INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

BERNHARD FRIEDRICH ARND RÜDIGER VON PEZOLD, ELISABETH REGINA MARIA GABRIELE VON PEZOLD, ANNA ELEONORE ELISABETH WEBBER (NÉE VON PEZOLD), HEINRICH BERND ALEXANDER JOSEF VON PEZOLD, MARIA JULIANE ANDREA CHRISTIANE KATHARINA BATTHYÀNY (NÉE VON PEZOLD), GEORG PHILIPP MARCEL JOHANN LUKAS VON PEZOLD, FELIX ALARD MORITZ HERMANN KILIAN VON PEZOLD, JOHANN FRIEDRICH GEORG LUDWIG VON PEZOLD, ADAM FRIEDRICH CARL LEOPOLD FRANZ SEVERIN VON PEZOLD

Respondents

and

REPUBLIC OF ZIMBABWE

Applicant

ICSID CASE NO ARB/10/15
ANNULMENT PROCEEDING

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Dr Veijo Heiskanen, President
Ms Jean Kalicki, Member
Prof Azzedine Kettani, Member

Secretary of the *ad hoc* Committee
Ms Jara Mínguez Almeida

Date of dispatch to the Parties: 21 November 2018

REPRESENTATION OF THE PARTIES

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Mr Philip R. Kimbrough
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Ms Helen Aldridge (until 19 October 2018)
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and

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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

Applications	Applications for Annulment of the Republic of Zimbabwe
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006
Award or the von Pezold Award	Award of the Tribunal rendered on 28 July 2015 in the arbitration proceeding *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15)
Awards	Awards of the Tribunals rendered on 28 July 2015 in the arbitration proceedings between Bernhard von Pezold and others and the Republic of Zimbabwe and Border Timbers Limited, Timber Products International (Private) Limited and Hangani Development Co. (Private) Limited and the Republic of Zimbabwe (ICSID Case Nos ARB/10/15 and ARB/10/25)
Committee	*ad hoc* Committee in the annulment proceeding composed of Dr Veijo Heiskanen, Ms Jean Kalicki and Prof Azzedine Kettani
Counter-Memorial	Respondents' Counter-Memorial on Annulment dated 8 October 2017
Decision on Stay	Decision on the Stay of Enforcement of the Award issued on 24 April 2017
Germany-Zimbabwe BIT	Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments, which entered into force on 29 September 1995
Hearing	Hearing on Annulment held on 3-5 April 2018
Hearing on Stay	Hearing on the Stay of Enforcement of the Awards held on 14-15 December 2016

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial	Applicant's Memorial on Annulment dated 7 June 2017
Rejoinder	Respondents' Rejoinder on Annulment dated 5 March 2018
Reply	Applicant's Reply on Annulment dated 15 January 2018
Switzerland-Zimbabwe BIT	Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments, which entered into force on 15 August 1996
Tr Day [#] [page:line]	Transcript of the Hearing on Annulment
Tribunal	Arbitral tribunal in the original proceeding composed of the Honourable L. Yves Fortier, Mr Michael Hwang, and Prof David A.R. Williams
VPB-[#]	Respondents' Exhibit
VPBLEX-[#]	Respondents' Legal Authority
VPBs	von Pezold and others and Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited
ZA-[#]	Applicant's Exhibit
ZALEX-[#]	Applicant's Legal Authority

I. INTRODUCTION

1. This case concerns the application for annulment (the "**Application**") of the award rendered on 28 July 2015 in the arbitration proceeding between Bernhard von Pezold and others and the Republic of Zimbabwe (ICSID Case No ARB/10/15) (the "**von Pezold Award**" or the "**Award**") rendered by an arbitral tribunal composed of the Honourable L. Yves Fortier, Mr Michael Hwang, and Prof David A.R. Williams (the "**Tribunal**").

2. The applicant on annulment is the Republic of Zimbabwe ("**Zimbabwe**" or the "**Applicant**"). The respondents on annulment are Bernhard Friedrich Arnd Rüdiger von Pezold, Elisabeth Regina Maria Gabriele von Pezold, Anna Eleonore Elisabeth Webber (née von Pezold), Heinrich Bernd Alexander Josef von Pezold, Maria Juliane Andrea Christiane Katharina Batthyàny (née von Pezold), Georg Philipp Marcel Johann Lukas von Pezold, Felix Alard Moritz Hermann Kilian von Pezold, Johann Friedrich Georg Ludwig von Pezold, Adam Friedrich Carl Leopold Franz Severin von Pezold (the "**VPBs**" or the "**Respondents**,"[1] and together with the Applicant, the "**Parties**").

3. The Parties' representatives and their addresses are listed above on page (i).

4. Zimbabwe filed simultaneously an application for annulment of the award rendered on 28 July 2015 in the arbitration proceeding between Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited (the "**Border Claimants**") and the Republic of Zimbabwe (ICSID Case No ARB/10/25) by the same Tribunal (the "**Border Timbers Award**," and together with the von Pezold Award, the "**Awards**").

5. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments, which entered into force on

[1] The terms "VPBs" and "Respondents" also include the Border Claimants.

29 September 1995 (the "**Germany-Zimbabwe BIT**"), the Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments, which entered into force on 15 August 1996 (the "**Switzerland-Zimbabwe BIT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

6. The dispute in the original proceeding related to the alleged expropriation by Zimbabwe of land and other property held by the VPBs.

7. In the Awards, the Tribunals unanimously found Zimbabwe in breach of the applicable BITs and ordered it to make restitution to the VPBs as well as pay compensation. The Awards further stipulated that if restitution was not perfected within 90 days, Zimbabwe would be obligated to pay additional compensation.

8. Zimbabwe applied for annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying three grounds for annulment: (i) the Tribunals were not properly constituted (Article 52(1)(a)); (ii) manifest excess of powers (Article 52(1)(b)); and (iii) serious departure from a fundamental rule of procedure (Article 52(1)(d)).

9. In its Amended and Restated Application for Annulment, which was filed on 7 June 2017, together with the Applicant's Memorial on Annulment, the Applicant added a further ground for annulment, namely that the Award had failed to state the reasons on which it is based (Article 52(1)(e)).

10. In the original proceeding, the Parties agreed that the two cases would be heard together, although they would not be formally consolidated, and that the two Tribunals would render two separate awards. In Procedural Order No 1 of the annulment proceeding, the Committees decided that the two cases would continue to be heard together, and that the Committees shall issue separate decisions in relation to each Award. The present decision deals with the von Pezold Award.

II. PROCEDURAL HISTORY

A. THE REQUEST FOR STAY OF ENFORCEMENT OF THE AWARD

11. On 21 October 2015, Zimbabwe filed the Application with the Secretary-General of ICSID. Zimbabwe's Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") for a stay of enforcement of the Award until Zimbabwe's Application was decided (the "**Request for Stay**").

12. On 2 November 2015, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Secretary-General of ICSID registered the Application. On the same date, in accordance with Arbitration Rule 54(2), the Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed.

13. By letter dated 21 December 2015, in accordance with ICSID Arbitration Rules 6 and 53, the Parties were notified that an *ad hoc* Committee composed of Dr Veijo Heiskanen, a national of Finland and designated as President of the Committee, Ms Jean Kalicki, a national of the United States of America, and Professor Azzedine Kettani, a national of Morocco, had been constituted (the "**Committee**"). On the same date, the Parties were notified that Ms Jara Mínguez Almeida, Legal Counsel, ICSID, would serve as Secretary of the Committee.

14. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on 1 February 2016 by teleconference. In addition to the Committee and the Secretary, participating in the teleconference were:

For the Applicant:

Mr Philip Kimbrough	Kimbrough & Associés
Mr Tristan Moreau	Kimbrough & Associés
The Honourable Prince Machaya	Attorney General of the Republic of Zimbabwe
Ms Fortune Chimbaru	Acting Director Civil Division, Attorney General's Office, Republic of Zimbabwe
Ms Elizabeth Sumowah	Legal Advisor, Ministry of Lands and Rural Resettlement, Republic of Zimbabwe

For the Respondents:

Mr Matthew Coleman	Steptoe & Johnson UK LLP
Ms Helen Aldridge	Steptoe & Johnson UK LLP
Mr Thomas Innes	Steptoe & Johnson UK LLP
Mr Charles O. Verrill, Jr	Attorney at Law

15. On 11 February 2016, the Committee issued Procedural Order No 1 recording the agreement of the Parties on procedural matters and the Committee's decisions on those procedural matters where the Parties did not agree. Procedural Order No 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France.

16. Procedural Order No 1 also sets forth the procedural calendar. In particular, Section 15.l of Procedural Order No 1 provides:

> *The proceedings shall consist of two parts. The first part ("Part I") shall deal with the Applicant's request that the enforcement of the Awards be stayed for the duration of the annulment proceedings.*
>
> *The second part ("Part II") shall deal with the Applicant's applications to annul the Awards. Each part of the proceedings shall consist of a written phase followed by an oral hearing before the Committees.*

17. 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 for Provisional Measures**"). 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.

18. By letter dated 24 February 2016, the ICSID Secretariat wrote to the Parties on behalf of the Committee, informing the Parties of the Committee's decision to deny the Applicant's request for an interim order and inviting the Respondents to submit their response to the Application on Provisional Measures by 2 March 2016. The Respondents submitted their response on that date.

19. On 17 March 2016, the Committee issued a Decision on the Applicant's Application for Provisional Measures (the "**Decision on Provisional Measures**"). The Committee dismissed the Application for Provisional Measures, while reminding the Parties of their general obligation to refrain from any conduct that may aggravate the dispute during the pendency of the annulment proceedings.

20. Pursuant to Procedural Order No 1, on 4 April 2016, the Applicant filed its Memorial in Support of Continuing the Stay of Enforcement of the Awards (the "**Memorial on Stay**"), together with Exhibits ZA-072 to ZA-113 and Legal Authorities ZALEX-061 to ZALEX-072.

21. On 11 June 2016, the Respondents filed their Counter-Memorial on the Stay of Enforcement of the Awards (the "**Counter-Memorial on Stay**"), together with Exhibits VPB-010 to VPB-026 and Legal Authorities VPBLEX-018 to VPBLEX-057.

22. On 1 July 2016, the Applicant filed its Reply on the Stay of Enforcement of the Awards (the "**Reply on Stay**"). On 7 July 2016, the Applicant submitted an amended version of its Reply on Stay, together with Exhibits ZA-114 to ZA-151, including a witness statement of Dr J.P. Mangudya (Exhibit ZA-121), a witness statement of the Honourable Prince Machaya (Exhibit ZA-137) and a witness statement of Mr Zvinechimwe Churu (Exhibit ZA-144), and Legal Authorities ZALEX-073 to ZALEX-077.

23. On 31 July 2016, the Respondents filed their Rejoinder on the Stay of Enforcement of the Awards (the "**Rejoinder on Stay**"), together with Exhibits VPB-027 to VPB-043, including a witness statement of Mr Heinrich von Pezold (Exhibit VPB-032), and Legal Authorities VPBLEX-058 to VPBLEX-068.

24. On 12 September 2016, pursuant to Articles 44 and 52(4) of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, the Applicant filed an Application for Provisional Measures to Exclude Consideration of the Merits in Part I (the "**Second Application for Provisional Measures**").

25. In accordance with an invitation from the Committee, on 23 September 2016, the Respondents filed a response to the Second Application for Provisional Measures.

26. On 13 October 2016, the Committee issued a Decision on the Second Application for Provisional Measures (the "**Second Decision on Provisional Measures**"), denying the Second Application.

27. On 16 November 2016, the Applicant requested leave from the Committee to file Exhibit ZA-152 with its Skeleton Arguments on Stay of Enforcement. On 18 November 2016, the Committee granted the Applicant's request and instructed the Respondents to file any observations they might have on that document within five business days of its production. Later that day, the Respondents filed their Skeleton Arguments on Stay and the Applicant filed its Skeleton Arguments on Stay, together with Exhibit ZA-152.

28. On 25 November 2016, the Respondents filed their observations on Exhibit ZA-152 in the form of Exhibits VPB-044 to VPB-047 and a further witness statement of Mr Heinrich von Pezold (Exhibit VPB-048).

29. Following exchanges between the Parties, on 30 November 2016, the Committee granted the Applicant leave to file an additional witness statement in response to the Respondents' observations of 25 November 2016.

30. On 2 December 2016, the Applicant filed an additional witness statement of Dr J.P. Mangudya (Exhibit ZA-153). Together with the witness statement, the Applicant requested a procedural ruling from the Committee in advance of the scheduled hearing regarding alleged hearsay evidence contained in the additional witness statement of Mr Heinrich von Pezold (Exhibit VPB-048). On 4 December 2016, the Committee invited the Respondents to comment on the Applicant's request.

31. On 6 December 2016, the Respondents filed their comments on the Applicant's 2 December 2016 request for a procedural ruling from the Committee regarding the alleged hearsay evidence. The Respondents requested that Exhibit VPB-048 be kept on the record in its entirety or, should the Committee decide to exclude it, Exhibit ZA-152 be struck from the record as well.

32. On 7 December 2016, the President of the Committee held a pre-hearing organizational meeting with the Secretary of the Committee and the Parties by telephone conference.

During the call, in addition to discussing logistical arrangements for the upcoming hearing on the stay of enforcement of the Award, the Parties agreed that there was no need for the Committee to strike portions of Exhibit VPB-048 from the record.

33. A hearing on the stay of enforcement of the Awards was held in Paris, France, on 14 and 15 December 2016 (the "**Hearing on Stay**"). In addition to the Members of the Committee and the Secretary of the Committee, the following individuals were present at the Hearing on Stay:

For the Applicant:

Mr Philip Kimbrough	Kimbrough & Associés
Mr Tristan Moreau	Kimbrough & Associés
The Honourable Prince Machaya	Attorney General of the Republic of Zimbabwe
Ms Fortune Chimbaru	Acting Director Civil Division, Attorney General's Office, Republic of Zimbabwe
Ms Elizabeth Sumowah	Legal Advisor, Ministry of Lands and Rural Resettlement, Republic of Zimbabwe
Ms Varaidzo Zifudzi	Principal Director, Legal Services, Ministry of Finance and Economic Development, Republic of Zimbabwe
Mr Chrispen Mavodza	Director, Legal Affairs Department Ministry of Foreign Affairs, Republic of Zimbabwe
Mr Zvinechimwe Ruvinga Churu	Principal Director, Budgets and Acting Permanent Secretary, Ministry of Finance and Economic Development, Republic of Zimbabwe

For the Respondents:

Mr Matthew Coleman	Steptoe & Johnson UK LLP
Ms Helen Aldridge	Steptoe & Johnson UK LLP
Mr Thomas Innes	Steptoe & Johnson UK LLP
Mr Charles O. Verrill, Jr	Attorney at Law
Mr Heinrich von Pezold	

Court Reporter:

Mr Trevor McGowan	The Court Reporter Ltd

34. During the Hearing on Stay, the following persons were examined:

On behalf of the Applicant:

The Honourable Prince Machaya	Attorney General, Republic of Zimbabwe
Mr Willard L. Manungo	Permanent Secretary, Ministry of Finance and Economic Development, Republic of Zimbabwe
Mr John Panonetsa Mangudya	Governor of the Reserve Bank of Zimbabwe

On behalf of the Respondents:

Mr Heinrich von Pezold

35. At the close of the Hearing on Stay, the Parties were instructed to agree on a further, limited document production procedure. Following exchanges between the Parties, on 19 January 2017, the Respondents sent directly to the Applicant a request that it produce certain documents and attached to their request Legal Authority VPBLEX-069. On 2 February 2017, the Respondents sent a further communication directly to the Applicant requesting additional updated information (this letter was subsequently introduced into the record as Exhibit VPB-050).

36. On 12 February 2017, the Applicant produced Exhibits ZA-154 and ZA-155 in response to the Respondents' document production request of 19 January 2017. The Applicant stated that Exhibits ZA-154 and ZA-155 should "properly inform the Parties without breaching the Applicant's confidentiality obligations."

37. On 13 February 2017, the Respondents wrote to the Committee stating that they did not consider the documents produced by the Applicant to satisfy their request for document production and asked the Committee to determine whether their request had been met. The Respondents also requested leave from the Committee to make observations and file new evidence in response to Exhibits ZA-154 and ZA-155. On 14 February 2017, the Committee granted the Respondents' request to make observations and file new evidence.

38. On 20 February 2017, the Respondents filed a witness statement of Mr Heinrich von Pezold (Exhibit VPB-049) in response to Exhibits ZA-154 and ZA-155.

39. By letter of 26 February 2017, the ICSID Secretariat wrote to the Parties on behalf of the Committee, informing the Parties of the Committee's decision to deny the Respondents' request for document production, taking note of the Applicant's refusal to produce the documents on grounds of confidentiality. The Committee noted that its decision was without prejudice to the determination, which it would make in due course, as to whether the Applicant had established the facts that the requested documents allegedly support.

40. The Applicant filed its Post-Hearing Brief on Stay on 9 March 2017, and the Respondents filed their Post-Hearing Brief on Stay on 10 March 2017.

41. On 31 March 2017, the Respondents wrote to the Committee requesting that certain allegations made in the Applicant's Post-Hearing Brief on Stay be disregarded. The Applicant commented on this request by letter dated 6 April 2017. By letter of 10 April 2017, the ICSID Secretariat wrote to the Parties on behalf of the Committee, informing the Parties that the Committee had decided not to formally disregard the Applicant's allegations, and that it would assess the Applicant's allegations in terms of their relevance to the Applicant's request for stay and the evidentiary record of this annulment proceeding.

42. Following exchanges between the Parties, by letter of 3 April 2017, the ICSID Secretariat wrote to the Parties on behalf of the Committee confirming the procedural calendar for Phase II of the proceedings, pursuant to the timetable set forth in Procedural Order No 1.

B. THE ESCROW ARRANGEMENT

43. On 24 April 2017, the Committee issued its Decision on Stay of Enforcement of the Award (the "**Decision on Stay**").[2] In its Decision, the Committee: (i) rejected the Applicant's request for the continued stay of the enforcement of the Awards; (ii) lifted the provisional stay of enforcement; (iii) noted that the Applicant had 90 days as of the dispatch of the Decision on Stay to comply with paragraph 1020.1 of the Award; and (iv) ordered that any funds paid by the Applicant or collected by the Respondents in consequence of the Award, and any documents establishing title to the properties specified in paragraph 1020.1 of the

[2] Annex A to this Decision.

Award and in the Tables referred to therein (the "**Claimed Properties**"), be placed in escrow until the conclusion of the annulment proceedings (the "**Escrow Arrangement**").

