INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bernhard von Pezold and others

v.

Republic of Zimbabwe

(ICSID Case No. ARB/10/15) – Annulment Proceeding

DECISION ON STAY OF ENFORCEMENT OF THE AWARD

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

Secretary of the ad hoc Committee
Ms Jara Mínguez Almeida

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24 April 2017

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I. PROCEDURAL HISTORY

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

2. On 2 November 2015, the Secretary-General of ICSID registered the Annulment Applications and at the same time notified the parties that enforcement of the Awards was provisionally stayed, pursuant to ICSID Arbitration Rule 54(2).

3. On 21 December 2015, the *ad hoc* Committee (the "**Committee**") was constituted in accordance with ICSID Convention Article 52(3). The members of the Committee are Dr Veijo Heiskanen, President, designated to the ICSID Panel of Arbitrators by Finland, Ms Jean Kalicki, designated to the ICSID Panel of Arbitrators by Hungary, and Professor Azzedine Kettani, designated to the ICSID Panel of Arbitrators by the Chairman of ICSID's Administrative Council. All members were appointed by the Chairman of ICSID's Administrative Council. On the same date, Bernhard von Pezold and others and Border Timbers Limited and others (the "**Respondents**" or "**VPBs**") and Zimbabwe (the "**Applicant**") (together, the "**Parties**") were duly informed of the commencement of the annulment proceedings.

4. The Committee conducted a joint first session with the Parties and the Secretary of the Committee by telephone conference on 1 February 2016 and issued Procedural Order No. 1 on 11 February 2016, setting out the procedural framework and the timetable for the present annulment proceeding. 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."

5. Moreover, Section l of Procedural Order No. 1 provides that the Annulment Applications would be conjoined and heard together. More specifically, Section 1.7 of Procedural Order No.1 foresees that:

> "The Committees shall issue separate decisions in relation to each Award but may nevertheless discuss these proceedings in decisions or procedural orders as a single set of proceedings, except where circumstances necessitate separate treatment."

6. On 23 February 2016, the Applicant filed an application requesting an order of provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (the "**First Application**"). Apart from a request for provisional measures, the Applicant also sought an interim order to preserve the *status quo* pending the Parties' filing of further observations on the matter. By letter of 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. On 2 March 2016, the Respondents filed a response to the First Application, requesting that the application be denied. The proceedings relating to the First Application are set out in detail in the Committee's Decision on the Applicant's Application for Provisional Measures, which was transmitted to the Parties on 17 March 2016. In their Decision, the Committee dismissed the First Application, stating that "[t]he Committees are not persuaded that any provisional measures are required in the circumstances, and in any event the Applicant has not demonstrated that such circumstances exist."[1] The Committee also reminded the Parties of their general obligation to refrain from any conduct that may aggravate the dispute during the pendency of the annulment proceedings.

[1] Decision on the Applicant's Application for Provisional Measures dated 17 March 2016, para. 33.

7. 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.

8. 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.

9. 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 a revised version of its Reply, together with Exhibits ZA-114 to ZA-151, including witness statements by Dr J.P. Mangudya, Attorney General Prince Machaya and Mr Zvinechimwe Chum (Exhibits ZA-121, ZA-137 and ZA-144, respectively), and Legal Authorities ZALEX-073 to ZALEX-077.

10. 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 by Mr Heinrich von Pezold (Exhibit VPB-032), and Legal Authorities VPBLEX-058 to VPBLEX-068.

11. 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**"). On 23 September 2016, the Respondents filed a response to the Second Application, requesting that the application be denied. The proceedings in respect of the Second Application are described in detail in the Committee's Decision on the Applicant's Application for Provisional Measures to Exclude Consideration of the Merits in Part I, which was transmitted to the Parties on 13 October 2016. In its Decision, the Committee dismissed the Second Application, stating that any decision

> "[…] on this preliminary issue […] would not, and indeed could not, prejudge the Committees' decision on the merits of the Annulment

> Applications, which will be briefed by the Parties and resolved by the Committees in Part II of these annulment proceedings. In these circumstances, there cannot be any risk that the Committees' decision could cause irreparable harm on the Applicant's right to present its case on the merits, which is the right that the Applicant seeks to protect by its Application."[2]

12. On 16 November 2016, the Applicant requested leave from the Committee to file Exhibit ZA-152 with its Skeleton Argument on Stay of Enforcement. On 18 November 2016, the Committee granted the Applicant's request for leave to file Exhibit ZA-152 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 (the "**Respondents' Skeleton Arguments on Stay**") and the Applicant filed its Skeleton Arguments on Stay (the "**Applicant's Skeleton Arguments on Stay**") and also Exhibit ZA-152.

13. 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 witness statement of Mr Heinrich von Pezold (Exhibit VPB-048).

14. 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.

15. 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.

[2] Decision on the Applicant's Application for Provisional Measures to Exclude Consideration of the Merits in Part I dated 13 October 2016, para. 46.

16. On 6 December 2016, the Respondents filed their comments on the Applicant's 2 December 2016 request for a procedural ruling from the Committee with respect to 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, then Exhibit ZA-152 be struck from the record as well.

17. 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, the Parties agreed that there was no need for the Committee to strike portions of Exhibit VPB-048 from the record.

18. A joint hearing on the stay of enforcement of the Awards was held in Paris, France, on 14 and 15 December 2016 (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
Mr Prince Machaya	Attorney General, 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
Ms Helen Aldridge	Steptoe & Johnson
Mr Thomas Innes	Steptoe & Johnson
Mr Charles Verrill	
Mr Heinrich von Pezold	

Court Reporter:

Mr Trevor McGowan	The Court Reporter Ltd.

19. During the Hearing, the following persons were examined:

On behalf of the Applicant:

Mr 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

20. At the close of the Hearing, 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).

21. 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."

22. 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.

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

24. 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.

