

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



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## Human Rights inapplicable in International Investment Arbitration?

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A commentary on the non-admission of ECCHR and Indigenous  
Communities as Amici Curiae before the ICSID tribunal

Berlin, July 2012

## **CONTENT**

### **I. Summary**

### **II. Investor-state disputes and the ICSID tribunal**

### **III. The petition of ECCHR and the Indigenous Chiefs**

### **IV. The Indigenous Communities**

### **V. The rights of indigenous peoples under international law and the obligations of the disputing parties**

### **VI. The tribunal's decision**

### **VII. Conclusion**

### **I. Summary**

In May 2012, the ECCHR submitted a petition to the arbitral tribunal in the conjoined cases *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15). These cases have been submitted for arbitration before the International Centre for the Settlement of Investment Disputes (ICSID) on the basis of German and Swiss Bilateral Investment Protection Agreements with the Republic of Zimbabwe.

The petitioners requested permission to file a written submission as *amicus curiae* to the tribunal. This request was made jointly with the Chiefs of four indigenous communities inhabiting the area of Chimanimani, in south-eastern Zimbabwe. The arbitrations concern properties in Zimbabwe on which the Claimants, European investors, currently operate timber plantations. These properties have been compulsorily acquired by the government of Zimbabwe as part of its land reform programme.

ECCHR, in partnership with the Chiefs, sought to raise before the tribunal the fact that these properties are located on the ancestral territories of indigenous peoples with rights to their lands, and to consultation, under international law. The tribunal is requested to make a decision that will determine legal rights to these properties: the Claimants request that by these arbitrations full unencumbered legal title and exclusive control to the properties be restored to them. The determination of legal ownership of the properties, in favour of either party to the dispute, will therefore necessarily impact on the rights of indigenous peoples to their ancestral lands.

On 26 June 2012, the tribunal rejected the petition. Despite acknowledging that the proceedings may well impact upon the rights of the affected indigenous communities, in their decision the tribunal asserts that international human rights law has no relevance to the dispute.

This decision demonstrates a failure of the current international investment arbitration system to ensure human rights compatibility of decisions. It also highlights the deficit of human rights provisions in bilaterally-negotiated trade and investment treaties, and the critical need for EU trade policy makers to strengthen human rights protection within their EU protection strategy.

### **II. Investor-state disputes and the ICSID tribunal**

The tribunal in this case is constituted pursuant to a dispute-settlement mechanism provided for in two Bilateral Investment Treaties (BITs) and the Convention on the Settlement of

Investment Disputes between States and Nationals 1965 (the ‘ICSID Convention’).

In 2011, there were an estimated 2,500 BITs in existence.<sup>i</sup> Under this type of treaty, the Contracting States expressly delegate the power to resolve investor-state disputes to ad-hoc arbitral tribunals. Investment protection is thus enforced through dispute settlement mechanisms that enable investors to initiate arbitration claims against their host states. As the BIT system has rapidly expanded in recent decades, so too have the number of international arbitration cases; according to UNCTAD, from five in 1995 to 337 in 2010.<sup>ii</sup>

BITs do not typically refer to any other international commitments made by the contracting parties in the area of human rights. Usually, the dispute settlement mechanisms of BITs enable investors to initiate arbitration proceedings at an ad-hoc tribunal, without first exhausting any domestic legal avenues in the host state. However, the involvement of a State in the investment context can lead to arbitral decisions that impact on public services and government social policy, in areas such as the protection of human rights, health and safety, labor laws, or environmental protection. This power of international investment arbitration to usurp national decision-making powers in areas of considerable public significance has led to growing questions about the system’s legitimacy. The UN Guiding Principles on Business and Human Rights, in the Commentary to Principle 9, expressly acknowledge that bilateral investment treaties ‘affect the domestic policy space of governments.’<sup>iii</sup> The Guiding Principles thus recommend that States encourage multilateral institutions, within their respective mandates and capacities, to promote business respect for human rights and to ‘*help States meet their duty to protect against human rights abuse by business enterprises.*’

ICSID is one of the principle forums for BIT arbitration, purposefully established to handle international investment disputes. A report by the International Institute for Sustainable Development, describes the independence of ICSID as ‘undeniably compromised’ from a conflict of interest perspective, in that it is not an independent organization, but ‘financially and structurally dependant’ upon the World Bank Group: the President of the World Bank chairs its Administrative Council; the Legal Vice President of the Bank is the ICSID’s Secretary General.<sup>iv</sup>