44. On 3 May 2017, the Committee issued Procedural Order No 2, inviting the Parties to advise the Committee, by 15 June 2017, of the agreement reached and, to the extent there were any issues on which the Parties were unable to agree, of their respective positions on the Escrow Arrangement provided for in the Decision on Stay.

45. As discussed further below, pursuant to the procedural calendar established in Procedural Order No 1 and as confirmed by the ICSID Secretariat's letter of 3 April 2017, on 7 June 2017, the Applicant filed its Memorial on Annulment (the "**Memorial**"), together with Exhibits ZA-156 to ZA-227, including witness statements of Mr Chrispen Mavodza (Exhibit ZA-156), Ms Sophia Christina Tsvakwi (Exhibit ZA-157), Ms Virginia Sithole (Exhibit ZA-158), Mr Onias Claver Masiwa (Exhibit ZA-159), the Honourable Prince Machaya (Exhibit ZA-160) and Ms Fatima Chakupamambo Maxwell (Exhibit ZA-161), and Legal Authorities ZALEX-085 to ZALEX-123.

46. By email of 14 June 2017, the Respondents, on behalf of the Parties, requested that the 15 June 2017 deadline for the Parties' comments on the Escrow Arrangement be extended until 23 June 2017. The Committee subsequently granted this extension.

47. By email of 23 June 2017, the Respondents, on behalf of the Parties, provided an update to the Committee on the progress made with respect to the Escrow Arrangement and requested until 29 June 2017 to provide a further update. The Committee subsequently granted the Parties' request.

48. By letter of 29 June 2017, the Respondents submitted a report on the progress and outstanding issues concerning the Escrow Arrangement, together with Exhibits VPB-051 to VPB-058. By email of the same date, the Applicant transmitted to the Committee a draft version of the Escrow Arrangement, together with a letter from Mr Philip Kimbrough, counsel for the Applicant, to Mr Matthew Coleman, counsel for the Respondents. In the absence of an agreement between the Parties, the Parties requested that the Committee

decide (i) who should be the escrow agent; and (ii) the mechanism for the release of the sums and/or documents held in escrow.

49. By letter of 30 June 2017, the Respondents submitted further comments on the Escrow Arrangement, together with Exhibits VPB-059 to VPB-062. The Applicant responded to these further comments by letter of 3 July 2017.

50. By letter of 7 July 2017, the ICSID Secretariat wrote to the Parties on behalf of the Committee with regard to the Escrow Arrangement and in response to the Parties' request of 29 June 2017. The Committee directed that (i) the Parties appoint the Escrow Service of the Office of the *Bâtonnier* of the Paris Bar as the escrow agent; and that (ii) the Parties agree on comprehensive directions for release of funds and/or documents held in escrow that would cover various scenarios. The Committee requested that the Parties report back on their progress on these issues by 14 July 2017.

51. By email of 14 July 2017, the Respondents provided an update on the Escrow Arrangement further to the Committee's directions of 7 July 2017 and requested until 19 July 2017 to provide a further update. The Committee subsequently granted the request.

52. By email of 19 July 2017, the Respondents transmitted to the Committee a revised Escrow Arrangement including a redline of the edits made to the draft version previously sent by the Applicant on 29 June 2017.

53. Also by email of 19 July 2017, the Applicant transmitted to the Committee its observations on the Escrow Arrangement, together with Exhibits ZA-228 to ZA-234. The Applicant's observations also contained a request that the Committee suspend the 90-day restitution deadline as ordered in the Decision on Stay.

54. On 20 July 2017, the Committee invited the Respondents to comment on the Applicant's request to suspend the restitution deadline. The Respondents provided their comments by a letter of the same date.

55. By letter of 23 July 2017, the ICSID Secretariat wrote to the Parties on behalf of the Committee with regard to the Applicant's 19 July 2017 request to suspend the restitution

deadline. The Committee rejected the Applicant's request, citing a lack of jurisdiction over the request as this would require the Committee to vary the Awards. The Committee therefore directed the Parties to provide an update by 7 August 2017 of the agreement reached or, to the extent that there were any issues on which the Parties had been unable to agree, of their respective positions on the Escrow Arrangement. Finally, the Committee stated that, in the absence of an agreement between the Parties by the stated deadline, it did not envisage granting any further extensions and would make a final decision on the Escrow Arrangement.

56. On 25 July 2017, the Applicant filed an Application for Provisional Measures requesting that the Committees order a temporary stay from 23 July 2017 to five business days following the opening of the *Bâtonnier* Escrow Account (the "**Third Application for Provisional Measures**"). The Committee invited the Respondents to comment on the Applicant's request by 28 July 2018.

57. On 28 July 2017, the Respondents submitted their comments on the Third Application for Provisional Measures, together with Exhibit VPB-063.

58. By letters of 7 August 2017, pursuant to the Committee's direction of 23 July 2017, each Party submitted a status report of the discussions on the Escrow Arrangement. With their letter, the Respondents included Exhibits VPB-064 to VPB-066.

59. On 22 August 2017, the Committee issued a Decision on the Third Application for Provisional Measures (the "**Third Decision on Provisional Measures**"). In the Decision, the Committee (i) dismissed the Third Application; (ii) directed the Parties to individually establish escrow accounts of their own devise, with an internationally reputable bank; and (iii) directed the Parties to submit their proposed Escrow Arrangements for the Committee's prior review and approval by 15 September 2017.

60. On 15 September 2017, pursuant to the Third Decision on Provisional Measures, each Party submitted to the Committee its proposed Escrow Arrangement; with their proposal, the Respondents included Exhibit VPB-067. By email of later that date, the Respondents objected to the wording of the Applicant's proposal and suggested alternative language.

The Committee subsequently invited the Applicant to comment on the Respondents' objection and suggestion by 19 September 2017.

61. On 19 September 2017, the Applicant confirmed its agreement with the Respondents' suggested language proposed on 15 September 2017; the Applicant also proposed additional language in light of Exhibit VPB-067. The Committee subsequently invited the Respondents to comment on the Applicant's proposal by 21 September 2017.

62. On 21 September 2017, the Respondents confirmed their agreement with the Applicant's proposed additional language of 19 September 2017.

63. On 25 September 2017, the Committee issued Procedural Order No 3, ordering the Parties to conclude individual Escrow Arrangements with the *Bâtonnier* of the Paris Bar as the escrow agent, directing that each Party deposit with the *Bâtonnier* of the Paris Bar the sums payable under the Award, until the conclusion of this annulment proceeding, and inviting the Parties to inform the Committee promptly of any sums deposited to the individual escrow accounts.

64. The Committee notes that neither Party has informed the Committee of any sums deposited on either escrow account during this annulment proceeding. Consequently, and in accordance with the terms of Procedural Order No 3, the Committee's directions in Procedural Order No 3 will lapse upon the issuance of the present Decision, as directed by the Committee in the operative part of this Decision.

C. THE APPLICATION FOR ANNULMENT

65. As noted in paragraph 45, the Applicant filed its Memorial on Annulment on 7 June 2017.

66. By email of 5 October 2017, the day before the deadline envisioned in the procedural calendar for the Respondents' Counter-Memorial on Annulment (the "**Counter-Memorial**"), the Respondents transmitted a letter addressed directly to the Applicant regarding an alleged breach by the Applicant of the *status quo*. The letter did not request any action from the Committee.

67. On 8 October 2017, two days later than the deadline envisioned in the procedural calendar, the Respondents filed their Counter-Memorial, together with Exhibits VPB-068 to VPB-282 and Legal Authorities VPBLEX-070 to VPBLEX-100. The Committee subsequently invited the Applicant to comment on the Respondents' late submission by 10 October 2017.

68. On 10 October 2017, the Applicant submitted its comments on the Respondents' late submission of their Counter-Memorial. The Applicant did not object to the admission of the Counter-Memorial into the record, however it requested that the Committee extend the deadlines for the remaining pleadings on annulment. The Committee subsequently invited the Respondents to submit their response to the Applicant's request by 13 October 2017.

69. On 13 October 2017, the Respondents provided their response to the Applicant's request of 10 October 2017.

70. By letter of 16 October 2017, the Secretary of the Committee wrote to the Parties on behalf of the Committee regarding the Applicant's request of 10 October 2017, informing the Parties of the Committee's decision to admit the Counter-Memorial into the record and to modify the procedural calendar.

71. By letter of 17 October 2017, the Applicant responded to the Respondents' letter of 5 October 2017 regarding the alleged breach of the *status quo*.

72. By letter of 22 November 2017, the Applicant requested that the deadline to submit its Reply on Annulment be extended "in light of the recent political developments in Zimbabwe." The Committee subsequently invited the Respondents to comment on the Applicant's request by 24 November 2017.

73. By letter of 23 November 2017, the Respondents, on behalf of the Parties, submitted an agreed amended procedural calendar. The Committee confirmed the amended procedural calendar on 24 November 2017.

74. By letter of 29 November 2017, the Respondents informed the Committee that the First Claimant in ICSID Case No ARB/10/15, Mr Rüdiger von Pezold, had passed away. The

Respondents subsequently filed a Power of Attorney in respect of Mr Rüdiger von Pezold's estate on 7 April 2018.

75. Pursuant to the amended procedural calendar, on 16 January 2018, the Applicant filed its Reply on Annulment (the "**Reply**"). On 22 January 2018, the Applicant submitted an amended version of its Reply, together with Exhibits ZA-235 to ZA-312, including witness statements of Ms Virginia Sithole (Exhibit ZA-306), Mr Onias Claver Masiwa (Exhibit ZA-307), the Honourable Prince Machaya (Exhibit ZA-308) and Ms Fatima Chakupamambo Maxwell (Exhibit ZA-309), as well as an additional witness statement of Ms Fatima Chakupamambo Maxwell (Exhibit ZA-237), and Legal Authorities ZALEX-124 to ZALEX-217.

76. By letter of 6 February 2018, the Applicant requested directions from the Committee in advance of the hearing and informed the Committee of its intention to reach an agreement on certain matters with the Respondents. By email of that same date, the Respondents stated that the matters referred to by the Applicant should be addressed after the last pleading had been filed.

77. By email of 8 February 2018 transmitted by the ICSID Secretariat, the Committee acknowledged the Parties' communications of 6 February 2017 and proposed a date and time for the pre-hearing teleconference. Included with the email was a draft agenda on which the Committee invited the Parties' comments by 14 February 2018; this deadline was subsequently extended to 7 March 2018.

78. Also by email of 8 February 2018, the Applicant requested that "the Committees […] direct 'that [new evidence which was not filed in the original arbitrations] will not be considered by the Committees and should not be filed in the first instance.'" The Committee subsequently invited the Respondents to comment on the Applicant's request by 9 February 2018.

79. By letter of 9 February 2018, the Respondents commented on the Applicant's request of 8 February 2018.

80. By letter of 12 February 2018, the ICSID Secretariat wrote to the Parties on behalf of the Committee regarding the Applicant's request of 8 February 2018. The Committee denied the Applicant's request, noting that while Section 16.2 of Procedural Order No 1 provides that the Committee expects that "the parties will primarily refer to the evidentiary record of the arbitration proceedings," evidence not submitted in the arbitration proceedings is not as such inadmissible in these annulment proceedings.

81. Pursuant to the amended procedural calendar, on 5 March 2018, the Respondents filed their Rejoinder on Annulment (the "**Rejoinder**"), together with Exhibits VPB-283 to VPB-317 and Legal Authorities VPBLEX-101 to VPBLEX-119.

82. On 7 March 2018, the Respondents submitted their comments on the proposed draft agenda for the pre-hearing teleconference; the Applicant submitted its comments on 8 March 2018.

83. On 9 March 2018, the Committee held a pre-hearing organizational meeting with the Secretary of the Committee and the Parties by telephone conference.

84. By letter of 10 March 2018, the Applicant submitted to the Committee a response to an alleged new argument made by the Respondents during the pre-hearing organizational meeting. By email of 11 March 2018, the Respondents sought leave from the Committee to respond to the Applicant's letter.

85. Later on 11 March 2018, by email transmitted by the ICSID Secretariat, the Committee informed the Parties that it had been sufficiently briefed on the matter, and that the Parties should refrain from submitting further comments unless invited to do so by the Committee. Accordingly, the Committee denied the Respondents' request for leave to respond to the Applicant's 10 March 2018 letter.

86. By letter of 12 March 2018, the ICSID Secretariat wrote to the Parties on behalf of the Committee regarding the organization of the upcoming hearing on annulment, including a deadline for the Parties to exchange Skeleton Arguments on Annulment.

87. On 20 March 2018, pursuant to the Committee's letter of 12 March 2018, the Parties filed their Skeleton Arguments on Annulment.

88. A hearing on annulment was held in Paris, France, on 3-5 April 2018 (the "**Hearing**"). In addition to the Members of the Committee and the Secretary of the Committee, the following individuals were present at the Hearing:

For the Applicant:

Mr Philip Kimbrough	Kimbrough & Associés
Mr Tristan Moreau	Kimbrough & Associés
The Honourable Prince Machaya	Attorney General of the Republic of Zimbabwe
Ms Fortune Chimbaru	Acting Director Civil Division, Attorney General's Office, Republic of Zimbabwe
Ms Elizabeth Sumowah	Legal Advisor, Ministry of Lands and Rural Resettlement, Republic of Zimbabwe
Ms Varaidzo Zifudzi	Principal Director, Legal Services, Ministry of Finance and Economic Development, Republic of Zimbabwe
Mr Chrispen Mavodza	Director, Legal Affairs Department Ministry of Foreign Affairs, Republic of Zimbabwe
Ms Fatima Chakupamambo Maxwell	Judge, Republic of Zimbabwe
Ms Virginia Sithole	Resident legal advisor, Exchange Control, Reserve Bank, Republic of Zimbabwe
Mr Onias Claver Masiwa	Chief Inspector Exchange Control, Head of Exchange Control Inspectorate of the Reserve Bank, Republic of Zimbabwe

For the Respondents:

Mr Matthew Coleman	Steptoe & Johnson UK LLP
Ms Helen Aldridge	Steptoe & Johnson UK LLP
Mr Thomas Innes	Steptoe & Johnson UK LLP
Ms Vivian Fischer	Steptoe & Johnson UK LLP
Mr Charles O. Verrill, Jr	Attorney at Law
Mr Heinrich von Pezold	

Court Reporters:

Ms Diana Burden	Diana Burden Ltd
Ms Laurie Carlisle	Diana Burden Ltd

89. On 29 June 2018, each Party filed its Post-Hearing Brief.

90. By letter of 6 July 2018, the Respondents wrote to the Committee alleging that the Applicant had raised new issues in its Post-Hearing Brief and requesting that the

Committee not consider these new issues. The Applicant responded by letter of 9 July 2018.

91. By letter of 17 July 2018 transmitted by the ICSID Secretariat, the Committee informed the Parties that it will consider the Parties' submissions in the course of its deliberations. If the Committee finds that the Applicant has raised new arguments not previously made in the course of the proceedings, it will determine the consideration to be given to them.

92. On 20 July 2018, each Party filed its Submission on Costs. With its submission, the Applicant filed Legal Authorities ZALEX-218 to ZALEX-225; with their submission, the Respondents filed Legal Authorities VPBLEX-120 to VPBLEX-136.

93. On 31 July 2018, each Party filed its Reply Submissions on Costs.

94. On 24 September 2018, the Committee closed the proceeding.

III. THE AWARD

A. THE CLAIMS

95. The dispute that was the subject matter of the original arbitration arose out of the Land Reform Program ("**LRP**") implemented by the Government of Zimbabwe through a series of measures that were first introduced after the independence of Zimbabwe in 1979. The aim of the LRP was to acquire (initially on a willing buyer-willing seller basis but subsequently allowing compulsory transfers) agricultural land from large-scale farms for purposes of resettlement.[3] However, the implementation of the LRP was hampered, *inter alia*, by lack of funds to compensate land owners and progress was slow in the first ten years of independence.

96. On 15 July 2000, the Government introduced a Fast Track Land Reform Program ("**FTLRP**"), which, *inter alia*, removed compensation provisions for agricultural land acquired compulsorily by the State. The introduction of the FTLRP also marked the

[3] Award (**VPB-174**), para 97.

beginning of the "invasions" by settlers of predominantly white-owned farms, including those owned by the VPBs.[4] In 2005, the Constitution of Zimbabwe was amended to acquire and vest in the State title to land which had been previously identified as being subject to the LRP. No compensation was payable for such land and persons having any right or interest in the land were prohibited from applying to the court or challenging the acquisition of the land by the State.[5]

97. The VPBs, through the Border Claimants, owned three estates in Zimbabwe (the "**Estates**"): (i) the Forrester Estate, "essentially a tobacco growing and curing operation set on 22,000 ha of land […] in the North of Zimbabwe;"[6] (ii) the Border Estate, "an integrated forestry plantation comprising 28 properties with pine and eucalyptus (gum) plantations […] and three sawmills set on 47,886 ha of land and located in […] the East of Zimbabwe;"[7] and (iii) the Makandi Estate, "a mixed plantation, growing coffee, bananas, maize, macadamia nuts, avocados, and timber for the production of transmission poles, set on 8,389 ha and spread across nine properties […] in the East of Zimbabwe."[8]

98. The VPBs stated that, as a result of the 2005 constitutional amendment, Zimbabwe had compulsorily acquired all but ten properties they owned, without any compensation. They also submitted that the remaining ten properties were not viable on their own and had thus been rendered worthless. They further alleged that before being formally acquired by Zimbabwe, invasions took place on the Estates, causing much damage while the police and armed forces failed to properly intervene and protect white farmers.

99. The VPBs alleged that, as a result of the events summarized above, Zimbabwe had breached Articles 4(2) (expropriation), 2(1) (fair and equitable treatment), 2(2) (non-impairment), 4(1) (full protection and security) and 5 (free transfer of payments) of the Germany-Zimbabwe BIT, as well as Articles 6(1) (expropriation), 4(1) (fair and equitable

[4] Award (**VPB-174**), paras 107-110.
[5] Award (**VPB-174**), para 116.
[6] Award (**VPB-174**), para 119.
[7] Award (**VPB-174**), para 126.
[8] Award (**VPB-174**), para 135.

treatment, non-impairment and full protection and security) and 5 (free transfer of payments) of the Switzerland-Zimbabwe BIT.

B. THE PROCEDURE BEFORE THE TRIBUNAL

100. On 11 June 2010, ICSID registered a Request for Arbitration filed by the VBPs.

101. On 3 December 2010, ICSID registered another Request for Arbitration filed by the Border Claimants.

102. Pursuant to the agreement between the Parties, two identically composed Tribunals were constituted to rule on both claims in two conjoined arbitration proceedings. The Tribunals were subsequently reconstituted three times, following resignations of members appointed by Zimbabwe.