25. The Applicant filed its Post-Hearing Brief on 9 March 2017 (the "**Applicant's Post-Hearing Brief**"), and the Respondents filed their Post-Hearing Brief on 10 March 2017 (the "**Respondents' Post-Hearing Brief**").

26. On 31 March 2017, the Respondents wrote to the Committee requesting that certain allegations made in the Applicant's Post-Hearing Brief 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 these annulment proceedings.

II. THE PARTIES' POSITIONS

A. TEST FOR DETERMINING WHETHER THE STAY SHOULD BE MAINTAINED

(1) The Applicant's Position

27. The Applicant submits that under the relevant ICSID jurisprudence a stay of enforcement should only be lifted in exceptional circumstances.[3] No such exceptional circumstances exist in this case and the stay should therefore be maintained.[4]

28. According to the Applicant, the language of the ICSID Convention as elaborated upon by ICSID annulment committees contradicts the Respondents' position that the Applicant bears the burden of proving that the stay should be continued.[5] The Applicant considers, in particular, that once an applicant for annulment has made a *prima facie* case for having an award annulled, the respondent must show that the annulment application is totally without merit in order to have a stay of enforcement lifted.[6]

29. The Applicant considers that it has nonetheless met the burden of establishing the existence of circumstances that require the continuation of the stay of enforcement.[7]

(2) The Respondents' Position

30. The Respondents submit that a stay is presumptively lifted unless there are special circumstances requiring that it be continued.[8] The Respondents argue that, accordingly, "there must be some circumstances present that speak in favour of granting a stay."[9]

[3] Applicant's Post-Hearing Brief, paras. 2, 12-13; Memorial on Stay, paras. 38-41, 158; Applicant's Skeleton Arguments on Stay, paras. 68-73

[4] Applicant's Post-Hearing Brief, paras. 2-4; Applicant's Skeleton Arguments on Stay, paras. 148 ff.

[5] Applicant's Post-Hearing Brief, para. 41; *see also* Memorial on Stay, para. 6.

[6] Applicant's Skeleton Arguments on Stay, paras. 74-84; Applicant's Post-Hearing Brief, para. 41.

[7] *See* Reply on Stay, paras. 292-325; Applicant's Post-Hearing Brief, paras. 42-43.

[8] Respondents' Post-Hearing Brief, para. 107; Counter-Memorial on Stay, paras. 19-27.

[9] Respondents' Post-Hearing Brief, para. 21.

31. The Respondents contend that it is for the Applicant to establish that there are circumstances that require the stay to remain in place.[10] The Respondents draw on the terms of ICSID Arbitration Rule 54, contending that, because it is the Applicant that requested the continuation of the stay, it is for the Applicant to establish that it should remain in place.[11]

32. The Respondents contest the *MTD* decision,[12] to the extent that it found that an applicant does not bear the burden of establishing the necessity of a stay for enforcement where it has given reasonable assurances that it will comply with the award if it is not annulled.[13] In any event, the Respondents consider that they would satisfy any burden incumbent upon them to establish that the stay should be lifted, arguing in particular that the Annulment Applications are dilatory, that Zimbabwe would not suffer any hardship through the lifting of the stay and that the VPBs would be prejudiced by the maintenance of the stay.[14]

B. THE ALLEGEDLY DILATORY NATURE OF THE APPLICANT'S ANNULMENT APPLICATIONS

(1) The Applicant's Position

33. While the Applicant appears to agree with the Respondents that the issue of whether the Annulment Applications have *prima facie* any merit is relevant to the question of whether or not the stay should be maintained, it denies that the standard applies in this case.[15]

34. The Applicant asserts that, on the contrary, it has a *prima facie* case for having the Awards annulled because its applications set forth grounds which, if proven, would lead to

[10] Respondents' Post-Hearing Brief, para. 22.

[11] Respondents' Post-Hearing Brief, para. 23; Arbitration Rule 54.

[12] ZALEX-065, *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution dated 1 June 2005 ("*MTD*"), para. 29.

[13] Respondents' Post-Hearing Brief, para. 22; Tr. Day 1, Respondents' Opening Statement, 148:6-149:9.

[14] *See below* Sections II.B, II.D and II.E.

[15] Applicant's Skeleton Arguments on Stay, para. 97.

annulment of the Awards.[16] The Applicant submits that this in turn demonstrates that its Annulment Applications are not dilatory.[17]

35. The Applicant submits that a demonstration that the Annulment Applications pass the *prima facie* threshold of not being dilatory shifts the burden of proof to the Respondents who would then have to establish that there are nonetheless reasons why the stay should be lifted.[18]

36. The Applicant also disagrees with the Respondents on a number of other points which, according to the Respondents, show that the Annulment Applications are dilatory and/or abusive. The Applicant argues that its claim for annulment based on non-disclosure cannot be abusive when Mr Fortier, the presiding arbitrator in the underlying arbitration, did not disclose his role as chair of the World Bank Sanctions Board until 548 days after his appointment;[19] that there was no waiver because the relevant disclosure came too late in the proceedings;[20] that any failure to object does not constitute a bar in annulment proceedings;[21] and that the Applicant was indeed denied its right to be heard in relation to its illegality exception because it only had the opportunity to furnish a rushed pleading on this issue.[22]

37. The Applicant further submits that the Respondents' claims that the Annulment Applications are dilatory unduly strays into a consideration of the merits that should not be entertained by the Committee in these stay proceedings.[23] According to the Applicant, it is not possible for the Committee to decide that certain grounds listed in the Annulment

[16] Applicant's Post-Hearing Brief, para. 43(i); Applicant's Skeleton Arguments on Stay, paras. 74-84, 113-120.
[17] Applicant's Skeleton Arguments on Stay, paras. 119-120; Tr. Day 1, Applicant's Opening Statement, 105:3-107:8.
[18] Applicant's Post-Hearing Brief, para. 41.
[19] Applicant's Skeleton Arguments on Stay, paras. 122-123.
[20] Reply on Stay, para. 304.
[21] Applicant's Skeleton Arguments on Stay, paras. 125-127
[22] Applicant's Skeleton Arguments on Stay, paras. 138-145.
[23] Tr. Day 1, Applicant's Opening Statement, 62:12-68:3.