Under Rule 37(2) of the ICSID Convention, a tribunal may permit the participation of non disputing parties (NDP), in order to file a written amicus curiae to an ICSID tribunal, provided that they meet certain criteria. The rationale behind introducing permission for NDPs to participate in ICSID arbitrations was largely influenced by the need to promote a level of public involvement and transparency. In the *Biwater* case, the arbitral tribunal took the view that ‘allowing for the making of such a submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself.’<sup>v</sup> To date, amici curiae have not however made submissions that were ‘determinative to the awards rendered’, and some have argued that the role of amicus curiae is ‘limited to contributing a level of public legitimacy to arbitral proceedings.’<sup>vi</sup>

### **III. The petition of ECCHR and the Indigenous Chiefs**

In May 2012, ECCHR submitted a joint petition with the four Chiefs of the indigenous tribes to the arbitral tribunal, requesting to participate in the above mentioned proceedings as *amici curiae*. The request was made pursuant to Rule 37(2) of the ICSID Rules. The petition argued that international human rights law, and in particular the rights of indigenous peoples under international law, are essential considerations for the tribunal in both the interpretation of the BITs, and in its deliberation of the award.

In particular, the Petitioners argued that the tribunal must not make any determination or award that negatively impacts on the rights of these peoples under international law to their

ancestral lands. The legal consequences of the tribunal's award in the present case include serious potential violations of the rights of the indigenous peoples affected:

- the determination of rights and access to land inhabited by indigenous communities, which may impede their enjoyment of their internationally recognized rights to their ancestral lands and violate their right to free, prior and informed consent;
- the prejudicing of the rights under international law to access to judicial remedies for human rights violations.

These issues are of significant public interest beyond the present dispute, to other indigenous communities and individuals living in areas potentially affected by foreign investments, to investors and governments, in Zimbabwe and elsewhere. Foreign investment increasingly presents a serious challenge to the implementation of internationally granted rights of indigenous peoples and rural communities not only in the African region.<sup>vii</sup> Various regional and international human rights institutions identify the relationship between investment treaties and international human rights as critical to effective human rights protection, and that the application of BITs should be in compliance with international human rights law.<sup>viii</sup> Furthermore, the harmonization of international investment law and investor-State arbitration with the UN Framework and Guiding Principles on Business and Human Rights represents a major challenge for years to come.

This arbitration also directly touches upon issues that have been identified as the Top Ten Business and Human Rights issues of 2011 and again for 2012 by the Institute for Human Rights and Business: namely, to address the negative impacts of land use and acquisition on communities, to emphasize community consultations within human rights due diligence, and to strengthen legal accountability and redress for alleged human rights abuses by corporations.<sup>ix</sup> Against this background, the decision of this tribunal will directly (in the present case) and indirectly (as a key precedent) affect the interests of indigenous peoples with rights to lands that are subject to investor-State dispute proceedings.

Although the two relevant BITs in this case are silent on the issue of human rights, Article 103 of the UN Charter presumes the primacy of human rights obligations under the Charter over other State obligations,<sup>x</sup> and expresses the 'supremacy' of international human rights law.<sup>xi</sup> A similar approach has been applied in the context of investment treaty interpretation by the Inter-American Court of Human Rights in the case of the *Sawhoyamaxa Indigenous Community v Paraguay*. Paraguay argued that it was precluded from giving effect to the indigenous community's right to property over their ancestral lands because, inter alia, these lands belonged to a German investor protected by a BIT. The Court ruled that the enforcement of BITs 'should always be compatible with the American Convention [on Human Rights], which is a multilateral treaty on human rights that stands in a class of its own.'<sup>xii</sup>

#### **IV. The Indigenous Communities**

Four distinct communities live in areas in the region of Chimanimani, in South-Eastern Zimbabwe, on which the Claimant's properties are located. They identify themselves as members of the Ngorima, Chikukwa, Nyaruwa and Chinyai tribes, respectively.<sup>xiii</sup>

Each group has deposed in a series of affidavits, their collective histories on these territories, their identification as distinct groups, their cultural identities and experiences of discrimination and dispossession of lands: The **Ngorima**, **Chinyai** and **Nyaruwa** peoples came to their ancestral territories, known respectively as Jiho, Chinyaieni and Nyaruwani, in the late seventeenth and early eighteenth century. The Ngorima, Chinyai and Nyaruwa are culturally distinct Rozvi clans who were awarded these lands, in the region now known as

Chimanimani, by Mwene Mutapa for having fought during the Mutapa-Manyika war against the Portuguese, which began in the 1670s and drove the colonial power out of the Mutapa State.<sup>xiv</sup> The **Chikukwa** people are a BaTonga clan that traces its origins in the Hangan Valley to before the seventeenth Century. The lineage of the Chikukwa peoples is Chief Nzinzvi Saungweme, who came to the area from Mutasa.