103. At the first procedural joint session held on 7 February 2011, Zimbabwe indicated that it did not intend to object to the Tribunal's jurisdiction. Accordingly, the Parties agreed that they would exchange two rounds of submissions on the merits of the VPBs' claims.

104. On 31 October 2011, the Tribunal issued Procedural Order No 1, ruling on document production requests.

105. On 15 November 2011, the VPBs submitted their Memorial on the Merits.

106. On 26 June 2012, the Tribunal issued Procedural Order No 2, which dismissed applications to participate as non-disputing parties submitted by the European Centre for Constitution and Human Rights and four indigenous communities of Zimbabwe.

107. On 11 August 2012, Zimbabwe filed its Counter-Memorial on the Merits.

108. On 12 October 2012, the VPBs filed their Reply on the Merits and Ancillary Claims.

109. On 14 December 2012, Zimbabwe, now represented by new counsel, submitted its Rejoinder on the Merits, including Objections to Jurisdiction to the Claimants' Original Claim and Observations on Ancillary Claims.

110. On 11 January 2013, the Tribunal issued Procedural Order No 3, which disposed of an application by the VPBs, *inter alia*, to strike out jurisdictional challenges and other defenses allegedly raised for the first time by Zimbabwe in its Rejoinder on the Merits, despite its submissions to the contrary during the first procedural joint session. In Procedural Order No 3, the Tribunal admitted Zimbabwe's jurisdictional objections into the record, acknowledging "special circumstances" within the meaning of ICSID Arbitration Rule 26(3). The Tribunal further joined Zimbabwe's jurisdictional challenges to the merits and vacated the previously set hearing dates to accommodate further briefing on the new issues.

111. On 1 March 2013, the VPBs filed their Observations on the Rejoinder and a Response to Observations on Ancillary Claims.

112. On 16 March 2013, the Tribunal issued Procedural Order No 4, which addressed the VPBs' application for an order for provisional measures, alleging that intruders had entered their properties in Zimbabwe. The VPBs requested that the Tribunal order Zimbabwe to instruct its police forces either (i) to prevent intruders from entering the Estates; or (ii) if intruders had already entered the Estates, to remove them. In Procedural Order No 4, the Tribunal dismissed the VPBs' application. First, the Tribunal acknowledged Zimbabwe's statement that it had instructed its police to maintain the *status quo* on the Estates as at the date of the filing of the Request for Arbitration. Second, the Tribunal acknowledged Zimbabwe's undertaking to instruct its police forces to act upon any report on intrusion into the VPBs' properties. The Tribunal noted that the VPBs themselves had stated that Zimbabwe's forces had already removed most of the intruders and helped the VPBs to restore damaged or stolen property. However, the Tribunal instructed the Parties not to aggravate the dispute further and to maintain the *status quo* until the resolution of the dispute.

113. On 3 April 2013, the Tribunal issued Procedural Order No 5, addressing an application by the VPBs for urgent interim relief. The VPBs alleged that Zimbabwe's Central Intelligence Office was planning to assassinate one of the Claimants, Mr Heinrich von Pezold. By Procedural Ordered No 5, the Tribunal ordered Zimbabwe to implement immediately, in cooperation with VPBs, measures of protection to ensure Mr Heinrich von Pezold's safety.

The Tribunal also ordered Zimbabwe to report periodically on the implementation and effectiveness of such protection measures.

114. On 19 April 2013, Zimbabwe filed its Response to Observations on the Rejoinder ("**Rebutter**").

115. On 15 May 2013, the VPBs submitted an updated request for relief and introduced a correction to the quantum of their claims.

116. On 22 July 2013, the Tribunal issued Procedural Order No 6, addressing a further request for provisional measures advanced by the VPBs, which was prompted by the entry of new intruders into the properties. In Procedural Order No 6, the Tribunal dismissed the application on the basis, *inter alia*, that the VPBs had failed to adduce evidence warranting the wide-ranging measures requested and to show emergency and necessity, as required under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1).

117. On 8 August 2013, the Tribunal issued Procedural Order No 7, addressing the VPBs' objections to (i) Zimbabwe's new jurisdictional objection, allegedly raised for the first time on 19 April 2013; and (ii) the new evidence submitted in support of the objection. After an exchange of submissions on this issue, the Tribunal dismissed the VPBs' objections and amended the briefing schedule to allow for the objection to be pleaded by both Parties.

118. On 15 August 2013, Zimbabwe filed its Re-Rebutter (*i.e.*, an addendum to its 19 April 2013 Response to Observations on the Rejoinder).

119. On 9 September 2013, the VPBs filed a Response to the Re-Rebutter. Together with this pleading, the VPBs submitted Exhibit C-858, which is a letter dated 12 November 1992 from the Merchant Bank of Central Africa Limited to Tanks Group Services Limited. The letter describes an approval given by the Reserve Bank of Zimbabwe for Tanks Consolidated Investment Limited (a Bahamian subsidiary of the Belgian bank, Société Générale de Belgique) to transfer a Zimbabwean company (then-named "Tanks Investments (Zimbabwe) Ltd," and from 24 August 1999 named "Franconian Zimbabwe Investments (Pvt) Ltd") ("**Franconian**")) from Tanks Consolidated Investments Ltd to another subsidiary of Société Générale de Belgique, Saxonian Estates Ltd of Jersey

("**Saxonian**"). In their 9 September 2013 Response to the Re-Rebutter, the VPBs stated that Exhibit C-858 constituted evidence of approval of one of their investments by the Reserve Bank of Zimbabwe.

120. On the same day, 9 September 2013, Zimbabwe filed observations on the Claimants' 15 May 2013 updated request for relief and corrected quantum.

121. On 25 September 2013, the Tribunal issued Procedural Order No 8, following Zimbabwe's request to extend the page limit of its 26 September 2013 submission, in order to allow it to properly reply to the VPBs' three new arguments raised in their 9 September 2013 Response to the Re-Rebutter. In Procedural Order No 8, the Tribunal reminded Zimbabwe that it had been afforded ample opportunity to plead its case at all stages of the proceedings. The Tribunal also recalled its decisions in (i) Procedural Order No 3, whereby Zimbabwe's jurisdictional objections were all admitted on the record despite its previous undertakings not to file jurisdictional objections; and (ii) Procedural Order No 7, whereby the Tribunal allowed additional jurisdictional arguments to be raised belatedly. In the circumstances, the Tribunal was not prepared to reopen Procedural Order No 7 and dismissed the Respondent's request for a page limit extension.

122. On 26 September 2013, Zimbabwe filed its Reply to the Response to the Re-Rebutter (*i.e.*, a response to the VPBs' 9 September 2013 submission). Zimbabwe's submission was accompanied by a second witness statement from Mr Grasiano Nyaguse and a third witness statement from Mr Onias Masiiwa. Zimbabwe argued that Exhibit C-858 showed that (i) the VPBs were aware that approval from the Reserve Bank of Zimbabwe was required for the acquisition of their investments; and that (ii) the VPBs could not show that all of their investments had been approved. Zimbabwe also indicated that Exhibit C-858 related to a transaction between two subsidiaries of Société Générale de Belgique and did not concern the VPBs.

123. On the same date, the VPBs filed their response to Zimbabwe's 9 September 2013 submission.

124. On 2 October 2013, Zimbabwe applied to the Tribunal, *inter alia*, to seek confirmation that its Re-Rebutter Reply and its 9 September 2013 Quantum Reply, and accompanying evidence, were fully on the record.

125. On 11 October 2013, the President of the Tribunal and the Parties convened a telephone conference during which it was agreed that there was no reason to postpone the hearing scheduled to start on 28 October 2013. Both Parties also made oral submissions on Zimbabwe's 2 October 2013 application.

126. On 12 October 2013, Zimbabwe further requested the Tribunal to order the VPBs to submit any further "approval/illegality exhibits they may have 'overlooked' through 10 December 2013." Zimbabwe also sought leave to reply to any further submission of documents.

127. Following these two applications, the Parties agreed to the admission of certain material filed by Zimbabwe with its 9 and 26 September 2013 pleadings, while leaving other material subject to the determination of the Tribunal.

128. On 14 October 2013, both Parties filed their Skeleton Arguments.

129. On 15 October 2013, the Tribunal issued Procedural Order No 9. The Tribunal found that the approval/illegality objections raised by Zimbabwe in its 26 September 2013 Reply to the Response to the Re-Rebutter (which raised the alleged illegality of all of the VPBs' investments for failure to comply with Zimbabwe's exchange control regulations) had been expanded in breach of the Tribunal's directions contained notably in Procedural Order Nos 3 and 7. The Tribunal determined that there were no "special circumstances" warranting the admission into the record at such a late stage of this expanded version of Zimbabwe's objections. The Tribunal also ruled that certain passages in the two witness statements filed by Zimbabwe with its Re-Rebutter Reply, which addressed the wider version of its illegality objection, should be redacted, while several other documents also filed with the submission would not be admitted into the record.

130. From 28 October to 2 November 2013, a hearing on jurisdiction, liability and quantum was held in Washington, D.C. As discussed further below, on Day 4 of the hearing, Mr Yves Fortier, the President of the Tribunal, mentioned that he was currently acting as chairperson

of the World Bank Sanctions Board, and inquired whether either Party would have any issue if the secretary of the Sanctions Board sat in on that day's proceedings. Separately from this issue, Zimbabwe contends in this annulment proceeding that during the examination of witnesses at the hearing, the President of the Tribunal made allegedly inappropriate or biased comments to Zimbabwe's witnesses.

131. On 24 February 2014, the Tribunal issued Procedural Order No 10, which dealt with the Parties' proposed corrections to the hearing transcript. The Tribunal also admitted into the record material submitted by Zimbabwe in response to questions formulated during the hearing. Procedural Order No 10 also set out the procedure for post-hearing submissions and denied a further request by Zimbabwe for an extension of time.

132. On 7 May 2014, both Parties submitted their Post-Hearing Briefs.

133. On 6 June 2014, the VPBs filed a Statement on Inadmissible Material Contained in Zimbabwe's Post-Hearing Brief.

134. On 2 July 2014, Zimbabwe submitted its Response to the Statement on Inadmissible Material. In its submission, Zimbabwe also made a number of procedural requests relating to (i) the admissibility of several of the VPBs' submissions which allegedly raised new arguments and contained new evidence; and (ii) Zimbabwe's right to file an additional submission on these new issues.

135. On 9 July 2014, the VPBs filed their Reply to Zimbabwe's Response to the Statement on Inadmissible Material.

136. On 15 July 2014, the Tribunal issued Procedural Order No 11. The Tribunal indicated that it required no further briefing on Zimbabwe's 2 July 2014 submission.

137. On 5 September 2014, the Tribunal issued Procedural Order No 12, in which it denied the last five procedural requests made by Zimbabwe in its 2 July 2014 pleading, including its request to be allowed to file a further brief on the alleged new arguments raised by the Claimants. The Tribunal also reserved its decision on the first five procedural requests for the Award.

138. On 20 October 2014, the Tribunal invited the Parties to comment on whether it should issue a single award or two separate awards. Zimbabwe supported the former approach, while the Claimants preferred the latter option.

139. On 1 December 2014, the Parties submitted their Submission on Costs and Fees.

140. On 18 December 2014, the Parties submitted their Reply Submissions on Costs and Fees.

141. On 23 December 2014, the Tribunal issued Procedural Order No 13, ruling that two awards should be rendered. Although the Tribunal found that the claims were fundamentally intertwined, it held that since the von Pezold and Border Claimants had elected to file two separate claims, they were entitled to pursue enforcement of any award independently.

142. On 3 February 2015, the Tribunal declared the proceedings in both cases closed, in accordance with ICSID Arbitration Rule 38(1).

C. THE AWARD

143. The Tribunal rendered its Award on 28 July 2015.

144. The Award deals with fifteen separate issues, with numerous sub-issues, relating to: (i) the Tribunal's jurisdiction over the VPBs' investments under both the Germany-Zimbabwe BIT and the Switzerland-Zimbabwe BIT; (ii) Zimbabwe's approval and illegality objections to the admissibility of the claims; (iii) attribution to Zimbabwe of conduct of settlers and of political statements of the President of Zimbabwe and of certain Government officials; (iv) proportionality, regulation and margin of appreciation; (v) the alleged expropriation of the VPBs' investments; (vi) the alleged breach by Zimbabwe of the fair and equitable treatment standard; (vii) the alleged impairment by Zimbabwe of the VPBs' investments; (viii) the alleged breach by Zimbabwe of the full protection and security standard; (ix) the alleged breach by Zimbabwe of the free transfer of payments standard; (x) Zimbabwe's necessity defense; (xi) the alleged lack of causation between Zimbabwe's conduct and the VPBs' loss; (xii) remedies available to the VPBs under the BITs; (xiii) interest applicable in case compensation was awarded; (xiv) the VPBs' requests for declaratory relief; and (xv) costs of arbitration.

145. The Tribunal upheld its jurisdiction under Article 25 of the ICSID Convention, noting that (i) it was not contested that the case involved a legal dispute within the meaning of Article 25 of the ICSID Convention;[9] and that (ii) Zimbabwe had consented to the submission of the dispute to the Centre.[10] The Tribunal also upheld its jurisdiction *ratione personae* as well as its jurisdiction *ratione materiae* under both the ICSID Convention[11] and the BITs.[12] The Tribunal also found jurisdiction *ratione temporis* under the Germany-Zimbabwe BIT (which Zimbabwe only challenged under that Treaty, but not under the Switzerland-Zimbabwe BIT).[13]

146. The Tribunal then turned to Zimbabwe's objections to admissibility based on the alleged lack of approval and illegality of the VPBs' investments (the "**Approval Objection**" and the "**Illegality Objection**," respectively), noting that Zimbabwe had presented its objections regarding the legality of the VPBs' investments and their approval as objections to admissibility rather than to jurisdiction.[14] The Tribunal determined to treat Zimbabwe's objections as admissibility objections, consistent with Zimbabwe's pleadings, but noted that the characterization of the objections was immaterial to its decision.[15]

147. In view of the seriousness of the arguments made by Zimbabwe in its Post-Hearing Brief regarding alleged procedural abuse and violation of its right to be heard, the Tribunal reviewed in detail the procedural history of the case. The Tribunal considered it "vital for its unanimous determination that PO No 9 should be reconfirmed again," and it so decided.[16]

148. As to Zimbabwe's Approval Objection, which was based on Article 9(b) of the Germany-Zimbabwe BIT, the Tribunal noted that the provision appeared to conflict with Ad Article

[9] Award (**VPB-174**), para 190.

[10] Award (**VPB-174**), para 199.

[11] Award (**VPB-174**), paras 205 and 225 (with the exception of claims by Mr Rüdiger von Pezold, over which it retained jurisdiction solely under the Germany-Zimbabwe BIT).

[12] Award (**VPB-174**), paras 225 and 285-286.

[13] Award (**VPB-174**), paras 337-343.

[14] Award (**VPB-174**), paras 344-346.

[15] Award (**VPB-174**), para 346 (save for the MFN argument, which the Tribunal did not find necessary to consider).

[16] Award (**VPB-174**), paras 347-402.

2(a) of the Protocol to the Germany-Zimbabwe BIT. Article 9(b) appeared to require formal approval of investments, while Ad Article 2(a) did not contain any such requirement. Relying on the general rule of treaty interpretation in Article 31 of the Vienna Convention on the Law of Treaties, the Tribunal concluded that there was no specific requirement of approval.[17] The Tribunal further found that Zimbabwe was in any event estopped from denying that it had given approval to the VPBs' investments, if approval was required.[18] Accordingly, the Tribunal dismissed Zimbabwe's Approval Objection.

149. As to the Illegality Objection, the Tribunal found that it was not convinced that the VPBs had breached any of Zimbabwe's laws, but even if they had, the Respondent was estopped from denying that BIT protection existed.[19]

150. The Tribunal then dealt with two of Zimbabwe's remaining 2 July 2014 requests relating to the alleged new evidence given by Mr Rüdiger von Pezold during his examination at the hearing, to the effect that Exhibit C-858 related to the VPBs' investments. Zimbabwe had applied for an opportunity to file further submissions on that alleged new evidence, but the Tribunal had reserved its decision for the Award. The Tribunal agreed with the VPBs that Mr Rüdiger von Pezold had simply misconstrued the letter and found that his statement did not constitute new evidence warranting further pleadings from Zimbabwe.[20]

151. The Tribunal went on to dismiss most of Zimbabwe's arguments on attribution, concluding that the conduct of State organs was attributable to the State, except if performed in purely private capacity, which issue did not arise in this case.[21] The Tribunal dismissed the VPBs' argument that the actions of the settlers were attributable to the State.

[17] Award (**VPB-174**), para 409.

[18] Award (**VPB-174**), para 411.

[19] Award (**VPB-174**), para 416.

[20] Award (**VPB-174**), paras 423-430.

[21] Award (**VPB-174**), para 450 (the Tribunal did accept Zimbabwe's arguments that the acts of Settlers/War Veterans did not meet the test of ILC Article 8 and thus were not attributable to the State).

152. The Tribunal also dismissed Zimbabwe's arguments on the applicability of the doctrine of proportionality and margin of appreciation,[22] noting that neither doctrine could be used to justify illegal conduct based on racial discrimination.[23]

153. On the merits, the Tribunal upheld the great majority of the VPBs' claims, finding that Zimbabwe had (i) unlawfully expropriated the VPBs' investments, including those which had not been formally seized but had been rendered worthless as a result of the expropriation of other properties.[24] The Tribunal also held that Zimbabwe had breached (ii) the fair and equitable treatment standards in Article 2(1) of the Germany-Zimbabwe BIT and Article 4(1) of the Switzerland-Zimbabwe BIT;[25] (iii) the non-impairment standard in Article 2(2) of the Germany-Zimbabwe BIT and Article 4(1) of the Switzerland-Zimbabwe BIT;[26] (iv) the full protection and security standard in Article 4(1) of the Germany-Zimbabwe BIT and Article 4(1) of the Switzerland-Zimbabwe BIT;[27] and (v) the free transfer of payments standard in Article 5 of Germany-Zimbabwe BIT and Article 5 of the Switzerland-Zimbabwe BIT.[28]

154. The Tribunal rejected Zimbabwe's necessity defense, finding that it did not meet the requirements of Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Articles**"), which the Parties agreed governed the issue. More specifically, the Tribunal noted that Zimbabwe had not declared a state of emergency at the relevant time, and that the settlers constituted a minority of the overall citizenry; accordingly their actions "were of a scale that was not uncontrollable by the Government and the police forces."[29] On the contrary, "the Zimbabwean Government chose to inflame the situation rather than dissolve it through

[22] Award (**VPB-174**), paras 460-463.
[23] Award (**VPB-174**), para 467.
[24] Award (**VPB-174**), paras 488-521.
[25] Award (**VPB-174**), paras 542-561.
[26] Award (**VPB-174**), paras 576-581.
[27] Award (**VPB-174**), paras 593-599.
[28] Award (**VPB-174**), paras 605-609.
[29] Award (**VPB-174**), para 630.

legal means."[30] Zimbabwe had thus failed to demonstrate a threat to the essential interests of the State.