Applications are dilatory without resolving matters that should only be considered as part of Part II of the proceedings on the merits.[24]

(2) The Respondents' Position

38. The Respondents assert that the Annulment Applications are dilatory and that the Applicant has not discharged its burden of proving that they are not.[25] According to the Respondents, an annulment application is dilatory if it is manifestly abusive, which is the case if it is either "manifestly unfounded" or an "abuse of process."[26] According to the Respondents, all four grounds upon which the Applicant seeks annulment of the Awards are dilatory.

39. As to the Applicant's first ground for annulment (the allegation that there was a serious departure from a fundamental rule of procedure as Mr Fortier failed to disclose his role as chair of the World Bank Sanctions Board) and as to the second ground (the allegation that the tribunal was improperly constituted tribunal due to Mr Fortier's failure to disclose), the Respondents submit that:

a. the parts of the Annulment Applications made on these grounds are dilatory principally as an abuse of process because they bring claims in relation to alleged defects that were waived, that are manifestly unfounded and/or based on a manifestly false assertion;[27]

b. a *prima facie* analysis reveals that these claims constitute an abuse of process and the Applicant has not proven that they do not;[28]

c. the Applicant waived its right to raise objections based on Mr Fortier's role by not seeking his disqualification between 31 October 2013 (when he openly stated his

[24] *See, e.g.*, Reply on Stay, paras. 302-304, 305-310, 311-313; Applicant's Skeleton Arguments on Stay, paras. 132-137, 180, 211; Applicant's Post-Hearing Brief, paras. 43(iii), 71.

[25] Respondents' Post-Hearing Brief, para. 28.

[26] Respondents' Post-Hearing Brief, para. 25; Respondents' Skeleton Arguments on Stay, paras. 7-9; Tr. Day 1, Respondents' Opening Statement, 146:7-168:9.

[27] Respondents' Skeleton Arguments on Stay, paras. 11-26.

[28] Rejoinder on Stay, paras. 30, 33; Respondents' Skeleton Arguments on Stay, para. 14.

role at the hearing) and the closure of proceedings (3 February 2015) or before the dispatch of the award (28 July 2015);[29] and

d. the Applicant's bias allegations against Mr Fortier do not meet the "reasonable third person" test that should be applied to assess such allegations.[30]

40. As to the Applicant's third ground of annulment, the Respondents argue that the Applicant's allegation that the Tribunal manifestly exceeded its powers by determining that Zimbabwe could not rely on the defense of necessity is manifestly false, made in bad faith, an "abuse of process" and "manifestly unfounded."[31]

41. As to the Applicant's fourth ground of annulment (the allegation that the Tribunal seriously departed from a fundamental rule of procedure by failing to hear Zimbabwe's submissions as to the VPBs' breach of host State law), the Respondents argue that this allegation is also based on a manifestly false assertion, is made in bad faith and, determined on a *prima facie* basis, is an "abuse of process" and/or manifestly unfounded.[32]

42. The Respondents contend that the Committee can conclude that the Annulment Applications are dilatory without prejudging their merits.[33] In any event, even if the Committees found that the Annulment Applications were not dilatory, the Applicant would still have to demonstrate that there are circumstances justifying the maintenance of the stay.[34]

[29] Counter-Memorial on Stay, paras. 36-39; Respondents' Skeleton Arguments on Stay, paras. 12-15; Respondents' Post-Hearing Brief, paras. 40-41.

[30] Respondents' Skeleton Arguments on Stay, paras. 17-25; Rejoinder on Stay, para. 30.

[31] Rejoinder on Stay, para. 37; Respondents' Post-Hearing Brief, para. 57.

[32] Rejoinder on Stay, para. 41; Respondents' Skeleton Arguments on Stay, para. 39; Respondents' Post-Hearing Brief, paras. 58-63.

[33] Respondents' Post-Hearing Brief, paras. 27, 37; Tr. Day 1, Respondents' Opening Statement, 154:22-25.

[34] Counter-Memorial on Stay, paras. 28-32; Rejoinder on Stay, para. 53; Respondents' Skeleton Arguments on Stay, para. 5.

C. RISK OF NON-COMPLIANCE WITH THE AWARDS

(1) The Applicant's Position

43. The Applicant asserts that it intends to comply with the Awards if they are not annulled and has provided letters of assurances and testimony to this effect.[35] The Applicant argues that these are serious statements of its intention to comply, and that in themselves they disprove the existence of any serious risk of non-compliance.[36]

44. The Applicant states that it would be more likely to be able to comply with the Awards (if they are not annulled) if the stay is maintained as this would allow time for it to complete the debt restructuring which would help it pay all creditors including, in that event, the Respondents.[37] In response to the Respondents' allegation that it has failed to comply with previous arbitral awards, the Applicant considers that its past conduct is irrelevant in the context of these stay proceedings, and in any event that its more recent conduct (including settlement of an outstanding ICSID award) demonstrates the likelihood of its compliance in this case.[38]

45. The Applicant further considers that its reengagement with the European Union ("**EU**"), along with its clearance of arrears to the International Monetary Fund ("**IMF**") and ongoing efforts with other international financial institutions ("**IFIs**") demonstrate its commitment to honoring the Awards if they are not annulled.[39]

(2) The Respondents' Position

46. The Respondents submit that a "consideration of the prospects of Zimbabwe complying with the Awards if they are not annulled is 'essential' to whether or not to continue the

[35] *See* Applicant's Post-Hearing Brief, para. 101.