Each of these communities has a distinct cultural identity and spiritual relationships that are inextricably tied to their ancestral territories.<sup>xv</sup> This heritage has been passed down through generations. The economic livelihoods of the four communities are traditionally agricultural, based on livestock (cattle and goats) and crop cultivation (maize, millet, rapoko and wheat). They furthermore share a history of continuous dispossession of and eviction from their lands, within living memory, which began in the early 1890s with the arrival of colonial settlers.<sup>xvi</sup> Their marginalization has persisted post-independence in Zimbabwe.

## **V. The rights of indigenous peoples under international law and the obligations of the disputing parties**

Both of the disputing parties incur a shared responsibility *vis a vis* the indigenous communities, who have rights under international law in relation to lands on which the Claimants' properties are located. Their rights to these lands, and their rights to consultations for measures affecting these lands, create obligations for the disputing parties.

### *i. The respondent State*

Recognition of the rights of indigenous communities culminated in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. Article 26 provides for the indigenous right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use and requires the State to give legal recognition and protection to these lands, territories and resources. The Declaration has obtained worldwide support and is, in combination with existing legally binding norms, laying the ground for current customary international law on the rights of indigenous peoples. These rights encompass collective ownership and usufruct of their traditional land as well as the collective right to consultation. Inter alia, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the African Charter on Human and Peoples Rights, concretize these rights of indigenous peoples.

### *ii. The Claimants*

Human rights instruments are addressed to states as the primary duty-bearers. However, companies themselves also incur human rights responsibilities in their activities. The UN Guiding Principles on Business and Human Rights declare in this regard that corporate actors have a responsibility to respect human rights. The Commentary to the Guiding Principles clarifies that corporate actors should not undermine States' abilities to meet their human rights obligations. The OECD Guidelines for Multinational Enterprises provide that commercial investment should foster general welfare by contributing to economic, environmental and social progress with a view to achieving sustainable development and by respecting internationally recognized human rights of those affected by their activities. Both the UN Guiding Principles and the OECD Guidelines expressly identify the need to protect indigenous peoples' rights against violation by corporate actors.<sup>xvii</sup> Comparable provisions can also be found in the context of the World Bank Group, in its Operational Policy 4.10, with respect to the rights of indigenous peoples. These principles highlight, inter alia, that companies should assess whether indigenous people may lay claim to territory in accordance with criteria laid down in international rules, and that companies cannot in the exercise of due diligence assume that the absence of official recognition of indigenous communal ownership

rights implies that such rights do not exist.

## **VI. The tribunal's decision**

On 26 June, the tribunal rejected the petition and denied the Petitioners the opportunity to submit written legal arguments, attend oral hearings, or access the submissions of the disputing parties. In its draft written submission to the tribunal, ECCHR and the affected indigenous communities had hoped to establish, *inter alia*:

- that relevant international human rights law is applicable to the arbitration proceedings
- that specific communities living in areas on which the Claimant's properties are located are indigenous peoples to whom a specific legal regime applies in international law
- that such law imposes positive obligations on the state party to this dispute
- that such law engages the responsibility of the investor to the dispute
- that the award of the tribunal must give due consideration to the above in dealing with questions submitted to the tribunal.

The tribunal's decision denies the Petitioners the opportunity to raise these arguments.