155. The Tribunal also found, in connection with Zimbabwe's necessity defense, that the land occupations by the settlers did not constitute a threat to the survival of the State and accordingly the measures taken by Zimbabwe had not been taken to save Zimbabwe of a "grave and imminent peril."[31] The Tribunal further ruled that the measures taken by Zimbabwe were not the "only way" to deal with the unrest at hand,[32] and that its conduct was racially motivated and breached "its obligation *erga omnes* not to engage in racial discrimination."[33] As a result, Zimbabwe's conduct constituted "an impairment to the international community as a whole and ILC Article 25(1)(b) precludes a defense of necessity [in such a case]."[34]

156. Finally, further in connection with Zimbabwe's necessity defense, the Tribunal held that Zimbabwe "not only contributed to its economic decline and but was also one of the primary instigators of the situation."[35] Accordingly, Zimbabwe could not invoke the necessity defense in Article 25 of the ILC Articles.[36]

157. Having found Zimbabwe liable for breaches of the Germany-Zimbabwe BIT and the Switzerland-Zimbabwe BIT, the Tribunal ordered Zimbabwe to restitute the VPBs' assets that had been unlawfully expropriated and awarded compensation to the VPBs for "land damage and losses of productivity," to achieve full reparation.[37] The Tribunal further awarded the von Pezold Claimants, should restitution occur, compensation in the amount of US$ 56,710,037. Should restitution not occur within the restitution window fixed by the Tribunal, the von Pezold Claimants were amounted compensation for their loss in the

[30] Award (**VPB-174**), para 630.
[31] Award (**VPB-174**), para 637.
[32] Award (**VPB-174**), paras 642-646.
[33] Award (**VPB-174**), para 657.
[34] Award (**VPB-174**), para 657.
[35] Award (**VPB-174**), para 667.
[36] Award (**VPB-174**), para 668.
[37] Award (**VPB-174**), para 744.

amount of US$ 186,814,861. The Tribunal further awarded the von Pezold Claimants the amount of US$ 7,186,302 in reimbursement of loans contracted by the von Pezold Claimants and the repayment of which had been impeded by Zimbabwe. The Tribunal also awarded US$ 1,000,000 in moral damages to Mr Heinrich von Pezold.[38]

158. Finally, the Tribunal awarded pre-award and post-award compound interest, while ordering Zimbabwe to pay to the von Pezold Claimants 92% of the costs and expenses of the arbitration.[39]

IV. GROUNDS FOR ANNULMENT: SUMMARY OF THE PARTIES' POSITIONS

159. The Applicant seeks the annulment of the Award, in its entirety, on eight separate grounds. These eight grounds are formulated on the basis of four of the five grounds of annulment in Article 52(1) of the ICSID Convention: (i) the Tribunal was not properly constituted (Article 52(1)(a)); (ii) the Tribunal manifestly exceeded its powers (Article 52(1)(b)); (iii) there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iv) the Award failed to state the reasons on which it is based (Article 52(1)(e)).

160. This Section sets out a summary of the Parties' positions on the eight annulment grounds relied upon by the Applicant (and as formulated by the Applicant). The Parties' positions are addressed in more detail in Section V, which deals with the Committee's decisions.

A. GROUND 1: SERIOUS DEPARTURE FROM FUNDAMENTAL RULE OF PROCEDURE—DENIAL OF RIGHT TO BE HEARD ON THE ILLEGALITY OBJECTION (ARTICLE 52(1)(D))

(1) The Applicant's Position

161. The Applicant submits that it has been denied the right to be heard on its jurisdictional objections, including the supporting evidence.

[38] Award (**VPB-174**), para 1020.

[39] Award (**VPB-174**), paras 1023-1024.

162. More specifically, the Applicant contends that the Tribunal, by way of Procedural Order Nos 7, 8 and 9, wrongly excluded the evidence relating to its jurisdictional objections, which challenged the legality of the Respondents' investments.[40]

163. First, the Applicant submits that the Tribunal, in Procedural Order No 7, afforded it insufficient time to argue properly its jurisdictional objections.[41] In Procedural Order No 8, the Tribunal refused the Applicant's request to extend by three to four pages the page limit applicable to its reply submissions on the issue.[42] Finally, in Procedural Order No 9, the Tribunal allegedly unduly restricted the Applicant's right to address and respond to the issues raised by the relevant evidence, specifically Exhibit C-858.[43] The Applicant in particular complains of the Tribunal's decisions in Procedural Order No 9 (i) to refuse its submission of evidence responsive to Exhibit C-858 and (ii) to order the redaction of several paragraphs included in three of its witness statements and expert reports which dealt with issues raised by Exhibit C-858.[44]

164. The Applicant contends that Procedural Order No 9 was also influenced by the bias of Mr Yves Fortier, the President of the Tribunal, towards the Applicant and to his belatedly disclosed role as chairperson of the World Bank Sanctions Board.[45] The Applicant argues that, due to his bias, Mr Fortier attributed the majority of the delays in the proceedings solely to the Applicant and ensured, through Procedural Order No 9, that the schedule would not be derailed by the Applicant's jurisdictional objections.[46] According to the Applicant, another telling example of the President's bias was the limited consideration given to the Applicant's submissions at the hearing to reconsider Procedural Order No 9.[47]

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[40] Memorial, paras 15, 18 and 182; Tr Day 1, 43:21–44:8.

[41] Procedural Order No 7 (**VPB-137**); Tr Day 1, 101:5–102:7.

[42] Procedural Order No 8 (**VPB-139**).

[43] Procedural Order No 9 (**VPB-148**). Exhibit C-858 in the original arbitration has been refiled by the Applicant as Exhibit ZA-045 in this annulment proceeding.

[44] Memorial, paras 19-46; Procedural Order No 9 (**VPB-148**).

[45] Memorial, paras 37-54 and 121-165; Tr Day 1, 36:2-21.

[46] Memorial, paras 43-46.

[47] Memorial, paras 47-50.

165. According to the Applicant, the President's bias is further evidenced by his Kaplan lecture on corruption issues in international arbitration, delivered when the arbitration proceedings were still pending. The Applicant submits that the lecture confirms that Mr Fortier prejudged the issues in the arbitration by attributing responsibility for corruption mainly to government officials, which made him more receptive to the Respondents' arguments that the Applicant's officials were corrupt when implementing the LRP.[48]

166. In the Applicant's view, as a result of these events, it was deprived of its fundamental right to be heard and accordingly the Award stands to be annulled under Article 52(1)(d) of the ICSID Convention.

(2) The Respondents' Position

167. The Respondents deny that the Award breached Article 52(1)(d) of the ICSID Convention. In particular, they argue that the Applicant has not shown that it was effectively deprived of its right to be heard. Indeed, according to the Respondents, the scope of the right to be heard is not without limits; it only requires that the parties be given a fair and reasonable opportunity to present their case, within the procedural limits determined by the arbitral tribunal. Consequently, when the Tribunal ruled that the Applicant's evidence and arguments relating to its Illegality Objection were raised out of time and were inadmissible, the Applicant was not deprived of the right to be heard as it had been given sufficient opportunity to plead its case but failed to take advantage of it.[49]

168. The Respondents argue that, in any event, the Applicant has failed to show that even if a departure from a fundamental rule of procedure occurred, it was so serious as to warrant annulment of the Award.[50] According to the Respondent, it is only if, but for the alleged departure, the outcome of the Award would have been substantially different, that such

[48] Memorial, paras 51-54.

[49] Counter-Memorial, paras 251-262.

[50] Tr Day 2, 432:19–436:15.

departure could be considered serious.[51] According to the Respondents, the Applicant has failed to meet the required threshold for annulment.

169. The Respondents further contend that decisions such as Procedural Order Nos 7, 8 and 9 cannot be reviewed on annulment since an ICSID tribunal is the sole judge of admissibility and probative value of evidence.[52]

170. The Respondents deny what they describe as the unsupported allegations of bias or prejudgement on the part of Mr Fortier when dealing with the Applicant's requests to adduce untimely and inadmissible evidence.

171. In particular, the Respondents highlight that in Procedural Order No 7, the Tribunal granted the exact time the Applicant requested, while permitting it to plead its Illegality Objection out of time.[53]

172. Likewise, according to the Respondents, the Tribunal's decision in Procedural Order No 8 to refuse the Applicant's request for an extension of the page limit was justified. Indeed, in its decision, the Tribunal rejected the Applicant's contention that the request was warranted to allow it to respond to new arguments raised by the Respondents as the admittedly new arguments were raised, in accordance with Procedural Order No 7, in response to the Applicant's own unauthorized submissions on approval and illegality. As a result, the Tribunal did not agree to the Applicant pleading these issues any further.[54]

173. Finally, as to Procedural Order No 9, the unredacted sections of the witness statements and expert reports targeted by the redaction order still stood as rebuttal evidence to Exhibit C-858 [ZA-45].[55] The Respondents further note that although the Tribunal, in Procedural Order No 9, excluded the Applicant's latest pleading on the Illegality Objection as having

[51] Counter-Memorial, para 273.
[52] Counter-Memorial, paras 22 and 274; Tr Day 2, 300:2–301:10.
[53] Counter-Memorial, para 114.
[54] Counter-Memorial, paras 155-157.
[55] Counter-Memorial, para 274.16.

been filed out of time, it accepted into the record nineteen out of the 21 documents that were submitted in support.[56]

174. In conclusion, according to the Respondents, the President of the Tribunal dealt with the Applicant's many vexatious motions fairly and enforced the applicable procedural rules in an even-handed fashion.[57] As a result, the Applicant was not deprived of its right to be heard and there is no basis to annul the Award.

B. GROUND 2: SERIOUS DEPARTURE FROM FUNDAMENTAL RULE OF PROCEDURE—DEPRIVING ZIMBABWE OF THE RIGHT TO CONSIDER, BE HEARD AND IMPLEMENT DISQUALIFICATION IN A MEANINGFUL TIME AND MANNER BEFORE CLOSURE OF RECORD (ARTICLE 52(1)(D))

(1) The Applicant's Position

175. The Applicant's submissions on the second ground of annulment focus on the timing and the manner in which the President of the Tribunal disclosed his role as chairperson of the World Bank Sanctions Board.

176. Notably, the Applicant contends that the late disclosure by the President of his role, made in passing on Day 4 of the final hearing in the original arbitration, deprived it of sufficient time to consider and apply for his disqualification.[58]

177. The late disclosure also meant that a disqualification application would have been meaningless. Even if the Applicant had succeeded in disqualifying the President on the basis of his late disclosure, this would have had only a prospective effect. It would not have allowed for the correction of the decisions that the Tribunal had already taken, which had been tainted by the President's bias, and in any event, the evidentiary record was effectively closed at the end of the hearing, soon after the disclosure. [59]

178. As a result, even if the Applicant had been allowed enough time to consider and apply for disqualification of the President before the record was closed, this would not have provided

[56] Counter-Memorial, para 182.

[57] Counter-Memorial, paras 22 and 274; Tr Day 2, 398:9–399:6.

[58] Reply, paras 807 *et seq.*; Tr Day 1, 13:23–14:19.

[59] Reply, paras 830-831; Tr Day 1, 98:4–99:4.

an effective remedy. In the circumstances, the Applicant argues that the only efficient remedy is the annulment of the Award.

(2) The Respondents' Position

179. The Respondents contend that the President of the Tribunal was under no duty to disclose his involvement with the World Bank Sanctions Board, for three main reasons.[60]

180. First, the President's position as chairperson of the Sanctions Board does not have any bearing on his impartiality and independence in the arbitration. The World Bank Sanctions Board is an autonomous entity within the World Bank, and the chairperson of the Sanctions Board is not a World Bank employee.[61]

181. Second, according to the Respondents, the Sanctions Board can only apply sanctions on private entities. It has no authority to impose sanctions on States, State entities or public officials.[62]

182. Third, the Respondents note that the subject matter of the arbitration had nothing to do with the international sanctions that had been imposed on Zimbabwe. The Tribunal referred to "sanctions" only in three contexts: (i) to determine the public purpose of the expropriation of the Respondents' investments as the measures were taken in the context of international sanctions applied mainly by the United States of America and the European Union; (ii) to deal with an argument relating to the foreign exchange rate proposed by the Respondents; and (iii) to address the Applicant's state of necessity defense.[63]

183. The Respondents submit that the Applicant waived its right to rely on the President's alleged non-disclosure in these annulment proceedings as it failed to challenge him during the arbitration, or indeed in a timely manner under ICSID Arbitration Rule 9(1).[64]

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[60] Rejoinder, paras 258 *et seq*.

[61] Counter-Memorial, paras 274.40-274.41; Tr Day 2, 424:18–425:10.

[62] Counter-Memorial, paras 274.41; Tr Day 2, 425:11-25.

[63] Counter-Memorial, paras 274.44; Tr Day 2, 426:6–428:16.

[64] Counter-Memorial, paras 242-244 and 256-257; Tr Day 2, 504:6-17.

184. The Respondents point out that, had the Applicant succeeded in disqualifying the President during the arbitration, it could have applied to the re-constituted tribunal to reopen any procedural decisions issued by the earlier tribunal that it believed might have been tainted.[65] Indeed, the Applicant did frequently seek to reopen unfavorable procedural decisions during the arbitration, which shows that in its own view reopening of such decisions was in principle possible.[66]

185. The Respondents insist that in any event the record of the arbitration was not in any way tainted or biased.[67] The Tribunal's decisions were based on the facts and they were soundly reasoned.[68]

186. In conclusion, in the Respondents' view, the Tribunal did not depart from a fundamental rule of procedure and accordingly there is no basis to annul the Award.

C. GROUND 3: TRIBUNAL NOT PROPERLY CONSTITUTED—ARBITRATOR LACK OF IMPARTIALITY, BOTH PERCEIVED AND REAL, RAISING DOUBTS ON MR FORTIER'S INDEPENDENCE AND NEUTRALITY IN HIS ROLE AS PRESIDENT OF THE TRIBUNAL (ARTICLE 52(1)(A))

(1) The Applicant's Position

187. The Applicant's third ground of annulment is also based on Mr Fortier's alleged late disclosure of his role as chairperson of the World Bank Sanctions Board. According to the Applicant, Mr Fortier was under a continuing obligation to disclose any circumstance "likely to give rise to justifiable doubts" as to his reliability to exercise independent judgment.[69] His failure to disclose his role in a timely fashion (that is, as soon as he had

[65] Tr Day 2, 501:22–502:23.

[66] Rejoinder, paras 260-264.

[67] Tr Day 2, 521:17–522:1.

[68] Rejoinder, paras 265-266.

[69] Amended and Restated Application for Annulment, para 176.

been appointed as chairperson of the Sanctions Board in May 2012)[70] created justifiable doubts as to his impartiality.[71]

188. The Applicant points out that Mr Fortier's role as chairperson of the Sanctions Board was incompatible with his function as the President of the Tribunal. Since Zimbabwe was subject to a variety of international sanctions and these were referred to frequently during the proceedings, Mr Fortier could not sit, at the same time, as a chairperson of a sanctioning body and as President of the Tribunal.[72] His role on the Sanctions Board made him also a contractor of an entity (the World Bank) which itself had repeatedly imposed sanctions on Zimbabwe.[73]

189. The Applicant also argues that Mr Fortier's partiality transpired on numerous occasions during the arbitration, *e.g.*, when he issued Procedural Order Nos 7, 8 and 9,[74] and when he made allegedly inappropriate comments to the Applicant's witnesses during the hearing.[75]

190. Accordingly, Mr Fortier's function on the Sanctions Board, coupled with the specific factual and procedural background of the arbitration, created reasonable doubt as to his independence and impartiality towards the Applicant. As a result, the Applicant concludes that the Tribunal was not properly constituted, and the Award should be annulled.

(2) The Respondents' Position

191. The Respondents submit that the Applicant has failed to discharge its burden of proof that the President's role as chairperson of the Sanctions Board created a manifest lack of impartiality or independence which had a material effect on the outcome of the arbitration. Notably, according to the Respondents, a reasonable third party would not have considered

[70] Amended and Restated Application for Annulment, para 178.

[71] Amended and Restated Application for Annulment, para 206; Memorial, paras 396-404; Tr Day 1, 14:17-19 and 58:25–59:5.

[72] Reply, paras 835-847; Tr Day 1, 53:20–54:12.

[73] Memorial, paras 390-395; Tr Day 1, 54:13-24.

[74] Memorial, paras 317-318; Tr Day 1, 28:8-25, 36:2-21, 40:2-18, 43:21–44:8.

[75] Memorial, paras 322, 367, 557; Witness Statement of the Honourable Prince Machaya dated 7 June 2017 (**ZA-160**), paras 49-52, Tr Day 1, 114:5-25.

it "obvious and highly probable" that the President lacked independence or impartiality because of his parallel function.[76]

192. The Respondents argue that, in any event, Mr Fortier's alleged lack of impartiality or independence did not have any material effect on the outcome of the arbitration as the Award was unanimous, and neither of the other two members of the Tribunal was ever challenged by Zimbabwe.[77]

193. For the reasons summarized in paragraphs 177 to 180 above, the Respondents insist that the President of the Tribunal was under no duty to disclose his position as chairperson of the Sanctions Board. Indeed, his role would not have created in the eyes of a reasonable person any justifiable doubts as to his reliability to exercise independent judgment, as the Sanctions Board's competence does not extend to States and public officials.[78]

194. Likewise, for the reasons summarized in paragraphs 181 to 184 above, the Respondents reiterate that the Applicant waived its right to rely on Mr Fortier's dual role to seek annulment of the Award as it failed to lodge a challenge against him during the arbitration.

195. Finally, the Respondents contend that the Applicant's allegations as to Mr Fortier's alleged procedural bias and impropriety are misplaced. The numerous procedural decisions taken by the Tribunal which are now challenged by the Applicant on annulment were fair and fully justified in the circumstances.[79] There was no improper conduct justifying the annulment of the Award.