[36] Memorial on Stay, paras. 101-109; Reply on Stay, paras. 221-222; Applicant's Skeleton Arguments on Stay, para. 172; Applicant's Post-Hearing Brief, Section 2.2.9, para. 112.

[37] Reply on Stay, para. 231; Applicant's Post-Hearing Brief, para. 61.

[38] Memorial on Stay, para. 59; Applicant's Post-Hearing Brief, paras. 47, 58.

[39] Applicant's Post-Hearing Brief, paras. 34-35; *see also* Memorial on Stay, paras. 61-95; Reply on Stay, paras. 200-210, 365; and Applicant's Skeleton Arguments on Stay, paras. 182, 189-191.

Stay."[40] According to the Respondents, the Applicant's assurances do not negate the risk of non-compliance because they "merely restate what a State is obligated to do under the ICSID Convention."[41]

47. The Respondents argue that Zimbabwe's record of non-compliance with ICSID awards and other international judgments demonstrates a serious risk of non-compliance with the Awards.[42] According to the Respondents, this is good evidence of the risk of non-compliance and the past informs the present because there has not been a change of government in Zimbabwe.[43]

48. The Respondents also point to Zimbabwe's strained relationship with the EU[44] and non-payment of its arrears to IFIs[45] as further evidence of the risk of non-compliance.

D. HARDSHIP TO THE APPLICANT IF THE STAY IS LIFTED

(1) The Applicant's Position

49. The Applicant alleges that it would "suffer immediate irreparable and/or catastrophic consequences should the stay be lifted."[46] More specifically, the lifting of the stay would cause "catastrophic immediate and irreversible consequences for Zimbabwe's ability to conduct its affairs during the course of these proceedings," including an inability to pay its costs of bringing them.[47]

[40] Respondents' Post-Hearing Brief, para. 65; *see also* Respondents' Skeleton Arguments on Stay, paras. 65, 75.

[41] Respondents' Post-Hearing Brief, paras. 80-81; *see also* Rejoinder on Stay, paras. 115-122.

[42] Counter-Memorial on Stay, paras. 90-91; Rejoinder on Stay, paras. 79-92; Respondents' Skeleton Arguments on Stay, paras. 46-50; Respondents' Post-Hearing Brief, paras. 67-73.

[43] Counter-Memorial on Stay, para. 90; Rejoinder on Stay, para. 64; Respondents' Skeleton Arguments on Stay, para. 45; Respondents' Post-Hearing Brief, para. 16.

[44] Respondents' Post-Hearing Brief, para. 75.

[45] Counter-Memorial on Stay, paras. 113-136; Rejoinder on Stay, paras. 102-114; Respondents' Skeleton Arguments on Stay, para. 53; Respondents' Post-Hearing Brief, para. 76.

[46] Applicant's Post-Hearing Brief, paras. 48(1) and 48(3); *see also* Applicant's Skeleton Arguments on Stay, para. 153.

[47] Applicant's Skeleton Arguments on Stay, paras. 153-156.

50. The Applicant argues that it would suffer the requisite hardship if the stay were lifted or if a financial guarantee equivalent to the amount owed under the Awards had to be paid, including several types of economic hardship:

    a. Zimbabwe has strained financial (foreign exchange) resources and the Awards debt, USD 210 million, is substantial;[48]

    b. The award debt constitutes over 5% of Zimbabwe's overall budget, over 25% of its education budget and over 60% of its healthcare budget;[49] and

    c. Having to pay or freeze the amounts due under the Awards would adversely impact on its ability to finalize its debt restructuring with the EU, the IMF and the World Bank.[50]

51. According to the Applicant, the impact of the Awards is particularly significant for Zimbabwe, a country with a small economy that has been subjected to sanctions over the last fifteen years. It is therefore not a consequence that would arise in each and every annulment proceeding.[51]

52. The Applicant contends that if the stay were lifted, it would be required to make restitution of the properties and, if the properties ended up being held in the hands of a complex VPB structure or third party that would likely be difficult to localize, Zimbabwe would be unable to recover them if the Awards were annulled.[52]

(2) The Respondents' Position

53. The Respondents argue that the Applicant's alleged hardship is in fact an "enforcement hardship" and premised on the assumption that the VPBs will have to take enforcement action. According to the Respondents, the Applicant is effectively asking for the

[48] Applicant's Skeleton Arguments on Stay, para. 153; Applicant's Post-Hearing Brief; para. 56.
[49] Reply on Stay, para. 333; Applicant's Post-Hearing Brief, paras. 53-55, 80.
[50] Reply on Stay, paras. 240-241, 358.
[51] Applicant's Post-Hearing Brief, paras. 62-63.
[52] Applicant's Post-Hearing Brief, para. 81; *see also* Memorial on Stay, paras. 26-37.

Committee to protect it from a consequence of its own failure to make payment as required under the ICSID Convention.[53]

54. The Respondents contest the percentages provided by the Applicant as to the relationship between the amount awarded and Zimbabwe's overall budget[54] and contend that the Applicant would not have to pay its Award debts from its education and healthcare budgets,[55] but could instead use funds designated for other expenses, such as the President's and Vice-President's salaries.[56]

55. The Respondents further state the amount of the Awards is too small a portion of Zimbabwe's debt for the payment of the amounts due under the Awards to affect its debt restructuring negotiations with the IFIs.[57] According to the Respondents, the IFIs to the contrary want Zimbabwe to meet its obligations under the Awards so it should not be trying to avoid them by seeking the continuation of the stay.[58]

56. The Respondents contend that, in any event, poverty alone does not suffice as hardship,[59] and that any economic hardship suffered as a result of lifting the stay is irrelevant where there is a serious risk of non-compliance with the award, which is the case here.[60]