In the decision laid out in Procedural Order No 2 explaining the tribunal's response, it is expressly acknowledged that the indigenous communities have 'some interest in the land over which the Claimants assert full legal title', and that 'it may therefore well be that the determinations of the Arbitral Tribunals in these proceedings will have an impact on the interests of the indigenous communities.'<sup>xviii</sup> Nonetheless, the tribunal states there is 'no evidence or support for [the Petitioners'] assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete.'<sup>xix</sup>

The fact that these proceedings may have an impact on the interests of the affected indigenous communities, demonstrates the intersection of international human rights law and international investor-State arbitration. This case raises substantive issues of public interest, which therefore necessitate the parallel application of international human rights law and investment law. The ICSID Convention, the Vienna Convention on the Law of Treaties 1969,<sup>xx</sup> the relevant Bilateral Investment Treaties and the intentions of the States as Contracting Parties, all require the tribunal to have due regard of relevant international law and of the relevant obligations of the disputing parties under this regime. This includes relevant international customary and treaty law of human rights.

The relevance of States' human rights obligations towards non-investors has been widely recognized by a number of previous arbitral tribunals. In *Suez, et al. v. Argentina*, the tribunal acknowledged that the proceedings would potentially raise 'a variety of complex public and international law questions, including human rights considerations.'<sup>xxi</sup> In *Biwater Gauff Ltd v United Republic Of Tanzania*, the tribunal noted that, although mandated to resolve claims as between the claimant investor and the Respondent State, the arbitration raised a number of issues of concern to the wider community in Tanzania.<sup>xxii</sup> To this end, the Arbitral Tribunal respectfully adopted the words of the Arbitral Tribunal in *Methanex v United States of America*:

There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties.<sup>xxiii</sup>

In these prior cases, these ‘public interest’ issues gave grounds for the participation of NDPs, as *amicus curiae*. In the present cases, the need for NDP participation is arguably heightened, as the dispute raises not only the issue of the respondent State’s obligations, but also of the responsibility of the company to exercise human rights due diligence. Since both disputing parties incur responsibilities with regard to the affected indigenous communities, it is significantly less likely that the rights of these communities under international law will be raised in these proceedings unless the communities themselves are permitted to participate. Nonetheless, the fact that neither of the disputing parties has raised the issue of the rights of the indigenous communities as relevant to the dispute is cited by the tribunal as a further reason to dismiss the petition.<sup>xxiv</sup> This runs contrary to the criteria set out in Rule 37(2,a), which requires that submissions of non-disputing parties ‘assist the Tribunal in the determination of a factual or legal issue related to the proceeding by *bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.*’

The tribunal further notes that there is a latent tension between the respective requirements for NDPs to be independent and to have a significant interest in the case.<sup>xxv</sup> While it accepts that the affected communities *have* a significant interest, the tribunal alleges that they are not independent as they have allegedly aligned their work with governmental policies on land reform.<sup>xxvi</sup> This narrow application of the NDP criteria could lead to grave consequences for NDP participation in ICSID proceedings generally: in effect, all affected communities and organizations that have sought or seek to assert their rights within the framework of governmental policies could be excluded as *amicus curiae* for lack of independence, even where there is no relationship of direct or indirect control between the government and the community or organization. This reductive approach is not only at variance with the intention of Rule 37 (2) of the ICSID Convention, but also contradicts prior jurisprudence on the application of the rule by other ICSID tribunals.<sup>xxvii</sup>

Finally, the tribunal expresses doubts as to its own competence to determine whether the indigenous communities are in fact indigenous peoples; it therefore considers this question and the petition to be outside the scope of the dispute in accordance with Rule 37 (2).<sup>xxviii</sup> As the petitioners would have argued in the amicus brief, self-determination is the fundamental criterion in the identification of indigenous peoples. Self-determination of membership and identity is also a fundamental right of indigenous communities, to be exercised by the communities themselves; deferring to a competent other body to ‘authenticate’ the communities, the tribunal ultimately impinges on the right of the communities to determine their own indigenous identity. This approach conflicts with a growing body of jurisprudence on the identification of indigenous peoples, which is well established under international law, and has been elaborated upon by various international human rights bodies, including the African Commission on Human and Peoples’ Rights and the Inter-American Court of Human Rights. Moreover, this approach would mean the exclusion of all groups of indigenous peoples on the basis of the tribunal’s lack of competence to determine whether or not they are in fact indigenous. This ultimately bars the participation of indigenous communities as NDPs.

The Petitioners are not given the opportunity to respond to the reasons given by the tribunal.