D. GROUND 4: SERIOUS DEPARTURE FROM FUNDAMENTAL RULE OF PROCEDURE—MR FORTIER'S AND THE TRIBUNAL'S FAILURE TO PROPERLY DISCLOSE HIS ROLE AS CHAIRPERSON OF THE WORLD BANK SANCTIONS BOARD (ARTICLE 52(1)(D))

(1) The Applicant's Position

196. According to the Applicant, both the third and the fourth ground of annulment refer to the same facts but are based on different legal grounds—whereas the third ground refers to

[76] Counter-Memorial, para 315; Rejoinder, para 245; Tr Day 2, 509:6-19.

[77] Rejoinder, para 246, Tr Day 2, 509:20-25.

[78] Counter-Memorial, para 368.

[79] Counter-Memorial, paras 71, 114, 120-123, 126, 155-157, 166-167, 176, 182, 215-222, 290.

Article 52(1)(a) of the ICSID Convention (the Tribunal was not properly constituted), the fourth ground is based on Article 52(1)(d) (serious departure from a fundamental rule of procedure). In particular, the Applicant contends that the President's duty to disclose any issue which could give rise to justifiable doubts as to his impartiality or independence is a "fundamental rule of procedure."[80]

197. The Applicant contends that the President failed to abide by this fundamental rule of procedure when failing to disclose "in a meaningful time and manner" to the Parties his role as chairperson of the World Bank Sanctions Board.[81] As a result, the Award should be annulled.

(2) The Respondents' Position

198. The Respondents deny that the duty to disclose qualifies as a fundamental rule of procedure. In the Respondents' view, only the arbitrator's duty to remain impartial and independent, which forms part of the "principles of natural justice," qualifies as such.[82] Accordingly, even assuming Mr Fortier did fail to abide by his duty to disclose, he remained independent and impartial throughout the proceedings and therefore did not breach any fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.[83]

199. The Respondents also insist, for the reasons set out in paragraphs 177 to 180 above, that Mr Fortier was under no duty to disclose his position as chairperson of the World Bank Sanctions Board. Similarly, for the reasons set out in paragraphs 181 to 184 above, the Applicant waived its right to rely on Mr Fortier's dual role and therefore cannot seek annulment of the Award.

[80] Memorial, paras 382-389, 417; Tr Day 1, 48:10–49:17 and 50:22–51:17.

[81] Reply, para 848.

[82] Counter-Memorial, para 361.

[83] Counter-Memorial, para 364; Rejoinder, paras 251-252.

E. GROUND 5: TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS—FAILURE TO APPLY THE LAW TO THE APPLICANT'S EMERGENCY / NECESSITY DEFENSE WHILE RELYING ON ZIMBABWEAN LAW REGARDING DECLARATION OF STATE OF EMERGENCY (ARTICLE 52(1)(B))

(1) The Applicant's Position

200. According to the Applicant, the Tribunal failed to apply, or applied erroneously, the applicable law on three separate occasions.

201. First, the Tribunal should not have applied Zimbabwean law to determine whether a state of emergency existed in Zimbabwe at the relevant time. Instead, it should have applied customary international law, as reflected in particular in the ILC Articles.[84]

202. Second, the Applicant contends that the Tribunal failed to apply Ad Article 3(a) of the Protocol to the Germany-Zimbabwe BIT.[85] According to the Applicant, this provision should have been considered by the Tribunal as a non-precluded measures clause. As such, it exonerated the Applicant from any liability for measures taken to safeguard public security and order. As a result, and by the operation of this provision, the Applicant should not have been held liable for the LRP, which was implemented to protect public security and order.[86]

203. Third, the Applicant argues that the Tribunal failed to apply (or applied erroneously) Articles 7(1) and 7(2) of the Switzerland-Zimbabwe BIT.[87] In particular, the Tribunal

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[84] Amended and Restated Application for Annulment, paras 390-392; Memorial, paras 450-453; Tr Day 1, 132:5-22.

[85] Ad Article 3(a) of the Germany-Zimbabwe BIT Protocol provides, in part, that "Measures necessary for reasons of public security and order, public health or morality shall not be deemed 'treatment less favourable' within the meaning of Article 3" (**VPBLEX-021**).

[86] Memorial, paras 442-444.

[87] Article 7(1) of the Switzerland-Zimbabwe BIT reads:

> *Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or investors of any other State whichever is more favourable to the investor concerned. Resulting payments shall be freely transferable.*

should have applied these provisions to the effect that the Applicant's obligations to provide full security and to indemnify investors would have been "nullified or at least suspended."[88]

(2) The Respondents' Position

204. The Respondents note, first, that the Tribunal applied Article 25 of the ILC Articles, which reflects customary international law, and not Zimbabwean law in determining whether the Applicant could invoke the necessity defense to excuse itself from liability.[89]

205. Second, the Respondents argue that Ad Article 3(a) of the Protocol to the Germany-Zimbabwe BIT does not exclude measures taken for reasons of public security and order from compliance with the fair and equitable treatment standard in the BIT.[90] Instead, it relates to the State's obligation to provide national treatment and most-favored nation ("**MFN**") treatment to foreign investors.

206. Moreover, the Tribunal did not fail to consider and apply Ad Article 3(a). Indeed, the Tribunal referred to the provision several times in the Award, when addressing the VPBs' claim for breach of the BIT's fair and equitable treatment standard.[91] The Respondents note, in this connection, that the Applicant's characterization of Ad Article 3(a) as a treaty-based necessity defense (or non-precluded measures clause) was expressly rejected by the Tribunal.[92]

Article 7(2) of the same BIT reads:

> *Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:*
>
> *(a) requisitioning of their property by its forces or authorities, or*
>
> *(b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation,*
>
> *shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable* (**VPBLEX-023**).

[88] Memorial, paras 477-484.

[89] Counter-Memorial, paras 397-398 *referring to* Award (**VPB-174**), para 624; *see also* Tr Day 2, 478:16–479:4.

[90] Tr Day 2, 479:23–480:16.

[91] Tr Day 2, 479:23–480:16; Counter-Memorial, para 402.

[92] Counter-Memorial, para 404.

207. Third, as to Article 7(1) of the Switzerland-Zimbabwe BIT, the Respondents argue that the Tribunal did apply the provision and rejected Zimbabwe's position.[93] In any event, Zimbabwe did not refer to Article 7(1) in the context of its necessity argument but rather argued that the provision should excuse it from its obligation to provide full protection and security in the event of national emergency.[94]

208. As to Article 7(2) of the Switzerland-Zimbabwe BIT, the Respondents argue that Zimbabwe never explicitly relied on it in the arbitration as a defense, but merely referred to it in passing to argue that it should be excused from any obligation to compensate foreign investors due to the necessity of the situation.[95]

209. Alternatively, the Respondents maintain that should the Committee find that Zimbabwe did rely on Article 7(2) of the Switzerland-Zimbabwe BIT, it should find that the Tribunal dismissed the argument either pursuant to Procedural Order No 3, as it was pleaded out of time, or because two of its triggering elements were missing (namely, that no state of emergency existed and that the destruction of the Respondents' assets was not warranted by the necessity of the situation).[96]

F. GROUND 6: TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS—FAILURE TO APPLY APPLICABLE LAW TO THE VPBS' CONCEALED FOREIGN INVESTMENT VIOLATIONS AND PREVIOUSLY WITHHELD INFORMATION AS PROVING THE ILLEGALITY OF THE VPBS' INVESTMENTS (ARTICLE 52(1)(B))

(1) The Applicant's Position

210. Under Ground 6, the Applicant argues that, under Article 9(a) of the Germany-Zimbabwe BIT[97] and Article 2 of the Switzerland-Zimbabwe BIT,[98] the Tribunal had to apply

[93] Counter-Memorial, para 408; Tr Day 2, 481:12–482:1.

[94] *See* Award (**VPB-174**), paras 592-599; Tr Day 2, 478:4-10.

[95] Counter-Memorial, para 409.

[96] Counter-Memorial, para 412.

[97] Germany-Zimbabwe BIT Article 9(a) provides that "This Agreement shall apply to all investments made before or after its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party which have been or are: a) made in accordance with the laws of the latter Contracting Party" (**VPBLEX-021**).

[98] Switzerland-Germany BIT Article 2 provides that "This Agreement shall apply to all investments made before or after its entry into force by investors of either Contracting Party in the territory of the other Contracting Party which have been or are made in accordance with the laws of the latter Contracting Party" (**VPBLEX-023**).

Zimbabwean law to determine the legality of the VPBs' investments.[99] However it failed to do so, most notably in relation to the requirement to seek the Reserve Bank of Zimbabwe's approval for each and every investment, as required by the Zimbabwean exchange control regulations.[100]

211. According to the Applicant, the Tribunal also failed to take into account the Respondents' admission that their acquisition of one of the companies they controlled was made in breach of an undertaking made by the former owner of the company to the Reserve Bank of Zimbabwe that no change of beneficial ownership in that company would occur in the future.[101] In view of this undertaking, the subsequent acquisition of the entity by the Respondents was a breach of the applicable exchange control regulations and thus illegal.[102]

212. In the Applicant's view, as a result, the Tribunal exceeded its powers when finding, in disregard of the applicable exchange control regulations, that the Respondents' investments were legal and thus qualified as investments protected under Article 9(a) of the Germany-Zimbabwe BIT and Article 2 of the Switzerland-Zimbabwe BIT.

(2) The Respondents' Position

213. The Respondents agree that the Tribunal indeed did not apply Zimbabwe's exchange control regulations to the Respondents' investments; however, this was entirely appropriate as Zimbabwe's argument regarding the alleged illegality of the Respondents' investments under the regulations had been dismissed by the Tribunal in Procedural Order No 9 as inadmissible. The remaining illegality arguments that were properly on record were dealt with by the Tribunal in the Award and were dismissed.[103]

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[99] Memorial, para 488; Tr Day 1, 232:4–240:6.

[100] Reply, para 864.

[101] *See* Letter from the Merchant Bank of Central Africa Limited to Tanks Group Services Limited dated 12 November 1992 (**ZA-045** / C-858 in the original arbitration).

[102] Memorial, paras 489-494; Tr Day 1, 86:3-16, 172:3–178:12.

[103] Counter-Memorial, paras 421-422.

214. The Respondents further contend that, in any event, the Tribunal also rejected the Applicant's argument on illegality on the basis that the Applicant was estopped from arguing that it had not approved the Respondents' investments.[104] Consequently, even assuming the Tribunal had, in Procedural Order No 9, unjustifiably refused to consider the wider illegality objection advanced by the Applicant, it would still have dismissed the objection by way of estoppel.

215. The Respondents contend that, as a result, the Tribunal's treatment of Zimbabwe's objection in the Award, and the alleged lack of application by the Tribunal of Zimbabwe's exchange control regulations, did not have had a material effect on the outcome of the arbitration.[105]

216. The Respondents also argue the Applicant failed to raise its Illegality Objection in a timely and diligent manner. In particular, once it had received, on 15 November 2011, the Respondents' Memorial, which detailed the acquisition of their investments, the Applicant could have used the Reserve Bank of Zimbabwe's system to check whether the Respondents' investments had been granted the required approvals under Zimbabwean law.[106] However, the Applicant failed to do so and therefore also failed to challenge the legality of the Respondents' investments at an appropriate time.

217. Furthermore, as to Exhibit C-858 [ZA-045], the Respondents submit that the document relates to a transaction that did not involve the VPBs but the subsidiaries of their previous owner, Société Générale de Belgique.[107] The letter also does not contain any undertaking that no change of beneficial ownership would occur in the future; it merely confirms that the specific transaction will not involve any change in the ultimate beneficial ownership of the company.[108]

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[104] Rejoinder, para 89.

[105] Tr Day 2, 467:12-23.

[106] Rejoinder, paras 31-40; Tr Day 2, 310:6–317:8.

[107] Counter-Memorial, para 135; Tr Day 2, 367:11-22.

[108] Rejoinder, paras 44-45.

218. Finally, and in any event, the Respondents argue that the letter does not emanate from the Reserve Bank of Zimbabwe and therefore does not imply any binding legal opinion that would engage the exchange control regulations.[109] Consequently, even if the Tribunal had failed to consider the letter, which is not the case, it would not have manifestly exceeded its powers by failing to apply the applicable law.[110]

G. GROUND 7: TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS—ISSUING AN AWARD WITHOUT HAVING JURISDICTION (ARTICLE 52(1)(B))

(1) The Applicant's Position

219. The Applicant submits that the Tribunal wrongly found jurisdiction over the Respondents' illegal investments. According to the Applicant, under Article 9(a) of the Germany-Zimbabwe BIT and Article 2 of the Switzerland-Zimbabwe BIT, the Tribunal could only assert jurisdiction over investments that had been made "in accordance with the laws" of Zimbabwe.[111]

220. The Applicant contends that the Respondents' investments were illegal, as they had not been approved by the Reserve Bank of Zimbabwe, as required under Zimbabwe's exchange control regulations.[112] The Applicant maintains that it established the illegality of the investments in the arbitration, but the Tribunal in Procedural Order No 9 erroneously dismissed the Applicant's arguments for procedural reasons.

221. According to the Applicant, the Tribunal also mistakenly relied on estoppel to assert jurisdiction over the Respondents' illegal investments.[113] The Applicant submits that estoppel and waiver cannot serve as a basis of jurisdiction, as these notions are only relevant to issues of admissibility. The Applicant contends that since jurisdiction trumps

[109] Tr Day 2, 383:14–384:8.

[110] Counter-Memorial, paras 431-433.

[111] Tr Day 1, 172:3-10

[112] *See above* paragraphs 209-210.

[113] Tr Day 1, 197:9–198:21.

admissibility, the Tribunal was wrong in relying on notions of admissibility to uphold jurisdiction.[114]

222. The Applicant submits that it could not have lodged its jurisdictional challenge based on the illegality of the Respondents' investments earlier in the proceedings.[115] It could not have been aware of the illegality of the Respondents' investments before they adduced Exhibit C-858 [ZA-45] into the record.[116] The Applicant accordingly could not have waived its right to raise its jurisdictional challenge, and the Tribunal should not have asserted jurisdiction over the Respondents' investments on that basis.[117]

(2) The Respondents' Position

223. The Respondents submit that Article 52(1)(b) of the ICSID Convention requires that any excess of power, whether as to failure to apply the proper law or excess of jurisdiction,[118] must be "manifest." The Respondents contend that, according to the jurisprudence of ICSID annulment committees, an excess of power can only be manifest if it is evident, that is, with only one interpretation being possible on the issue in question.[119] In particular, the Respondents assert that if the relevant reasoning of the tribunal is tenable or arguable, there cannot be any "manifest excess of power."[120] According to the Respondents, the reasons

[114] Reply, paras 879-887; Tr Day 1, 265:20-23.

[115] Reply, para 885.

[116] Tr Day 1, 197:17–198:21.

[117] Reply, paras 913-914.

[118] Counter-Memorial, para 437.

[119] The Respondents, *inter alia*, refer to the annulment decisions issued in *Alapli Elektrik B.V v Republic of Turkey*, ICSID Case No ARB/08/13, Decision on Annulment, 10 July 2014 ("*Alapli v Turkey*") (**VPBLEX-079**), paras 231-232; *Wena Hotels LTD v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment, 28 January 2002 ("*Wena v Egypt*") (**ZALEX-044**), para 25; and *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No ARB/03/23, Decision on Annulment, 5 February 2016 ("*EDF v Argentina*") (**VPBLEX-080**), para 192. *See also* Tr Day 2, 469:3-8 (*citing CDC Group plc v Repiblic of Seychelles*, ICSID Case No ARB/02/14, Decision on Annulment, 29 June 2005 ("*CDC v Seychelles*") (**VPBLEX-073**), para 41; *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Annulment, 1 September 2009 (**ZALEX-046**), para 68; *Enron Corporation Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Annulment, 7 October 2008 (**ZALEX-061**), para 69; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment, 23 December 2010 ("*Fraport v Philippines*") (**ZALEX-045**), para 112).

[120] *EDF v Argentina* (**VPBLEX-080**), para 193; Tr Day 2, 459:18–460:4.

given by the Tribunal on the Applicant's illegality arguments were evidently tenable and thus cannot result in the annulment of the Award.

224. The Respondents argue that several ICSID annulment committees have drastically limited the scope of review of ICSID tribunals' jurisdictional decisions on annulment.[121] The Respondents submit that Article 52(1)(b) of the ICSID Convention requires that an excess of jurisdiction be "obvious, without deeper analysis" for the annulment committee to annul an ICSID award on this basis.[122] However, since the Applicant is effectively requesting the Committee to review the Tribunal's jurisdictional decision *de novo*, its annulment application must fail.

225. As to the Applicant's estoppel arguments, the Respondents note that the Applicant relies on the alleged misapplication by the Tribunal of the estoppel principle (*i.e.*, it applied estoppel in relation to jurisdiction rather than admissibility). However, an erroneous application of the law cannot lead to an award's annulment under Article 52(1) of the ICSID Convention.[123]

226. Moreover, according to the Respondents, the Applicant relies on ICSID annulment decisions which do not establish that estoppel cannot vest jurisdiction in an ICSID tribunal.[124] Finally, and in any event, the Respondents point out that the Applicant did not put forward the argument regarding the relationship between jurisdiction and admissibility during the arbitration.[125] Thus, according to the Respondents, the Applicant is precluded from raising its estoppel arguments in the annulment phase.[126]

[121] Counter-Memorial, paras 441-444.
[122] Counter-Memorial, para 441; Tr Day 2, 468:23–469:2.
[123] Rejoinder, para 92.
[124] Rejoinder, paras 95-105.
[125] Tr Day 2, 470:20–471:1.
[126] Rejoinder, para 91.

H. GROUND 8: FAILURE OF THE AWARD TO STATE THE REASONS ON WHICH IT IS BASED (ARTICLE 52(1)(E))

(1) The Applicant's Position

227. The Applicant's eighth ground of annulment is based on the Tribunal's procedural decisions dealing with the Applicant's Illegality Objection. According to the Applicant, the Tribunal failed to consider "outcome-determinative questions" relating to the illegality of the VPBs' investments.

228. First, the Applicant submits that the Tribunal, by way of Procedural Order No 9, wrongly excluded the Applicant's submissions and evidence relating to the wider illegality defense—that is, that the VPBs' investments were all illegal for failure to comply with Zimbabwe's exchange control regulations.[127] As a result, the Award failed to consider Exhibit C-858 and the related jurisdictional objections.

229. Second, the Applicant argues that the Tribunal contradicted itself by quoting in the Award in full Zimbabwe's corrected statement of relief, even if it had previously excluded it from the record. The Tribunal cannot rely on a document that it has itself decided is not part of the record.[128]

230. As to the Respondents' argument that the Applicant's eighth ground of annulment is time-barred, the Applicant argues that the elements of its eighth ground "could reasonably be considered as covered by the statements in the application for annulment" and therefore are not really new grounds.[129]

(2) The Respondents' Position

231. The Respondents argue that, as a preliminary matter, the Applicant's eighth ground of annulment is inadmissible as it was not mentioned in the Applicant's Annulment Application. It is therefore time-barred under ICSID Arbitration Rule 50(1)(c)(iii), which requires that an application for annulment must "state in detail … the grounds on which it

[127] Memorial, para 608.