57. The Respondents argue that there is in fact no prospect of the Applicant having to make restitution of the properties if the stay were lifted, because the 90-day period in which Zimbabwe had the opportunity to make restitution of this property – instead of paying compensation – has expired.[61] The Respondents also argue, citing the *Mitchell* decision on the stay of enforcement, that the risk of non-recoupment cannot justify a continuation

[53] Respondents' Post-Hearing Brief, paras. 97-98.
[54] Rejoinder on Stay, paras. 146-148; Respondents' Skeleton Arguments on Stay, para. 63.
[55] Rejoinder on Stay, paras. 123-153.
[56] Rejoinder on Stay, paras. 154-155.
[57] Respondents' Skeleton Arguments on Stay, para. 72.
[58] Tr. Day 1, pp. 236:21-237:20.
[59] Respondents' Skeleton Arguments on Stay, para. 64; Respondents' Post-Hearing Brief, para. 103.
[60] Respondents' Skeleton Arguments on Stay, paras. 65, 75.
[61] Respondents' Post-Hearing Brief, paras. 68-69, 88-90.

of a stay on its own.[62] The Respondents contend that a restitution hardship, even if established, would only justify the partial continuation of the stay (in particular, the part of the stay preventing the VPBs from seeking title to the properties), not the whole of the stay and that the Committee has discretion under ICSID Convention to only partially lift the stay.[63]

58. According to the Respondents, much of the hardship being alleged by the Applicant would arise as a result of its own actions in breach of its international obligations and that this hardship should be ignored for the purposes of deciding whether or not the stay should be maintained in line with the principle that no State should benefit from its own wrongdoing.[64]

E. PREJUDICE TO THE RESPONDENTS IF THE STAY IS MAINTAINED WITHOUT SECURITY

(1) The Applicant's Position

59. The Applicant submits that the Respondents will not be prejudiced by the continuation of the stay other than by a delay which is incidental to the ICSID Convention's system of annulment.[65]

60. The Applicant argues that any financial prejudice suffered by the Respondents as a result of the continuation of the stay would be automatically remedied by the payment of interest if the Annulment Applications turn out to be unsuccessful.[66] According to the Applicant, this undermines the Respondents' claim for the posting of security.[67]

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[62] Respondents' Post-Hearing Brief, paras. 87, 91 (citing ZALEX-064, *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award dated 30 November 2004 ("*Mitchell*"), para. 28).

[63] Respondents' Post-Hearing Brief, para. 92.

[64] Rejoinder on Stay, para. 143; Respondents' Skeleton Arguments on Stay, paras. 70, 74.

[65] Applicant's Skeleton Arguments on Stay, paras. 158, 168-169; Reply on Stay, para. 247; Memorial on Stay, para. 148; Applicant's Post-Hearing Brief, para. 99.

[66] Respondents' Post-Hearing Brief, para. 158; Memorial on Stay, para. 148; Reply on Stay, para. 271(iv).

[67] Applicant's Skeleton Arguments on Stay, para. 167 (citing ZALEX-068, *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award dated 30 September 2013, paras. 58-59).

61. The Applicant also considers that the Respondents cannot suffer any prejudice as a result of the continuation of the stay when they are still on the properties and using them for their own benefit.[68]

(2) The Respondents' Position

62. According to the Respondents, "a continuation of the Stay will in fact cause the VPBs substantial and irreparable prejudice,"[69] including pushing the VPBs further back in the line of creditors and limiting the range of assets available for the VPBs to enforce against by pushing back the time at which the VPBs may seek the payment of the amounts due under the Awards;[70] the serious risk that Zimbabwe will not comply with the Awards;[71] and preventing the VPBs from recovering the amounts due under the Awards before the health of one of the members of the Respondents' family deteriorates further.[72]

63. According to the Respondents, interest is not always sufficient, especially where there are very grave breaches of public international law (as in this case) and the dispute is protracted (as in this case).[73] Moreover, the Respondents contend that the prejudice of any continuation of the stay would not be remedied by the continued accrual of interest (at the six-month USD LIBOR rate plus 2%, compounded every six months) "because the VPBs could receive significantly higher rates of return if the Awards are paid now."[74]

64. In the Respondents' view, even if they were not prejudiced by a continuation of the stay, this does not mean that it should be maintained.[75]

[68] Memorial on Stay, paras. 150-152; Reply on Stay, para. 271; Applicant's Skeleton Arguments on Stay, para. 159.

[69] Respondents' Post-Hearing Brief, para. 106.

[70] Respondents' Post-Hearing Brief, para. 109.

[71] Respondents' Post-Hearing Brief, para. 108.

[72] Respondents' Post-Hearing Brief, para. 15.

[73] Counter-Memorial on Stay, paras. 184-186; Respondents' Skeleton Arguments on Stay, para. 79.

[74] Respondents' Post-Hearing Brief, para. 113; Respondents' Skeleton Arguments on Stay, para. 83; Rejoinder on Stay, para. 172; Counter-Memorial on Stay, paras. 195-199.

[75] Respondents' Post-Hearing Brief, para. 107.

65. In response to the Applicant's argument that the VPBs are in possession of the properties, the Respondents contend that "delayed payment is not remedied by the VPBs' *de facto* continued use of the properties because: (i) the time for Zimbabwe to make the Restitution has already expired, such that the VPBs derive no benefit from that use; (ii) Border Timbers Limited is in Judicial Management and therefore the VPBs no longer have the benefit of the properties owned through it; (iii) large amounts of the properties are occupied and are therefore unusable; and (iv) the businesses cannot be used to raise finance because they no longer own the land because Zimbabwe expropriated it (as established in the Awards)."[76]

F. THE REQUIREMENT OF SECURITY IF THE STAY IS MAINTAINED

(1) The Applicant's Position

66. The Applicant submits that there is no requirement in the ICSID Convention that security be provided as a condition for a stay and argues that security – like all conditions imposed on the maintenance of a stay – should only be ordered in "exceptional circumstances," which are not present in this case.[77]

67. The Applicant points out that the provision of a bank guarantee would in fact put the Respondents in a better position than they would be if annulment had not been sought, since it converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids sovereign immunity from execution being invoked.

