013, Kluwer Arbitration Blog, http://kluwerarbitrationblog.com.

provisional measures has been intentionally excluded, possibly because under Article 52(5) of the Convention they may stay enforcement of an award pending their decision on annulment, which is effectively a special form of interim relief.[49]

31. However, the matter is complicated by Rule 53 of the ICSID Arbitration Rules, which provides that "[t]he provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee." One of such rules applicable *mutatis mutandis* is Rule 39, which deals with provisional measures in great detail. The Respondents further suggest that Article 44 of the ICSID Convention is also relevant in this context as it establishes that "[a]ny arbitration proceedings [and presumably therefore also any annulment proceedings] shall be conducted in accordance with the provisions of this Section." The Section in question (Section 3 of the ICSID Convention) contains Article 47, which as noted above deals with provisional measures.

32. The Committees note in this connection that the Parties agree that the Committees would have, at the very least, an inherent power to recommend provisional measures necessary to protect the integrity of the present proceedings. However, in view of the conclusions reached below, the Committees do not consider it necessary to rule on this issue.

33. When reaching their decision, the Committees have carefully considered the Applicant's Application, the supporting evidence and the legal argument submitted by the Applicant in support of its Application. The Committees are not persuaded that any provisional measures are required in the circumstances, and in any event the Applicant has not demonstrated that such circumstances exist.

34. First, the Applicant has not demonstrated that the Respondents or their legal counsel are responsible for the alleged "leak" of the von Pezold Award to the public domain. The disclosure of the von Pezold Award in the proceedings before the Zimbabwe High Court cannot justifiably be considered an illegitimate "leak" as such disclosure was made for purposes of pursuing or protecting a legal right. In any event, ICSID awards are not confidential as such. Even if the ICSID Secretariat may publish an ICSID award only with the consent of the parties, it may publish excerpts of the legal reasoning of the tribunal without their express consent; see Rule 48(4) of the ICSID Arbitration Rules. Moreover, unless the parties have specifically agreed otherwise, either party may make the award publicly available, and indeed, this appears to be the way in which ICSID awards often become public in practice.

35. Second, the Committees are not persuaded that the statements made by the Respondents' legal counsel in the media were of such a nature as to aggravate the present dispute, or otherwise threaten the integrity of the present annulment proceedings. Indeed, parties to ICSID annulment proceedings must be considered to be entitled to comment on the ICSID

[49] *See* Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair: "The ICSID Convention: A Commentary," 2nd edition, p. 1055.

award in question to the media, so long as this is done in a manner that does not amount to an attempt to litigate the pending annulment proceedings in the public domain, or in a manner that may otherwise aggravate the dispute. There is no evidence that this has occurred in the present case. Nor is there any evidence that the publication of the von Pezold Award or the statements made by the Respondents' counsel to the press would tend to frustrate the *ad hoc* Committees' eventual decision in these annulment proceedings. The Applicant's Application therefore stands to be dismissed.

36. Nonetheless, mindful of the importance and sensitivity of the matter before it, the Committees consider it appropriate to remind the Parties of their general obligation not to take any action during the pendency of these annulment proceedings that may aggravate the dispute. In this connection, the Committees note the Respondents' assurance that "it is not the VPBs' intention to disclose during the course of the Annulment Proceedings the pleadings or other documents filed by the parties during the course of the Arbitrations or the Annulment Proceedings."[50] The Committees take note of the Respondents' undertaking and expect that both Parties share and respect the spirit of this undertaking in the course of these annulment proceedings.

[50] Response, p. 8, para. 24.

IV. DECISION

37. For the reasons set out above, the Committees decide as follows:

a. The Applicant's Application for Provisional Measures is dismissed; and

b. The Parties are reminded of their general obligation to refrain from any conduct that may aggravate the dispute during the pendency of the annulment proceedings.

On behalf of the *ad hoc* Committees

Dr Veijo Heiskanen
President of the *ad hoc* Committees
Date: 17 March 2016