[128] Memorial, paras 608-609.

[129] Reply, para 917.

is based." Therefore, at a minimum, the application must identify the bases under Article 52 of the ICSID Convention which the applicant is invoking.

232. The Respondents submit that Article 52(1)(e) of the ICSID Convention only requires that the reasoning of the challenged award can be followed; it does not require that the reasons be "appropriate" or "convincing."[130] Nor can an ICSID tribunal be criticized on annulment for not having considered arguments that the parties did not make in the underlying arbitration proceeding.[131]

233. The Respondents submit that the Applicant's contentions are based on a new, wider iteration of the Illegality Objection which it has only developed during the annulment proceeding. Hence, the Tribunal could not be criticized for having failed to consider an argument which was never made before it.[132]

234. As to the Applicant's second argument, the Respondents state that, in quoting the full request for relief in the Award, the Tribunal was not entertaining the Applicant's Illegality Objection that it had already dismissed repeatedly, most notably in Procedural Order No 9.[133] Hence, since the relevant requests for relief had already been dismissed previously, there was no need for the Tribunal to address them again in the Award. There is therefore no contradiction in the Tribunal's quoting the full request for relief in the Award.[134] In any event, even assuming the Tribunal's reference to the Applicant's full request for relief were to be considered a mistake, it could not lead to the annulment of the Award. According to the Respondents, only reasons which are so contradictory as to cancel each other out can lead to an annulment of an award under Article 52(1)(e) of the Convention.[135]

[130] Tr Day 2, 472:19–474:3.

[131] Counter-Memorial, paras 489-496; Tr Day 2, 473:17-22.

[132] Counter-Memorial, para 469.

[133] Counter-Memorial, para 478; Rejoinder, paras 280-281.

[134] Counter-Memorial, paras 483-485; Tr Day 2, 474:4–475:16.

[135] Counter-Memorial, para 501.

235. The Respondents insist that the Tribunal did not fail to consider "outcome determinative" questions relating to the Applicant's Illegality Objection. Indeed, these questions were either not pleaded by the Applicant as such in the arbitration, or the objection, as pleaded on annulment by the Applicant, had been dismissed as inadmissible by the Tribunal in Procedural Order No 9.[136]

236. Finally, the Respondents note that since the Tribunal rejected the Illegality Objection in all its forms on the basis of estoppel, the treatment of this objection throughout the arbitration had no material effect on the outcome of the arbitration. In other words, the Respondents contend that, since the Tribunal ruled that the Applicant was estopped from claiming that it did not grant the necessary approval to the Respondents' investments, it would have dismissed any illegality objection based on lack of approval, regardless of the timing of its submission by the Applicant.[137]

V. THE COMMITTEE'S DECISION

A. THE LEGAL FRAMEWORK AND THE LEGAL PRINCIPLES GOVERNING ANNULMENT

237. The legal framework and the legal principles governing ICSID annulment proceedings are well established in the ICSID Convention and in the jurisprudence of ICSID annulment committees. The key provision governing annulment is Article 52 of the ICSID Convention, which provides:

> *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *(a) that the Tribunal was not properly constituted;*
>
> *(b) that the Tribunal has manifestly exceeded its powers;*
>
> *(c) that there was corruption on the part of a member of the Tribunal;*

[136] Counter-Memorial, para 486; Tr Day 2, 476:7-13.

[137] Counter-Memorial, para 510; Rejoinder, paras 284-286.

> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
>
> *(e) that the award has failed to state the reasons on which it is based.*

238. While Article 52 sets out the annulment grounds in abstract terms, their real test therefore being in their application, there is a well-established understanding of the legal basis and the scope of annulment under the ICSID Convention. Thus, the practice of ICSID annulment committees has confirmed that the grounds of annulment listed in Article 52 are exclusive, and that it is the applicant that carries the burden of proof in establishing that any of the annulment grounds it invokes exist.[138]

239. It is also clear from the language of Article 52, and it is well established in ICSID annulment practice, that annulment is an extraordinary remedy and not an appeal from the legal or factual findings of the arbitral tribunal.[139] The object and purpose of annulment proceedings is not to test the substantive correctness of the award; indeed, Article 53(1) of the ICSID Convention specifically provides that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." Annulment can be successful only if there is a fundamental flaw in the award, or in the proceeding that led to it, that falls under one or more of the annulment grounds in Article 52. The function of an ICSID *ad hoc* committee is not to review the factual findings of an ICSID tribunal or its decision on the merits, but to determine whether any of the annulment grounds in Article 52 has been established. Nor is an ICSID annulment proceeding a retrial and accordingly it is based on the record before the tribunal.[140] Pursuant to ICSID Arbitration Rule 34(1), it is the tribunal, and not an ICSID

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[138] *See, e.g.*, *CDC v Seychelles* (**VPBLEX-073**), para 34; *Alapli v Turkey* (**VPBLEX-079**), paras 31-32, 134, 202, 256; *EDF v Argentina* (**VPBLEX-080**), para 132.

[139] *See, e.g.*, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, ICSID Case No ARB/84/4, Decision on Annulment, 14 December 1989 ("*MINE v Guinea*") (**ZALEX-043**), para 4.04; *CDC v Seychelles* (**VPBLEX-073**), para 34; *Alapli v Turkey* (**VPBLEX-079**), paras 33 and 234; *EDF v Argentina* (**VPBLEX-080**), paras 64-67, 69 (*quoting MTD Equity and MTD Chile v Republic of Chile*, ICSID Case No ARB/01/07, Decision on Annulment, 21 March 2007 ("*MTD v Chile*"), para 31).

[140] *See, e.g.*, *MTD v Chile*, para 31 (*as quoted in EDF v Argentina* (**VPBLEX-080**), para 64); *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/07, Decision on Annulment, 5 June 2007, paras 20, 23 (*as quoted in EDF v Argentina* (**VPBLEX-080**), paras 65-66); *Alapli v Turkey* (**VPBLEX-079**), paras 31-33.

annulment committee, that is the judge of the admissibility of evidence and its probative value.[141]

240. It follows from these principles that a party seeking annulment cannot make new arguments on the merits that were not made in the original proceedings, or more generally, try to re-argue the case on the merits. Thus, for instance, in *Klöckner I*, the *ad hoc* committee noted that an application for annulment cannot be used by a party "to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments."[142] Other ICSID annulment committees have made similar observations.[143]

241. In the present case, there appears to be no disagreement between the Parties as to the applicable legal principles, as outlined above. These principles will govern and inform the Committee's determinations, as relevant, as set out in this Section V.

B. GROUND 1: SERIOUS BREACH OF FUNDAMENTAL RULE OF PROCEDURE—DENIAL OF RIGHT TO BE HEARD ON THE ILLEGALITY OBJECTION (ARTICLE 52(1)(D))

242. The Applicant contends that it was denied the right to be heard on the Illegality Objection as a result of the Tribunal's procedural decisions excluding certain evidence from the record. The Applicant challenges, in particular, the Tribunal's Procedural Order Nos 7, 8 and 9, which excluded substantial parts of its Illegality Objection, refused the Applicant's request for extension of the page limit for its response and ordered the redaction of three witness statements submitted by Zimbabwe. According to the Applicant, these decisions

[141] *See Alapli v. Turkey* (**VPBLEX-079**), para 234.

[142] *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais SA*, ICSID Case No ARB/81/2, Decision on Annulment (Translation), 3 May 1985 ("*Klöckner I*") (**ZALEX-078**), para 83.

[143] *See, e.g., Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No ARB/13/8, Decision on Annulment, 29 September 2016 ("*Poštová banka v Greece*") (**VPBLEX-082**), para 130; *MINE v Guinea* (**ZALEX-043**), para 6.42, *Sociedad Anónima Eduardo Vieira v Republic of Chile*, ICSID Case No ARB/04/7, Decision on Annulment (Translation), 10 December 2010 ("*Vieira v Chile*") (**VPBLEX-083**), para 237; *Togo Electricité and GDF-Suez Energie Services v Republic of Togo*, ICSID Case No ARB/06/7, Decision on Annulment (Translation), 6 September 2011 ("*Togo Electricité v Togo*") (**VPBLEX-084**), para 50.

constitute a serious departure from a fundamental rule of procedure and thus justify the annulment of the Award in its entirety.[144]

243. There is no dispute between the Parties that the right to be heard is a fundamental rule of procedure. The Committee agrees, as have agreed other ICSID *ad hoc* committees.[145] However, the Parties disagree as to whether the Tribunal committed a serious breach of this rule.

244. The Committee has carefully reviewed the procedural history of the arbitration proceeding in order to determine whether the Applicant was denied an opportunity to plead its illegality defense and to present evidence in its support, including, and in particular, as a result of Procedural Order Nos 7, 8 and 9.

245. The Committee notes that the Tribunal took its decisions in Procedural Order Nos 7, 8 and 9 in the context of protracted proceedings, which resulted in additional pleading rounds beyond the initially envisaged two rounds and in several postponements of the evidentiary hearing. As summarized above, the additional pleading rounds were ordered by the Tribunal, in particular, in order to allow Zimbabwe to raise its Illegality Objection, even though Zimbabwe had initially indicated that it did not intend to challenge the jurisdiction of the Tribunal. Zimbabwe did not raise any jurisdictional objections in its Counter-Memorial, and while it did raise certain jurisdictional and admissibility objections in its Rejoinder, including on the basis that the VPBs' investments allegedly had not been approved as required under Article 9(b) of the Germany-Zimbabwe BIT, it did not challenge the legality of the VPBs' investments. Although filed late under ICSID Arbitration Rule 41(1), the Tribunal admitted all of these objections in Procedural Order No 3, finding that "special circumstances" existed, within the meaning of ICSID Arbitration Rule 26(3), which justified the admission of the objections even if pleaded out of time.

[144] The Applicant also contends, under this annulment ground, that Mr Fortier was biased against Zimbabwe. The Committee considers it more appropriate to address this argument when dealing with the third ground of annulment.

[145] *See, e.g.*, *Fraport v Philippines* (**ZALEX-045**), para 197; *Wena v Egypt* (**ZALEX-044**), para 57; *MINE v Guinea* (**ZALEX-043**), para 5.06.

246. In its Rebutter dated 19 April 2013, Zimbabwe expanded its Approval Objection under Article 9(b) of the Germany-Zimbabwe BIT and also raised, for the first time, an objection to the legality of the investments under both Article 9(b) of the Germany-Zimbabwe BIT and Article 2 of the Switzerland-Zimbabwe BIT, on the basis that the VPBs had failed to obtain approval from competent Zimbabwean authorities for their investments.[146] Although the Tribunal had not scheduled further pleadings beyond Zimbabwe's 19 April 2013 Rebutter, on 4 July 2013, Zimbabwe wrote a letter to the Tribunal raising a wider illegality objection (the "**Wider Illegality Objection**"), arguing now that all of the VPBs' investments were in breach of Zimbabwe's exchange control regulations and therefore illegal. On 8 August 2013, the Tribunal issued Procedural Order No 7, dismissing the VPBs' application not to admit the Illegality Objection raised in the Rebutter, deciding not to admit Zimbabwe's 4 July 2013 letter as an additional pleading, and ordering Zimbabwe instead to file by 16 August 2013 a Re-Rebutter setting out its Illegality Objection under Article 9(b) of the Germany-Zimbabwe BIT and Article 2 of the Switzerland-Zimbabwe BIT.

247. Zimbabwe filed its Re-Rebutter on 15 August 2013, expanding the scope of its Illegality Objection, but not arguing, at this time, that all of the VPBs' investments were illegal for failure to comply with Zimbabwe's exchange control regulations. In other words, although given the opportunity to clearly set out its Illegality Objection in this pleading, Zimbabwe did not embrace in its Re-Rebutter the Wider Illegality Objection it had raised in its 4 July 2013 letter.

248. It was not until 26 September 2013, in its Reply to the Response to the Re-Rebutter, that Zimbabwe for the first time raised its Wider Illegality Objection in an admissible pleading, alleging that all of the VPBs' investments were in breach of Zimbabwe's exchange control regulations and therefore illegal. Zimbabwe also contended that Exhibit C-858 (which the

[146] While Zimbabwe argued in the original arbitration that its illegality objection was an objection to admissibility rather than jurisdiction, it argues now in the annulment proceeding that it was in fact an objection to jurisdiction (*see, e.g.*, Memorial, paras 599-606). As explained below, the Committee does not consider that this characterization issue is of any relevance in the present proceeding; the issue is rather whether Zimbabwe was improperly precluded from raising this objection or producing evidence in its support.

VPBs had filed with their Response to the Re-Rebutter on 9 September 2013) was not relevant since at the time the Reserve Bank of Zimbabwe granted its approval for the transaction reflected in Exhibit C-858, neither party to the transaction was owned or controlled by the VPBs; accordingly the document could not evidence exchange control approval of the VPB's investments.[147] This point was subsequently conceded by the VPBs, in a telephone conference hearing held on 11 October 2013 (see below) and in their skeleton argument for the hearing.

249. After hearing the Parties by way of a telephone conference on 11 October 2013, the Tribunal on 15 October 2013 issued Procedural Order No 9, excluding, *inter alia*, Zimbabwe's 26 September 2013 pleading insofar as it raised the new Wider Illegality Objection that Zimbabwe had not raised in its 15 August 2013 Re-Rebutter. The Tribunal found that "[t]his expansion of [Zimbabwe's] jurisdictional objections was done in breach of the Tribunal's Procedural Orders, in particular paragraph 55(i) of PO No 3 and paragraph 62 of PO No 7, as well as Arbitration Rules 31(3) and 41(1)."[148] The Tribunal also found that no special circumstances existed within the meaning of ICSID Arbitration Rule 26(3) to warrant the admission of the Wider Illegality Objection at that stage of proceedings.[149] The Tribunal also declared inadmissible certain passages in Zimbabwe's witness statements, insofar as they related to the Wider Illegality Objection.

250. The Committee notes that the alleged illegality of the VPBs' investments is a preliminary objection on which Zimbabwe had the burden of proof from the very beginning of the arbitration. However, as noted above, Zimbabwe did not raise the Illegality Objection until its Rebutter in April 2013, when it argued that the VPBs' investments were illegal for lack of approval, and in its letter of 4 July 2013, when it for the first time raised the Wider Illegality Objection, to the effect that all of the VPBs' investments were illegal for failure to comply with the exchange control regulations (however, as noted above, the 4 July 2013

[147] Letter from the Merchant Bank of Central Africa Limited to Tanks Group Services Limited dated 12 November 1992 (**ZA-045** / C-858 in the original arbitration). *See also* Zimbabwe's Reply to the Response to the Re-Rebutter dated 26 September 2013 (**VPB-079**), para 26 and Third Witness Statement of Mr Onias Claver Masiwa dated 23 September 2013 (**ZA-047**), paras 4-5.

[148] Procedural Order No 9 (**VPB-148**), para 51.

[149] Procedural Order No 9 (**VPB-148**), para 51.

letter was not an admissible pleading). It is therefore not correct to state, as the Applicant does, that it was not in a position to raise the Wider Illegality Objection until the VPBs filed Exhibit C-858 on 9 September 2013. Moreover, as summarized above, the Applicant itself did not consider at the time that Exhibit C-858 constituted relevant evidence because when the transaction referred to in C-858 (which showed the approval of the acquisition of Franconian through Saxonian) occurred, the VPBs did not own Saxonian; both companies were owned by their previous owner (Société Générale de Belgique).[150] Consequently, the Applicant's contention that it was not in a position to raise the Wider Illegality Objection (*i.e.*, that all of the VPBs' investments were illegal for failure to comply with Zimbabwe's exchange control regulations) until the VPBs submitted Exhibit C-858, together with its 9 September 2013 Response, has no basis in fact.[151]

251. It is well-established that an ICSID annulment proceeding is indeed an annulment proceeding and not an appeal, and it is therefore not a place for a party to raise an argument that it did not make in the underlying arbitration proceeding[152]—and even less a place to raise an argument that contradicts the argument raised by a party in the arbitration proceeding. Consequently, insofar as the Applicant seeks to argue now, in this annulment proceeding, that Exhibit C-858 constitutes evidence of illegality, it raises a new argument that cannot be considered at this stage of the proceedings, even assuming it were valid (which in any event is not the case, as conceded by Zimbabwe in the arbitration).

[150] Zimbabwe's Reply to the Response to the Re-Rebutter dated 26 September 2013 (**VPB-079**), p. 9 and Third Witness Statement of Mr Onias Claver Masiwa dated 23 September 2013 (**ZA-047**), paras 4-5.

[151] The Applicant also cannot argue that it could not determine whether Tanks Limited had the necessary exchange control approvals because it was not aware that Franconian was previously called Tanks Limited, and because it only became aware of this fact when the VPBs filed C-858 (which showed the previous name of Franconian). As pointed out by the Respondents, one of the VPBs' witness statements, filed in support of its Memorial, contained an organogram showing the previous name of Franconian. The Committee does not follow the Applicant's argument that the fact that the name of Tanks Limited was handwritten somehow precluded Zimbabwe from performing the necessary verifications.

[152] *See Klöckner I* (**ZALEX-078**), para 83 ("[A]s a rule an application for annulment cannot serve as a substitute for an appeal against an award and permit criticism of the merits of the judgments rightly or wrongly formulated by the award. Nor can it be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments."). *See also Poštová banka v Greece* (**VPBLEX-082**), para 130; *MINE v Guinea* (**ZALEX-043**), para 6.42; *Vieira v Chile* (**VPBLEX-083**), para 237; *Togo Electricité v Togo* (**VPBLEX-084**), para 50.

252. The Applicant now also argues that Exhibit R-087 (a letter from the Merchant Bank of Central Africa Limited to the Reserve Bank of Zimbabwe dated 8 September 1992), in which the Merchant Bank states, on behalf of Tanks Consolidated Investment Limited (the previous name of Franconian), that when Franconian is transferred to Saxonian, "there will be no change in the ultimate beneficial ownership of [Franconian],"[153] records a condition imposed by the Reserve Bank of Zimbabwe that applied to any future transactions involving Franconian. The Applicant suggests that the subsequent transfer of Franconian to the VPBs breached this condition. This is a new argument not made by Zimbabwe in the arbitration and therefore not relevant in this annulment proceeding; as noted above, a party cannot raise new arguments in ICSID annulment proceedings that it could have raised, but did not raise, in the arbitration proceeding. In any event, the Applicant misreads the letter; the Committee agrees with the Respondents that it is evident from the language and context of the letter that it refers to the 9 December 1992 transaction itself and does not apply to any future transactions. Indeed, the statement is contained in a letter from Tanks Consolidated Investment Limited to the Reserve Bank of Zimbabwe, and not from the latter to the former, so in any event it cannot be read to contain a condition imposed by the Bank.