68. The Applicant disagrees that it bears the burden of proving that a security is not required, citing *Azurix* and arguing that it is the claimant in the underlying arbitration (the Respondents in this proceeding) who must make out the case that security is required.[78]

[76] Respondents' Post-Hearing Brief, para. 112.

[77] *See*, *e.g.*, Applicant's Post-Hearing Brief, paras. 13-14, 24, Section 2.2.3 (introductory table).

[78] Applicant's Post-Hearing Brief, para. 41(1) (citing ZALEX-066, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award dated 28 December 2007 ("*Azurix*"), para. 37; Applicant's Skeleton Arguments on Stay, para. 195 (citing *Azurix*, paras. 37, 44 ff).

The Applicant also denies any risk of non-compliance,[79] or that security would be necessary to offset a prejudice suffered by the Respondents if the stay were maintained.[80]

69. The Applicant further submits that security should not be ordered because doing so would cause Zimbabwe great hardship. It points to the substantial costs in freezing assets for a continuing period of time,[81] and the fact that this would limit its ability to conduct the annulment proceedings.[82]

(2) The Respondents' Position

70. The Respondents submit that, if the stay is maintained, Zimbabwe should be ordered to provide security for payment of the amounts due under the Awards.[83]

71. The Respondents dispute that exceptional circumstances are required for posting a security, and that, in any event, such circumstances exist in this case, in particular because Zimbabwe has a history of non-payment and there is a serious risk of non-compliance.[84] Indeed, a risk of non-compliance is in itself enough to make the ordering of security necessary if the stay is maintained.[85]

72. The Respondents also dispute the Applicant's argument that they bear the burden of proof; on the contrary, it is for the Applicant to show why security should not be ordered if the stay is maintained.[86]

73. The Respondents dispute that they would be put in a better position if security were required. According to the Respondents, they would only be put in a better position relative

[79] *See* Section II.C above.

[80] Applicant's Skeleton Arguments on Stay, para. 169; *see also* Section II.E above.

[81] Reply on Stay, paras. 351-355; Applicant's Skeleton Arguments on Stay, paras. 175-176.

[82] Memorial on Stay, paras. 114, 135; Reply on Stay, para. 255; Applicant's Skeleton Arguments on Stay, paras. 164-165; *see also* above para. 49.

[83] Memorial on Stay, para. 129; Reply on Stay, paras. 253-254; Applicant's Post-Hearing Brief, para. 38, Section 2.2.12.

[84] Respondents' Post-Hearing Brief, para. 117.

[85] Respondents' Post-Hearing Brief, para. 119; Respondents' Skeleton Arguments on Stay, para. 88.

[86] Respondents' Post-Hearing Brief, para. 117.

to a situation in which Zimbabwe plans to assert its sovereign immunity in order to avoid paying the amounts required under the Awards – a situation that the Committee cannot legitimately use as a basis for comparison.[87]

74. The Respondents reject Zimbabwe's allegation that it would suffer hardship if ordered to pay security for the same reasons they reject the claims that Zimbabwe would suffer hardship if the stay were lifted.[88] The Respondents argue that Zimbabwe would only be "penalized" by having to pay security if it did not intend to comply with the Awards, which cannot be a valid reason not to provide security.[89]

III. THE *AD HOC* COMMITTEE'S ANALYSIS

75. The relevant provision of the ICSID Convention governing an *ad hoc* committee's decision on stay of enforcement is Article 52(5) of the ICSID Convention. According to this provision, "[t]he Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision."

76. The procedure for dealing with requests for continuation of stay is set out in Rule 54 of the ICSID Arbitration Rules. Rule 54 provides:

> "(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.
>
> (2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule

[87] Counter-Memorial on Stay, paras. 92.3, 210-216; Rejoinder on Stay, paras. 175-176; Respondents' Skeleton Arguments on Stay, para. 87; Respondents' Post-Hearing Brief, para. 118.

[88] Respondents' Post-Hearing Brief, para. 120; *see* Section II.D above.

[89] Counter-Memorial on Stay, para. 230.

> within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall be automatically terminated.
>
> (3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).
>
> (4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.
>
> (5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification."

77. The Parties agree that ICSID *ad hoc* committees have discretion in determining whether or not to continue a stay of enforcement of an ICSID award; this is reflected in the term "may" in Article 52(5) of the ICSID Convention: "The Committee **may,** if it considers that the circumstances so require, stay enforcement of the award pending its decision" (emphasis added). In other words, an ICSID *ad hoc* committee may or may not stay enforcement of an award, depending on the circumstances.

78. The Committee notes, at the outset, that the language of Article 52(5) of the ICSID Convention is open-ended in the sense that it does not specify the "circumstances" to be taken into account in determining whether or not a stay is required. However, it is apparent from the context that such circumstances must be relevant to the case, and that they must "require" a stay. In other words, not just any circumstances, even if relevant to the case, may justify a stay; the circumstances must be sufficiently compelling so as to "require" a

stay. This is how ICSID *ad hoc* committees have understood the terms of Article 52(5) of the ICSID Convention:

> "Based on the plain language of the ICSID Convention and Arbitration Rules on annulment, it is clear to the Committee that a continued stay of enforcement of the award is not, in any event, automatic. Pursuant to article 52(5) of the ICSID Convention, a continued stay is dependent on the specific circumstances of the case. Indeed, to order the continuation of the provisional stay, the Committee must be convinced that within the context of the case at hand such continuation is required. … The Committee also notes that Article 52(5) of the ICSID Convention provides that the stay shall only be continued if the Committee considers that 'the circumstances so **require**.' The Convention does not use other less categorical verbs, such as 'recommend,' 'deserve,' 'justify' or similar words, but resorts to the imperative verb 'require.'"[90]

79. The Applicant's case is that there is a principle that flows from ICSID case law that there must be "exceptional circumstances" to lift a stay of enforcement. According to the Applicant, the relevant question therefore is not whether there are circumstances that require continuation of the stay, but rather whether there are circumstances that require the lifting of the stay.