## **VII. Conclusion**

Amicus curiae status provides communities whose rights are interfered with by the regime of international investor-State arbitration, as the sole opportunity to voice their cases. The ECCHR, in partnership with the affected indigenous communities, had sought to draw attention to the fact that human rights law on indigenous peoples is relevant and applicable to this dispute, and in particular, to the request made by the Claimants for restoration of the full and unencumbered legal title and exclusive control to the Border Properties. The ICSID Convention does not provide ‘for the substance of an award,’<sup>xxix</sup> but provides that the award

of the tribunal ‘shall deal with every question submitted to the tribunal and shall state the reasons upon which it is based.’<sup>xxx</sup> The award of this tribunal must therefore deal with the determination of the Claimant’s request. For the tribunal to make any determination or award that negatively impacts on the rights of these peoples under international law to their ancestral lands – for example, by restoring to the company exclusive property rights over the indigenous people’s lands, or declaring the presence of these communities on the land to be unlawful – would be to produce or make inevitable a violation of these peoples’ fundamental human rights under international law.

The decision of the tribunal not only denies the Petitioners the right to raise this argument in these proceedings; it also denies that there is any basis for the application of human rights law in investor-State arbitration. The tribunal’s interpretation of the criteria for participation of NDPs under the ICSID Rules is potentially so narrow as to deny the filing of any potential amicus submission that does not support the interests of the Claimants.

This decision demonstrates that the growing field of investor-State arbitration is failing to harmonise international investment law with human rights law. The strengthening of the protection of European investments worldwide is one of the EU priorities identified in the European Commission’s Communication on trade policy strategy, “Trade, Growth and World Affairs”, 2010.<sup>xxxi</sup> The decision of this ICSID tribunal shows that particular challenges lie for the EU and its members when implementing this strategy: these challenges lie in the development of a more robust and coherent approach to ensuring human rights compatibility within the international system of investment protection.

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<sup>i</sup> E. Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’; *BERKELEY JOURNAL OF INTERNATIONAL LAW*, Vol. 29:1 (2011), p202

<sup>ii</sup> J Perez, M Gistelneck, D Karbala, ‘Sleeping Lions: International investment treaties, state-investor disputes and access to food, land and water’; Oxfam (2011) p4

<sup>iii</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework A/HRC/17/31

<sup>iv</sup> H Mann, A Cosbey, L Peterson, K von Moltke; ‘Comments on ICSID Discussion Paper, “Possible Improvements of the Framework for ICSID Arbitration”’; International Institute for Sustainable Development (2004) p13

<sup>v</sup> ICSID Case No. ARB/05/22, *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania*, Procedural Order No. 5, Para. 50

<sup>vi</sup> E. Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’; *BERKELEY JOURNAL OF INTERNATIONAL LAW*, Vol. 29:1 (2011), p216

<sup>vii</sup> See the Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, on corporate responsibilities and the rights of indigenous people: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN-Doc. A/HRC/15/37 (2010).

<sup>viii</sup> Commentary to Principle 9, UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework A/HRC/17/31; *Inter-American Court of Human Rights, Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29.03.2006, Series C No. 146, Para. 140; The Committee on Economic, Social and Cultural Rights has identified that ‘the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations as a specific instance of violation of the right to food.’ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The right to adequate food (art. 11), U.N. doc. E/C.12/1999/5, at para. 19.; De Schutter, Oliver (UN Special Rapporteur on the right to food) *Confronting the Global Food Challenge: A Human Rights Approach to Trade and Investment Policies* (November 2008)

<sup>ix</sup> Online available at: [http://www.ihrb.org/top10/business\\_human\\_rights\\_issues/2012.html](http://www.ihrb.org/top10/business_human_rights_issues/2012.html), last access: 21 May 2012.



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<sup>x</sup> ‘Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law’, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para 328-340

<sup>xi</sup> Article 103 provides that ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’.<sup>xi</sup> Articles 1(3) and 55 of the Charter indicate that the objective of the Charter is the achievement of international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination. Article 56 imposes obligations both on the organization itself and on its Member States to contribute to the fulfilment of this objective. Therefore: ‘Any international obligation conflicting with the obligation to promote and protect human rights should be set aside, in order for this latter objective to be given priority (...) Should a conflict arise between the obligations imposed on a State under international human rights law and obligations imposed under a trade agreement, the former should prevail.’ De Schutter, Oliver (UN Special Rapporteur on the right to food) *Confronting the Global Food Challenge: A Human Rights Approach to Trade and Investment Policies* (November 2008), pp4 and 7

<sup>xii</sup> Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C No. 146, para. 140

<sup>xiv</sup> Parts of this history are noted in D.N. Beach. *The Shona and Zimbabwe 900-1850: An Outline of Shona History*. London, Heinemann: 1980. p134, 170, 256. Manyika refers to the area known today as Manicaland, the province in which Chimanimani District is located.