253. The Committee is unable to find in the sequence of procedural events summarized above any denial of opportunity for the Applicant to be able to argue its case on illegality, nor any breach of its right to be heard. It is undisputed that Zimbabwe raised its illegality defense, in its narrow form, only in its Rebutter on 19 April 2013. At that point in time, Zimbabwe had already had an opportunity to raise its illegality defense twice, both in its Counter-Memorial and in its Rejoinder. It was only in its 26 September 2013 Reply to the Response to the Re-Rebutter that Zimbabwe sought to extend its illegality defense, which it had finally raised in its Rebutter in April 2013, to govern all of the VPBs' investments. In the circumstances, it cannot be said that the Applicant was denied the opportunity to be heard on its illegality defense. Nor does the Committee agree that the Tribunal acted improperly when issuing Procedural Order No 9, in which it found Zimbabwe's Wider Illegality Objection and the supporting witness evidence to be inadmissible. The Tribunal's

[153] Letter from MBCA to the Deputy General Manager, Exchange Control Department, Reserve Bank of Zimbabwe dated 8 September 1992 (**ZA-049** / R-087 in the original arbitration).

decisions were legitimate procedural decisions to protect the due process rights of both Parties in circumstances where one of the Parties continued to raise new preliminary objections out of time, and where the Party in question had already been given an opportunity to raise its new objections even if they were out of time.

254. The Committee further notes that, while the Applicant now argues that its Illegality Objection was an objection to jurisdiction, in the arbitration it characterized its objection as an objection to admissibility rather than jurisdiction.[154] However, the issue of characterization of the Applicant's objection has no bearing on the Committee's determination as to whether or not there has been a serious breach of a fundamental rule of procedure. While under ICSID Arbitration Rule 41(2) an ICSID tribunal "may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence," the burden of proof remains with the party raising a preliminary objection, whether based on jurisdiction or admissibility. Indeed, ICSID Arbitration Rule 41 ("Preliminary Objections"), which requires that preliminary objections "be made as early as possible" and be filed "no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder," covers all preliminary objections, including those to "competence," and not only objections to jurisdiction. While the provision makes an exception for situations in which "the facts on which the objection is based are unknown to the party at that time," the Tribunal did allow Zimbabwe to raise its Illegality Objection late, after the completion of the first two rounds of pleadings. Moreover, and in any event, Exhibit C-858 (which the Applicant argues constituted new evidence relevant to illegality) cannot be considered to evidence a new fact which was unknown to Zimbabwe at the time; as noted above, both Parties agreed in the arbitration that it was not relevant evidence as it did not relate to a transaction entered into by the VPBs.[155]

[154] *See* Award (**VPB-174**), paras 344, 346.

[155] It is also evident from the record that, based on the information in Appendix 1 filed with VPBs' Memorial, Zimbabwe would have been able to verify whether the required exchange control regulations, if any, had been provided to all of the VPBs' investments.

255. An ICSID tribunal's task is to provide a party with a reasonable opportunity to be heard; there is no right to an unlimited opportunity to be heard. It is for the party concerned to take advantage of that opportunity, when provided. In the present case, the Tribunal did provide the Applicant with a reasonable opportunity, and indeed several opportunities, to be heard on its Illegality Objection, and accordingly there was no denial of the right to be heard and therefore no breach of a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.

256. Finally, as to Zimbabwe's argument that the Tribunal denied Zimbabwe's right to be heard, thus committing a serious breach of a fundamental rule of procedure, when dismissing in Procedural Order No 8 Zimbabwe's request for a page extension of its 26 September 2013 pleading by three to four pages, the Committee is unable to see in such a routine procedural decision any denial of the right to be heard, in particular as the new matters raised by the VPBs in their 9 September 2013 submission were responsive to Zimbabwe's Re-Rebutter and accordingly the page extension was not justified in the first place.

257. The Applicant's first ground of annulment is therefore dismissed.

C. GROUND 2: SERIOUS BREACH OF FUNDAMENTAL RULE OF PROCEDURE—DENIAL OF RIGHT TO BE HEARD AS A RESULT OF THE TIMING OF THE PRESIDENT'S DISCLOSURE (ARTICLE 52(1)(D))

258. The Applicant argues that Mr Yves Fortier, the President of the Tribunal, failed to timely disclose his role as chairperson of the World Bank Sanctions Board, which he had held since May 2012. Mr Fortier mentioned his position during the hearing, on 31 October 2013, when inquiring whether either Party would have any issue if the Secretary of the Sanctions Board were to attend the hearing on that day. According to the Applicant, it was too late at that point in time, when the proceedings had already reached the hearing stage, to seek disqualification. As result, the late disclosure deprived the Applicant of the right to be heard in the matter, which allegedly constitutes a serious breach of a fundamental rule of procedure.

259. The Respondents note that the World Bank Sanctions Board has no power to pronounce sanctions against States and accordingly its sanctioning powers are irrelevant in this

proceeding. According to the Respondents, Mr Fortier is not an official of the World Bank and when chairing the Sanctions Board—he acts independently, just as he acted independently when chairing the Tribunal. Consequently, Mr Fortier's function as a chairperson of the Sanctions Board was not a disclosable matter, and even if it had been, Zimbabwe had ample time to challenge him—until 3 February 2015, when the Tribunal declared the proceedings closed. In accordance with ICSID Arbitration Rule 27, the Applicant has therefore waived its right to challenge Mr Fortier's alleged lack of impartiality.

260. The Committee need not, in this annulment proceeding, take a view on whether Mr Fortier's position as a chairperson of the World Bank Sanctions Board constitutes a valid basis for disqualification, or whether any disqualification application by Zimbabwe would have been successful. The Committee merely notes, as the issue has been debated by the Parties in this annulment proceeding, that the Sanctions Board is tasked with sanctioning companies and individuals suspected of having engaged in misconduct and recommending sanctions to the World Bank President, to protect the integrity of World Bank's operations and to ensure that development financing is used only for its intended purpose. The Sanctions Board has no jurisdiction to impose sanctions on States, and it is undisputed that the Sanctions Board has not imposed sanctions in connection with any World Bank operations involving Zimbabwe. The Applicant's case appears rather to be that any position involving sanctioning powers or authority to impose sanctions of any kind is incompatible with the function of the president of an ICSID tribunal in the present case, given that Zimbabwe has been a target of international sanctions since the early 2000s.[156] This is a broad proposition, and certainly not one that Zimbabwe has demonstrated would create a *prima facie* basis for disqualification. Be that as it may, Zimbabwe never made any application to disqualify Mr Fortier, so the proposition that Zimbabwe now advances was never assessed as part of the arbitration proceeding.

261. As to the Applicant's argument that Mr Fortier's late disclosure deprived it of the opportunity to challenge him, the Committee notes that under ICSID Arbitration Rule 9(1)

[156] *See* Tr Day 1, 64:24–69:24.

"[a] party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor."[157] In the present case, as the Applicant became aware of the alleged basis for disqualification during the hearing, it could have brought an application for disqualification at any time between the end of the hearing, which occurred on 2 November 2013, and 3 February 2015, the date when the Tribunal declared the proceedings closed. The Committee is unable to agree that a proposal for disqualification at that stage of the proceedings would have been futile as the Tribunal had not yet rendered its award.

262. Consequently, in view of its failure to propose disqualification promptly, as soon as it became aware of the alleged basis of disqualification, the Applicant must be considered to have waived its right to challenge Mr Fortier, in accordance with Rule 27 of the ICSID Arbitration Rules. According to Rule 27, a party which knows that a provision of the Rules has not been complied with and which fails to state promptly its objections, "shall be deemed … to have waived its right to object."[158] Accordingly, it cannot be said that the Applicant was deprived of the opportunity to challenge the President of the Tribunal and that, as a result, it was denied the right to be heard.

263. The Applicant's second ground of annulment therefore stands to be dismissed.

D. GROUND 3: TRIBUNAL NOT PROPERLY CONSTITUTED—LACK OF IMPARTIALITY OF PRESIDENT OF THE TRIBUNAL (ARTICLE 52(1)(A))

264. The Applicant's third ground of annulment is based on the same alleged facts as the second ground—Mr Fortier's involvement with the World Bank Sanctions Board, which according to the Applicant was incompatible with his function as President of the Tribunal. According to the Applicant, Mr Fortier not only was perceived as being partial as a result of his function; he also acted *de facto* in a partial manner, in particular during the hearing.

[157] According to Article 57 of the ICSID Convention, a party may propose disqualification of a member of an ICSID tribunal "on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." According to Article 14(1), one of the qualities required is that the person in question "may be relied upon to exercise independent judgment."

[158] The provision is subject to Article 45 of the ICSID Convention ("Failure to Appear"), which however does not apply in the present case.

According to the Applicant, this calls for annulment of the Award on the basis that the Tribunal was not properly constituted under Article 52(1)(a) of the ICSID Convention.

265. The Respondents argue that Zimbabwe could have invoked Article 57 of the Convention and accordingly could have proposed the disqualification of Mr Fortier at any time after the date when it became aware of the alleged manifest lack of impartiality, until the closure of the proceedings on 3 February 2015; however, it failed to do so. Having thus failed to comply with ICSID Arbitration Rule 9(1), which requires a party to raise its proposal for disqualification "promptly," the Applicant must be deemed to have waived its right to challenge, in accordance with ICSID Arbitration Rule 27.

266. The Committee agrees that ICSID Arbitration Rules 9(1) and 27 are indeed the relevant provisions in this context. Consequently, insofar as the Applicant relies in support of its application on the mere fact of Mr Fortier's function as chairperson of the Sanctions Board (said to be incompatible with his function as President of the Tribunal), the annulment application stands to be dismissed on the same basis as the Applicant's second ground of annulment—the Applicant must be considered to have waived its right to seek disqualification under ICSID Arbitration Rule 27.

267. The Committee also fails to see in Mr Fortier's conduct during the arbitration proceedings, including the hearing, any evidence of lack of impartiality. First, to the extent that the Applicant relies on the decisions taken by the Tribunal which dismissed Zimbabwe's position in the arbitration or were otherwise incompatible with its pleaded position, as evidence of alleged lack of impartiality, such decisions, without more, are insufficient to establish the Applicant's case. Indeed, it is the very function of an ICSID tribunal to resolve disputes, that is, to decide which party is right and which party is wrong on any disputed issue, and such decisions, which are a necessary element of the dispute resolution function, cannot, without more, constitute evidence of partiality. Second, all the decisions taken by the Tribunal, including those referred to by the Applicant, were unanimous; in the one instance where Mr Fortier acted alone, this was because the matter was urgent, and the Parties had previously agreed that in such a situation the President was indeed authorized

to act without consulting his co-Arbitrators.[159] Moreover, that decision was not disputed by Zimbabwe at the time.

268. Nor is the Committee able to find evidence of partiality in the President's conduct during the hearing; indeed, the Applicant confirmed at the end of the hearing that it had had its day in court and had been treated fairly.[160]

269. In view of the above, the Applicant's third ground of annulment is to be dismissed.

E. GROUND 4: SERIOUS BREACH OF FUNDAMENTAL RULE OF PROCEDURE—DENIAL OF RIGHT TO BE HEARD AS A RESULT OF FAILURE TO DISCLOSE (ARTICLE 52(1)(D))

270. The Applicant's fourth ground of annulment is based essentially on the same issue as its second and third grounds of annulment—Mr Fortier's role as chairperson of the World Bank Sanctions Board. While both the second and the fourth ground rely on the same legal argument—alleged serious breach of a fundamental rule of procedure—they differ as to their factual basis: the second ground focuses on the (informal and late) manner in which the disclosure was made, whereas the fourth ground relies on the alleged failure to disclose. On the other hand, the third and the fourth ground of annulment are based on the same facts, but their legal basis is different—the third ground relies on the alleged improper constitution of the Tribunal, whereas the fourth ground is founded on an alleged serious breach of a fundamental rule of procedure.

271. Under its fourth ground of annulment, the Applicant argues that Mr Fortier withheld information about his role as chairperson of the World Bank Sanctions Board for 548 days after his appointment and did not disclose it until two days before the end of the hearing. According to the Applicant, this constitutes a failure to disclose, which amounts to a serious breach of a fundamental rule of procedure. The Award therefore must be annulled.

272. The Respondents argue that there was nothing significant to be disclosed, and that in any event, a duty to disclose is not a fundamental rule of procedure. Moreover, Zimbabwe waived its right to challenge the Award on this basis as it failed to challenge Mr Fortier

[159] *See* Summary Minutes of the Joint First Session of the two Arbitral Tribunals dated 7 February 2011 (**ZA-071**).
[160] Original Arbitration Final Hearing Transcript of Day 6 dated 2 November 2013 (**VPB-173a**), 1880:8-14.

during the arbitration. According to the Respondents, even assuming the duty to disclose constituted a fundamental rule of procedure, which the Respondents deny, there was no serious breach of the rule since in the absence of any evidence of lack of impartiality, the failure to disclose had no impact on the outcome of the proceedings.

273. The Committee notes that, even assuming Mr Fortier had an obligation to disclose (an issue on which the Committee need not take a view, in view of its finding below), Mr Fortier did in fact disclose his function as chairperson of the Sanctions Board during the arbitration. As determined in Section C) above, in connection with the Applicant's second ground of annulment, the Applicant was in fact not deprived of an opportunity to be heard, as it still had ample time to propose disqualification during the period from Mr Fortier's statement at the hearing until the closure of the proceedings, which occurred more than a year later. The Applicant had an opportunity to be heard, but it did not use that opportunity.

274. Accordingly, the Applicant was not denied the right to be heard and its fourth ground of annulment must be dismissed.

F. GROUND 5: MANIFEST EXCESS OF POWERS—FAILURE TO APPLY THE APPLICABLE LAW TO THE NECESSITY DEFENSE (ARTICLE 52(1)(B))

275. The Applicant contends that the Tribunal applied customary international law and Zimbabwean law when deciding on the Applicant's necessity defense and thus failed to apply the relevant provisions of the BITs—Ad Article 3(a) of the Protocol to the Germany-Zimbabwe BIT and Article 7(1) and 7(2)(b) of the Switzerland-Zimbabwe BIT. The Tribunal thus failed to apply the applicable law and thus exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention.

276. According to the Applicant, its application is timely as it only learned about the Tribunal's failure to apply the proper law when reviewing the Award.

277. The Respondents submit that the Tribunal did apply the applicable international law when determining Zimbabwe's necessity defense and made clear that they did not apply Zimbabwean law. The Respondents further note that Ad Article 3(a) of the Protocol to the

Germany-Zimbabwe BIT does not deal with necessity, and Zimbabwe never invoked Article 7(2) of the Switzerland-Zimbabwe BIT before the annulment proceedings.

278. The Committee notes that Zimbabwe raised its necessity defense in the arbitration proceedings primarily in terms of Article 25 of the ILC Articles, and that the Tribunal devoted a significant part of the Award to this issue.[161] Having analyzed the issue extensively, the Tribunal eventually dismissed the defense, concluding that Zimbabwe had not satisfied the requirements of Article 25. Consequently, the Tribunal did apply international law rather than Zimbabwean law when determining Zimbabwe's necessity defense. As noted above, the Tribunal also specifically addressed Zimbabwe's defense based on Ad Article 3(a) of the Germany-Zimbabwe BIT, dismissing it.[162] While the Tribunal did not specifically address Article 7(1) of the Switzerland-Zimbabwe BIT, this provision only provides for national treatment and MFN treatment in relation to restitution, indemnification, compensation or other settlement of claims in the context of "war, other armed conflict, revolution, a state of emergency, revolt, insurrection or riot," and accordingly does not contain any general necessity defense. Moreover, as noted by the Respondents, Zimbabwe never specifically invoked Article 7(2) of the Switzerland-Zimbabwe BIT in the arbitration,[163] and in any event, Article 7(2) also does not provide for a necessity defense; it merely refers to necessity as an exception to the obligation to restitute or compensate for destruction of property in the circumstances referred to in Article 7(1).

279. Consequently, the Tribunal did not fail to apply the applicable law and the Applicant's fifth ground of annulment fails.

G. GROUND 6: MANIFEST EXCESS OF POWERS—FAILURE TO APPLY THE APPLICABLE LAW TO THE ILLEGALITY DEFENSE (ARTICLE 52(1)(B))

280. The Applicant's sixth ground of annulment is based on the argument that the Tribunal failed to apply the applicable Zimbabwean law, specifically Zimbabwe's exchange control

[161] Award (**VPB-174**), paras 610-668.

[162] Award (**VPB-174**), para 560.

[163] *See* Zimbabwe's Rebutter dated 19 April 2013 (**VPB-074**), para 718.

regulations, when determining the legality of the VPBs' investments. The Applicant's argument relies on the premise that the Tribunal improperly excluded the Applicant's Wider Illegality Argument and the supporting evidence.

281. The Committee has rejected the Applicant's Wider Illegality Argument (above in Section B), when addressing the Applicant's first ground annulment, and it follows that the Applicant's sixth ground of annulment also fails. The Applicant never raised the Wider Illegality Argument in an admissible pleading and therefore cannot rely on it as a basis for an annulment application to argue that the Tribunal failed to apply the law applicable to its illegality argument.

282. The Applicant's sixth ground of annulment is accordingly dismissed.

H. GROUND 7: MANIFEST EXCESS OF POWERS—NO JURISDICTION AS THE RESPONDENTS' INVESTMENTS WERE ILLEGAL (ARTICLE 52(1)(B))

283. The Applicant contends that the Tribunal wrongly characterized its illegality defense as an objection to admissibility rather than jurisdiction and therefore manifestly exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention. According to the Applicant, jurisdiction is dominant over admissibility as it relates to the State's consent to arbitrate and also cannot be created by way of estoppel.

284. The Committee notes that, in the arbitration, Zimbabwe raised its objections regarding the legality of the VPBs' investments and their approval as objections to admissibility rather than jurisdiction (while noting that jurisdiction and admissibility are often considered together). The Tribunal determined to treat Zimbabwe's illegality objections as objections to admissibility, "consistent with how they have been presented by [Zimbabwe] in the majority of its pleadings,"[164] adding that "the characterization of these arguments as either jurisdictional or relating to admissibility, in these cases, is immaterial."[165]

[164] Award (**VPB-174**), para 346.