80. The Committee is unable to agree with the Applicant's position, which is incompatible with the language of Article 52(5) of the ICSID Convention, as set out above. It is for the party requesting continuation of the stay to establish that there are circumstances that require such continuation; it is not for the counterparty to show that there are "exceptional circumstances" that require the lifting of the stay.[91] The fact that under Rule 54(2) of the

[90] VPBLEX-039, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Paraguay's Request for the Continued Stay of the Enforcement of the Award dated 22 March 2013, paras. 82, 87 (emphasis in original). *See also* VPBLEX-042, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award dated 4 April 2016 ("*OI European Group*"), para. 89 ("The aforementioned provisions of the ICSID Convention and the ICSID Arbitration Rules lead this *ad hoc* Committee to a fundamental conclusion, set forth at the outset, that the continuation of the stay of enforcement in the ICSID system is far from automatic. ICSID Convention Article 52(5) provides that the stay shall continue if an *ad hoc* committee considers that 'the circumstances so require.' Said article does not use other less categorical verbs, such as 'recommend,' 'deserve,' 'justify' or similar words, but resorts to the imperative verb 'require.'")

[91] *See, e.g.*, VPBLEX-037, *Ioannis Kardassapoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB0/07/15, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award dated 12 November 2010

ICSID Arbitration Rules, if an application for annulment contains a request for stay of enforcement of the award, enforcement is provisionally stayed pending the decision of an *ad hoc* committee on whether or not the stay should be continued, does not create a presumption in favor of continuation. Nor does the fact that according to Rule 54(2) of the ICSID Arbitration Rules "either party" (*i.e.,* either the applicant or the respondent) may request an *ad hoc* committee to rule on whether or not a provisional stay should be continued, create any presumption in favor of continuation of the stay; it merely means that it is for the requesting party – whether the applicant or the respondent – to establish that the stay should be continued, or that it should be terminated, as the case may be.

81. Moreover, while there are decisions of ICSID *ad hoc* committees that contain language that appears to support the Applicant's argument of a presumptive stay, on a careful reading those decisions have also turned on the issue of whether the requesting party has established that there are circumstances that require continuation of the stay. Thus, in *Azurix* (the case primarily relied upon by the Applicant), the *ad hoc* committee "confirm[ed] its determination that, for the reasons submitted by Argentina, the circumstances require a stay of enforcement of the Award pending its decision on the annulment application."[92] The Committee notes that the Applicant's counsel accepted at the Hearing that it is indeed for the Applicant to establish the relevant circumstances, and that the Applicant has also submitted argument to this effect in its written and oral submissions.[93]

82. The Applicant submits that the continuation of the stay is required for a number of reasons, including *inter alia* because the Annulment Application presents a *prima facie* case for

("*Kardassapoulos*"), para. 26 ("Stay of enforcement during the annulment proceeding is by no way automatic, quite to the contrary, a stay is contingent upon the existence of relevant circumstances which must be proven by the Applicant.")

[92] *Azurix*, para. 21.

[93] Tr. Day 1, Applicant's Opening Statement, 73:1-24 ("[MR. KIMBROUGH:] So it's clear there's nothing automatic. And I think I have used the words later that it's not automatic for us; I don't think it's automatic for them. But the phrase technically is worded in such a way that you may, if the circumstances require, stay. So that means that clearly we have to establish circumstances that require. We believe we've done that…So the reasons there are the direct elements that we bring forward as the reasons that this Committee should continue the stay. So we accept that if these reasons were made up or not serious, that you would not grant the stay.")

annulment; because the right to institute annulment proceedings "constitutes a fundamental right under the ICSID Convention;" because the seizing of its assets by the Respondents would cause "irreparable injury" to the Applicant, even if they were eventually returned; and because termination of the stay would lead to "catastrophic immediate and irreversible consequences for Zimbabwe's ability to conduct its affairs during the course of the proceedings," due to its "strained foreign exchange resources," and would also deprive it of its ability to pay the costs related to these proceedings.[94]

83. Having carefully considered the record before it, the Committee is not satisfied that the Applicant has proven that the circumstances require the continuation of the stay of enforcement of the Award. While the Applicant argues that the lifting of the stay would cause irreparable injury to it, it has not explained how this concern is specific to the lifting of the stay, as opposed to compliance with the Award in the event the Award is not annulled. Indeed, the Applicant has confirmed its intention to pay the Award if the Annulment Application is rejected, which implies that the payment of the Award would not have consequences that would have "catastrophic immediate and irreversible consequences for [Zimbabwe's] ability to conduct its affairs."[95]

84. Nor is there any evidence before the Committee that the lifting of the stay, in itself, would cause irreparable damage to the Applicant. More specifically, there is no evidence that would show that "the termination of the stay would necessarily result in the deductions from the specific budgetary items involving the 'people's needs' that the Applicant cites as the basis for its claimed irreparable harm, as opposed to deductions, if any, from other budgetary items."[96] While the Committee accepts that, on a general level, Zimbabwe's strained public finances are a matter of public knowledge, this in itself is not a sufficient

[94] Applicant's Post-Hearing Brief, paras. 42-43.

[95] VPBLEX-020, *Maritime International Nominees Establishment (MINE) v. Guinea*, ICSID Case No, ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award dated 12 August 1988 ("*MINE*"), para. 27.