<sup>xv</sup> These characteristics are pertinent to the determination of indigenous peoples under international law. Under Art 1(1) of the ILO Convention 169, the Convention applies to both (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; and (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

<sup>xvi</sup> Also see, on the history of Chimanimani, Jocelyn Alexander, *The Unsettled Land: State Making and the Politics of Land in Zimbabwe, 1893-2003*, Ohio University Press: 2006, p37; and Diana Jeater, *Law Language and Science: The Invention of the “Native Mind” in Southern Rhodesia, 1890-1930*. Border Timbers Limited was incorporated in 1979 through an amalgamation of three companies, one of which, Forestry Management Services had taken over plantations that were first established by the British South African Company in 1924 (From Border Timbers Limited Homepage: [http://www.bordertimbers.com/about\\_us.html](http://www.bordertimbers.com/about_us.html). Accessed: 1 March 2012)

<sup>xvii</sup> UN-Guiding Principles on Business and Human Rights, UN-Doc. A/HRC/17/31, Principle 12, 18 and Commentary; OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, adopted on 25.05.2011, Part. I, Chapter IV and Commentary; see also: United Nations Permanent Forum on Indigenous Issues, *Analysis of the duty of the State to protect indigenous peoples affected by transnational corporations and other business enterprises* (2012), UN-Doc. E/C.19/2012/3, Para. 21.

<sup>xviii</sup> *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15, Procedural Order No 2, 26 June 2012, para 62

<sup>xix</sup> *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15, Procedural Order No 2, 26 June 2012, para 58

<sup>xx</sup> The Vienna Convention (under Article 31.3.c) expresses the principle of ‘systemic integration’ of the international legal system; that treaty interpretation should take account of the normative environment and of international law generally, in order to prevent fragmentation of the international legal order. This principle is now itself part of customary international law and thus necessarily opens the interpretation of investment treaties to international human rights law. Therefore, arbitrators must, where relevant, consider the human rights obligations of each party to a dispute in the course of interpreting their obligations under the BITs and in the making of any award. See ‘Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law’, *Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para 410-480; Bruno Simma, ‘Foreign

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Investment Arbitration: A Place For Human Rights?' *International and Comparative Law Quarterly* Vol 60 (July 2011), p584

<sup>xxi</sup> Suez, et al. v. Argentina, ICSID Case no. ARB/03/19, Order in response to a petition for transparency and participation as amicus curiae, May 19, 2005, para 19

<sup>xxii</sup> Biwater Gauff (Tanzania) Ltd v United Republic Of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 Feb 2007, para 51-53

<sup>xxiii</sup> Methanex v. United States of America (UNCITRAL Arbitration), Decision on Petitions from Third Persons to Intervene as Amici Curiae of 15 January 2001, para. 49

<sup>xxiv</sup> *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15, Procedural Order No 2, 26 June 2012, para 57

<sup>xxv</sup> *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15, Procedural Order No 2, 26 June 2012, para 62.

<sup>xxvi</sup> *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15, Procedural Order No 2, 26 June 2012, paras 54-56, 62.

<sup>xxvii</sup> In their petition for *amicus curiae* status in ICSID Case No. Arb/05/22, the Lawyers' Environmental Action Team, one of the petitioners, asserted that while it seeks to work with the government of Tanzania or other governmental units within Tanzania on environmental and natural resource management issues, it is not under subject or control by any government agency, p. 3.

<sup>xxviii</sup> *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15, Procedural Order No 2, 26 June 2012, para 60.

<sup>xxix</sup> Christoph Schreuer, Non-Pecuniary Remedies in ICSID Arbitration, *Arbitration International* Vol 20 No 4 2004, 325

<sup>xxx</sup> Article 48(3) ICSID Convention 1965

<sup>xxxi</sup> EU Commission 2010: Trade, Growth and World Affairs, Trade Policy as a core component of the EU's 2020 strategy COM(2010) 612, online available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0612:FIN:EN:PDF>, last access : 25 July 2012.

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## **Imprint**

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Human Rights inapplicable in International Investment Arbitration? - A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal

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