[165] Award (**VPB-174**), para 346 (The sentence continues "…save as to whether the [VPBs] are entitled to raise their MFN defence," which the Tribunal however did not find necessary to consider).

285. As the Committee noted above, a party seeking annulment of an ICSID award cannot raise new arguments in an annulment proceeding that it did not raise in the underlying arbitration proceedings. As stressed by the *ad hoc* Committee in *Klöckner I,* an application for annulment cannot be used "to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments."[166]

286. In any event, even assuming that the Tribunal should have characterized Zimbabwe's objection (contrary to its pleading) as an objection to jurisdiction rather than admissibility, the Applicant has failed to show or indeed even argue that this would have resulted in a different outcome, or that the alleged excess of jurisdiction was manifest, as required by Article 52(1)(b) of the ICSID Convention.

287. The Applicant's seventh annulment ground is accordingly dismissed.

I. GROUND 8: FAILURE TO STATE REASONS—THE APPLICANT'S ILLEGALITY ARGUMENT WAS NOT CONSIDERED (ARTICLE 52(1)(E))

288. The Applicant's eighth ground of annulment is based on Article 52(1)(e) of the ICSID Convention, which provides for annulment if "the award has failed to state the reasons on which it is based."

289. As noted above, the Respondents argue that, insofar as the Applicant relies on Article 52(1)(e), its Annulment Application is time-barred and as such inadmissible as it did not mention Article 52(1)(e) at all in its Annulment Application dated 21 October 2015. This particular ground for annulment was introduced by the Applicant only on 7 June 2017, when it filed its Amended and Restated Annulment Application, together with its Memorial on Annulment. According to the Respondents, this conclusion is not affected by the fact that the original Annulment Application did mention the matters that the Applicant now raises in support of its eighth annulment ground, as these matters were raised only in support of other annulment grounds.

[166] *Klöckner I* (**ZALEX-078**), para 83. *See also Poštová banka v Greece* (**VPBLEX-082**), para 130; *MINE v Guinea* (**ZALEX-043**), para 6.42, *Vieira v Chile* (**VPBLEX-083**), para 237; *Togo Electricité v Togo* (**VPBLEX-084**), para 50.

290. The Applicant argues, in response, that the Respondents' position is "formalistic" and refers, in support, to the *Amco I* decision, in which the *ad hoc* committee considered whether the application for annulment should contain more than just a reference to the grounds in Article 52 of the ICSID Convention, and went on to examine whether the annulment grounds in question could be reasonably be considered as being covered by the statements in the annulment application. According to the Applicant, "the elements of Ground 8 could reasonably be considered as covered by the statements in the [A]pplication for [A]nnulment" as they "were in fact referred to in the Application or reasonably implicit in the Application."[167] The Applicant also refers to the *Wena v Egypt* and *Klöckner II* annulment decisions, which, according to the Applicant, adopted a similar approach. The Applicant suggests that "there is no harm to VPB as it had the issues if not yet [in] the final form and as it has not needed not [*sic*] respond to [the Annulment Application] before its [Counter-Memorial]."[168]

291. The Committee recalls that under Article 52(2) of the ICSID Convention, annulment may be requested on one or more of the grounds set out in Article 52(1), and that the application shall be made within 120 days after the date on which the award was rendered (with the exception of the ground of corruption, which is not relevant in this case). Furthermore, under ICSID Arbitration Rule 50(1)(c)(iii), an application for annulment must "state in detail … the grounds on which it is based." The issue in the present case is whether the applicant can omit mentioning the specific annulment ground that it invokes, and whether it is sufficient to simply mention the specific reasons, or substantive grounds, for annulment, albeit under a different legal annulment ground, without invoking the annulment ground itself.

292. The Committee notes that in all of the three other cases cited by the Applicant in support of its position—*Amco I*, *Klöckner II* and *Wena v Egypt*—the issue was whether it is sufficient to merely refer to the legal annulment ground in Article 52(1) of the ICSID Convention, or whether the applicant should also "detail" the reasons, or the substantive grounds on which its application is based and, if so, on what level of "detail." The issue in

[167] Reply, para 917.

[168] Reply, para 921.

the three cases was therefore the opposite to the one in the present case, where the Applicant suggests that it only needs to set out the reasons but need not mention the legal annulment ground itself.

293. Thus, in *Amco I*, the *ad hoc* committee characterized the issue before it in the following terms:

> *It appears to the ad hoc Committee that Arbitration Rule 50(i)(c) is not adequately complied with by an Application for annulment which merely recites verbatim the specific subparagraph(s) of Article 52(1) of the Convention being invoked by the applicant. The thrust of Arbitration Rule 50 is not successfully avoided by coupling a recital of the subparagraphs invoked with a general reservation of a "right to supplement (a) presentation [of Indonesia's claims] with further written submissions."*[169]

294. Similarly, in *Klöckner II*, the *ad hoc* committee addressed Klöckner's argument that Cameroon's annulment application was inadmissible because it did "not state any reason which could justify the annulment on the basis of any of these three grounds [invoked by Cameroon in its application]."[170] The *ad hoc* committee noted that "[t]he Washington Convention, in Article 52 and other provisions, does not require an application for annulment to be reasoned 'in detail,'"[171] and concluded that "it is incumbent upon the Committee, seized with an annulment application, to determine whether the claims submitted by the applicant can be considered as included within or covered by the grounds on which the application is founded."[172]

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[169] *Amco Asia Corporation, Pan American Development, Ltd and PT Amco Indonesia v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Annulment, 16 May 1986 ("*Amco I*"), available in: 1 ICSID Reports 509 (1993) (**ZALEX-214**), para 46. The *ad hoc* committee went on to find that the grounds invoked by Amco "are not really new grounds raised for the first time by Indonesia in its Memorial but were either in fact referred to in the Application or reasonably implicit in the Application" (*Amco I* (**ZALEX-214**), para 53).

[170] *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2 (Resubmission), Decision on Annulment, 17 May 1990 ("*Klöckner II*") available in 14 ICSID Reports 101 (2009), para 4.02.

[171] *Klöckner II*, para 4.23.

[172] *Klöckner II*, para 4.43.

295. In *Wena v Egypt*, the respondent (Wena) argued that "several grounds for annulment were time-barred, by the fact that they had not been argued in the initial Request, but only later in the Applicant's Memorial requesting annulment."[173] Noting that Wena had "admitted […] that these arguments do not exceed the scope of the grounds for annulment initially invoked," the *ad hoc* committee concluded that "[t]he ICSID Convention […] does not preclude raising new arguments which are related to a ground of annulment invoked within the time limit fixed in the Convention."[174]

296. In the circumstances of this case, the Committee need not take a view on how detailed the reasons, or the substantive grounds, for the application should be as this is not the issue before it. The Applicant has failed on the threshold issue of having failed to refer to Article 52(1)(e) in support of its Application in the first place.

297. The Committee concludes that the Applicant's eighth ground for annulment is time-barred and as such inadmissible.

VI. COSTS

A. THE APPLICANT'S COST SUBMISSION

298. The Applicant submits that ICSID administrative costs should be borne equally by the Parties, regardless of the outcome of the two annulment phases. As to the Parties' legal fees and costs, the Applicant argues that each Party should bear its own costs. [175]

[173] *Wena v Egypt* (**ZALEX-044**), para 19.

[174] *Wena v Egypt* (**ZALEX-044**), para 19.

[175] Applicant's Submission on Costs, paras 9-10.

299. The Applicant states that its position is consistent with Article 10(6) of the Germany-Zimbabwe BIT[176] and Article 11(6) of the Switzerland-Zimbabwe BIT[177] which should be considered by the Committees as representing the Parties' agreement on these issues within the meaning of Article 61(2) of the ICSID Convention.[178]

300. The Applicant states that it has made advance payments to ICSID in the total amount of US$ 900,000 (US$ 450,000 for each case), and that it has incurred € 986,687.50 in legal fees and € 36,191.17 in disbursements to its legal counsel, as well as expenses in the amount of US$ 208,100 in connection with the travel of Zimbabwe's delegation to Paris, France, for work sessions with counsel and to attend the two hearings.[179]

301. According to the Applicant, an analysis of the Parties' procedural conduct during both the arbitration and the annulment proceedings supports its submission that each Party be held liable for half of the ICSID administrative fees and for the full amount of its own legal fees and costs. In particular, the Applicant insists that both Parties contributed to delays in the arbitration,[180] and the VPBs withheld evidence, in particular Exhibit C-858, which increased the inefficiency of the proceedings.[181] The Applicant has also "acted in an efficient, professional and courteous manner throughout the pendency of the annulment proceeding."[182]

302. Finally, and in any event, the Applicant argues that ICSID tribunals most often decide in favor of each party bearing its own costs.[183] In addition, the Applicant highlights that the

[176] Article 10(6) of the Germany-Zimbabwe BIT reads, in part: "Each Contracting Party shall bear the cost of its own member and of its representatives at the arbitration proceedings. The cost of the chair[person] and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may make a different decision concerning costs. In all other respect, the arbitral tribunal shall determine its own procedure" (**VPBLEX-021**).

[177] Article 11(6) of the Switzerland-Zimbabwe BIT reads: "Each Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the Chair[person] and the remaining costs shall be borne in equal parts by the Parties" (**VPBLEX-023**).

[178] Applicant's Submission on Costs, para 15.

[179] Applicant's Submission on Costs, paras 2-3, 5-6.

[180] Applicant's Submission on Costs, paras 17-30.

[181] Applicant's Reply Submission on Costs, paras 17, 23-30.

[182] Applicant's Submission on Costs, para 32.

[183] Applicant's Submission on Costs, paras 31-48; Applicant's Reply Submission on Costs, para 18.

Respondents' legal fees total more than twice those claimed by the Applicant and are unreasonable. They should be borne solely by the Respondents.[184]

B. THE RESPONDENTS' COST SUBMISSION

303. The Respondents disagree with the Applicant's position that both applicable BITs contain provisions dealing with the apportionment of arbitration costs and legal fees. Indeed, the provisions referred to by the Applicant (Article 10(6) of the Germany-Zimbabwe BIT and Article 11(6) of the Switzerland-Zimbabwe BIT) only apply in State-to-State arbitration, and thus should be ignored by the Committee.[185] According to the Respondents, the provisions which do address investor-State arbitration in the BITs are silent on the apportionment of arbitration costs and legal fees.[186]

304. The Respondents argue that the Committees should apply the "costs follow the event" principle. The Respondents contend that, should the Committees fully reject the Applicant's annulment application, in accordance with the practice of ICSID annulment committees, the Applicant should also be ordered to bear all of the ICSID administrative costs (according to the current trend in annulment decisions).[187]

305. As to legal costs (*i.e.*, the expenses incurred by the Parties in connection with annulment proceedings, including legal fees), the Respondents note that two apportionment approaches have been generally followed by ICSID annulment committees: (i) the "costs follow the event" approach;[188] and (ii) each party bears its own costs, unless the annulment application fundamentally lacks merit or a different allocation is warranted in light of the parties' conduct.[189] The Respondents submit that, while in their view the former approach is preferable, in this case both approaches should lead the Committee to shift (if not fully

[184] Applicant's Reply Submission on Costs, para 17.
[185] Respondents' Reply Submission on Costs, para 2.
[186] Respondents' Reply Submission on Costs, para 2.
[187] Respondents' Submission on Costs, para 10.
[188] Respondents' Submission on Costs, paras 12-16 and 22.
[189] Respondents' Submission on Costs, paras 18-19 and 24-37.

at least in part)[190] the burden of the Respondents' costs on to the Applicant, notably because the Applicant's application was fundamentally lacking in merit, and because of its conduct in the course of the annulment proceeding, in particular its failure to establish an escrow account for payment of the Award and the manner and tone of presentation in its pleadings.[191]

306. While the Respondents dispute that they were responsible for any of the delay in the arbitration proceedings, they point out that the conduct of the Parties in the arbitration proceeding is irrelevant to the determination of costs in this annulment proceeding.[192] The Respondents also deny that they were responsible for any inefficiency of the arbitration proceedings and reiterate that they did not withhold Exhibit C-858, which in any event was irrelevant to the arbitration proceeding, as agreed by both Parties at the time.

307. The Respondents request that the Committee order the Applicant to reimburse all of their legal costs which amount to £ 2.55 million (consisting of a fixed fee of £ 450,000 plus a success fee of £ 2.1 million in respect of Steptoe's fees) plus US$ 240,000 (consisting of a fixed fee of US$ 60,000 plus a success fee of US$ 180,000) in respect of Mr Verrill's fees.[193] Likewise, the Respondents request that the Committee order the Applicant to pay their disbursements, which they assess as amounting to £ 22,756.81, US$ 25,945.58 and € 2,150.[194] The Respondents' total legal fees (including success fees) and disbursements amount to £ 2,572,765.81, US$ 265,945.58 and € 2,150.

308. The Respondents state that the von Pezold Claimants have borne the legal costs associated with these annulment proceedings and accordingly the Respondents have apportioned their costs and fees between the two annulment proceedings such that the von Pezold Claimants seek an order in ICSID Case No ARB/10/15 for the entirety of their costs and fees and the

[190] Respondents' Submission on Costs, para 38. The Respondents argue that if they do not succeed in the annulment phase, the Applicant's conduct should lead the Committee to order the Applicant to bear all of the arbitration costs, "to pay at least 50% of the [Respondents'] legal costs, and to bear its own legal costs."

[191] Respondents' Submission on Costs, paras 19, 26-28, 30-33.

[192] Respondents' Reply Submission on Costs, paras 4-7.

[193] Respondents' Submission on Costs, paras 42-45.

[194] Respondents' Submission on Costs, paras 46-48.

Border Claimants do not seek a cost order in ICSID Case No ARB/10/25. The Respondents also request that the Applicant be ordered to pay interest on costs at the interest rate adopted in the Award, *i.e.*, the six-month US$ LIBOR rate plus 2%, compounded every six months from the date of the Committee's decision on the Annulment Application to the date of full payment.[195]

309. Finally, the Respondents assert that their legal costs are reasonable given, *inter alia*, (i) the importance of the matter to the Parties and the value of the assets involved;[196] (ii) the amount and extent of factual and expert evidence;[197] (iii) the conduct of the Parties during the proceedings;[198] (iv) the time spent and the complexity of the case;[199] and (v) the fact that the legal costs have already been paid or, as to the success fee component, are contractually required to be paid (which, to the Respondents, is a strong indication that they are reasonable).[200]

C. THE COMMITTEE'S DECISION ON COSTS

310. According to Article 52(4) of the ICSID Convention, Chapter VI of the Convention, titled the "Cost of the Proceeding," "shall apply *mutatis mutandis* to proceedings before the Committee." In this connection, the relevant provision of Chapter VI is Article 61(2), which provides:

> *In the case of arbitration proceedings, the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

311. ICSID Arbitration Rule 53 further provides that the provisions of the Rules "shall apply *mutatis mutandis* to any procedure relating to […] annulment of an award and to the

[195] Respondents' Submission on Costs, para 61.
[196] Respondents' Submission on Costs, para 51.
[197] Respondents' Submission on Costs, para 52.
[198] Respondents' Submission on Costs, para 53; Respondents' Reply Submission on Costs, paras 4-7.
[199] Respondents' Submission on Costs, para 55.
[200] Respondents' Submission on Costs, para 56.

decision of the […] Committee." Rule 47 further specifies that "the [decision of a Committee] shall be in writing and shall contain […] any decision of the [Committee] regarding the cost of the proceeding."

312. In accordance with ICSID Administrative and Financial Regulation 14(3)(e), the Applicant made the advance payments requested by the ICSID Secretariat to cover the costs of the annulment proceedings, which include the costs and expenses of the Centre and the fees and expenses of the members of the Committee. These costs (the "**Costs of the Proceeding**") amount to US$ 359,711.12 and are broken down as follows:

Committee's fees and expenses:

Dr Veijo Heiskanen	US$ 84,831.95
Ms Jean Kalicki	US$ 53,671.89
Prof Azzedine Kettani	US$ 70,037.83
ICSID's administrative fees	US$ 106,000.00
Other disbursements[201]	US$ 45,169.45
Total	US$ 359,711.12

313. The Costs of the Proceeding have been paid out of the advances made by the Applicant pursuant to ICSID Administrative and Financial Regulation 14(3)(e).[202]

314. The Applicant's Annulment Application has been dismissed in its entirety. In the circumstances, the Committee considers that it is appropriate that the costs follow the event as to the Costs of the Proceeding as well as the Respondents' legal costs, although not in their entirety as to the latter, in view of the relatively large discrepancy between the costs incurred by the Parties. In the absence of any risk of double compensation for the costs claims of the von Pezold Claimants and the Border Claimants, the Committee accepts the apportionment of costs as agreed between the von Pezold Claimants and the Border Claimants. Accordingly, the Committee decides, in the exercise of its discretion under Article 61(2) of the ICSID Convention, that the Applicant shall bear the Costs of the

[201] This amount includes actual charges relating to the dispatch of this Decision (courier, printing and copying).

[202] The remaining balance will be reimbursed to the Applicant.

Proceeding as well as its own costs and that it shall, within sixty days of the date of this decision, reimburse 50% of the Respondents' legal costs in the amount of £ 1,286,382.90, US$ 132,972.79 and € 1,075.

315. The Committee also finds it appropriate that, if no payment is made within the stipulated sixty-day period, the Applicant be ordered to pay interest on the outstanding amount at the rate provided in paragraph 1024 of the Award, *i.e.*, US$ LIBOR rate plus 2% compounded every six months, from the sixtieth day of the date of this Decision until the date of full payment.

VII. DECISION

316. For the reasons set out above, the Committee unanimously decides as follows:

(1) The Application for Annulment of the Award of 28 July 2015 is dismissed in its entirety;

(2) The Committee's directions in Procedural Order No 3 regarding the appointment of the escrow agent and the operation of the escrow accounts lapse upon the issuance of this Decision;

(3) The Applicant shall bear in full the costs incurred by ICSID in these annulment proceedings, including the fees and expenses of the members of the *ad hoc* Committee, in the amount of US$ 359,711.12;

(4) The Applicant shall reimburse the Respondents for 50% of their legal costs and expenses, in the amount of £ 1,286,382.90, US$ 132,972.79 and € 1,075, within sixty days of the date of dispatch of this Decision; and

(5) If no full payment is made in accordance with sub-paragraph (4) above within the sixty-day period, the amount payable is to be increased by interest on the outstanding amount until full payment at the rate provided in paragraph 1024 of the Award.

Ms Jean Kalicki
Member

Date: 11 November 2018

Prof Azzedine Kettani
Member

Date: 10 November 2018

Dr Veijo Heiskanen
President of the *ad hoc* Committee

Date: 12 November 2018