[96] *OI European Group B.V.*, para. 119.

reason to support, let alone establish, a request for continuation of a stay. As noted by the *ad hoc* committee in *MINE*, and confirmed by other *ad hoc* committees,

> "'[p]overty as such is not a circumstance justifying a stay any more than it would justify non-payment of an award. The criterion is, rather, whether termination of the stay would have what Guinea calls 'catastrophic' immediate and irreversible consequences for its ability to conduct its affairs."[97]

85. At the hearing, the Applicant's counsel specified that the irreparable consequences that the Applicant was referring to are primarily "those that frustrate the fundamental right to pursue annulment," *i.e.*, the effect that parallel enforcement proceedings would have on "the serenity of the judicial process we are in now, the annulment proceedings, by these extraneous factors."[98] While the Applicant provided some examples of how ongoing enforcement proceedings could affect its participation in the present annulment proceedings, the Applicant has failed to explain how this would amount to irreparable damage; nor has it provided any evidence to demonstrate that it would be unable to finance the present annulment proceedings or its participation therein.

86. Nor is there any concrete evidence before the Committee that the lifting of the stay would jeopardize Zimbabwe's debt restructuring process, and in any event, in the Committee's view this would not be a sufficient reason to maintain the stay of enforcement of the Award. It also seems unlikely that the debt restructuring process, which appears to be at a relatively early stage of re-engagement with the IFIs, could be completed during the pendency of these annulment proceedings, so as to have any effect on Zimbabwe's ability to pay the Award.

87. In the circumstances, the Applicant having failed to establish that the circumstances of the case require the stay of enforcement of the Award, there is no need for the Committee to consider whether a security should be ordered as a condition for continuation of the stay.

[97] *MINE*, para. 27. *See also Kardassapoulos*, para. 44; VPBLEX-024, *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Whether or Not to Continue Stay and Order dated 14 July 2004, para. 21.

[98] Tr. Day 1, Applicant's Opening Argument, 27:22-28:11. The Applicant also confirmed, in response to a question from the Committee, that there would be "economic harm." Tr. Day 1, Mr Kimbrough, 77:8-78:12.

Nor is there any need in the circumstances to consider the Respondents' argument that the Annulment Application is dilatory and that, therefore, the Applicant's request for continuation of the stay should be dismissed on this basis alone.

88. Having reached this conclusion that the circumstances of the case do not require the continuation of the stay of enforcement of the Award, the Committee will turn to the question of the implications of its decision. In this connection, the Committee recalls that the Award provides for the restitution of the properties specified in paragraph 1020.1 of the Award and in the Tables referred to therein (the "**Claimed Properties**") within 90 days of the dispatch of the Award (the "**Restitution Window**") and, in addition, for payment of compensation in the amount specified in paragraph 1020.2 of the Award or, in the alternative, if restitution is not made in full within the Restitution Window of 90 days, for compensation in the higher amount specified in paragraph 1020.3 of the Award.

89. The Respondents argue that the 90-day period has already expired and that therefore upon termination of the stay, restitution is no longer available. According to the Respondents, the date on which the stay of enforcement took effect is the date of registration of the Annulment Application, *i.e.* 2 November 2015, which is more than 90 days after the dispatch of the Award, 28 July 2015.[99] The Respondents rely in support of their position on the *Kardassopoulos* decision, which in the Respondents' submission confirmed that the relevant date in this connection is the date of registration.[100] The Applicant argues, by contrast, that the date on which the stay of enforcement took effect is not the date of registration, but the date on which the complete Annulment Application was received by the ICSID Secretariat; and as this date was 23 October 2015,[101] it was before 26 October 2015, *i.e.* the date on which the 90-day period expired.[102]

[99] Tr. Day 1, Respondents' Opening Statement, 131:11, 132:16.

[100] Tr. Day 1, Respondents' Opening Statement, 220:23, 221:18.

[101] The Applicant submitted its Annulment Application on 21 October 2015, followed by the transmission of the supporting documents on 22 and 23 October 2015. ICSID acknowledged receipt of the complete copy of the Annulment Application on 23 October 2015.

[102] Tr. Day 1, Applicant's Opening Statement, 18:20, 19:16.

90. Thus the question arises whether the termination of the provisional stay of enforcement results in the resumption of the Applicant's obligation to restitute the Claimed Properties, together with the obligation to pay the related (lower) amount of compensation, or whether the Restitution Window has already closed and, accordingly, whether the obligation to compensate in the higher amount specified in paragraph 1020.3 of the Award would become applicable.

91. The Committee notes, at the outset, that it is unable to agree with the Respondents' argument that the *Kardassopoulos* decision provides authority to determine that the date on which the stay of enforcement took effect is the date of registration of an annulment application. The passage of the decision on which the Respondents rely, and which appears to imply that, in that case, the provisional stay took effect on the date of registration of the annulment application, is contained in the part of the decision dealing with the procedural history of the annulment proceedings, and it is apparent from the context that it does not contain any findings of the *ad hoc* committee.[103]

92. In examining this issue, the Committee notes that, while Article 52 of the ICSID Convention and ICSID Arbitration Rule 50 define the requirements for registration of an annulment application, neither the ICSID Convention nor the ICSID Arbitration Rules specifically address the issue as to when the provisional stay of enforcement takes effect. As noted above, Article 52(5) of the ICSID Convention merely provides that, "[i]f the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request." Similarly, ICSID Arbitration Rule 54(2) merely provides that the Secretary-General shall inform both parties of the provisional stay of enforcement together with the notice of registration of the annulment application, but again does not address the issue of the date of effect. The Explanatory Notes that were published with the ICSID Regulations and Rules of 1968 confirm that, in accordance with Article 52(5) of the ICSID Convention, "the Secretary-General […] has no discretion as to the granting or the refusal of the stay of enforcement

[103] *See Kardassapoulos*, para. 3.

of an award."[104] The Explanatory Notes further clarify that if the Secretary-General "refuses to register an application for lack of timeliness […] then no stay of enforcement can be based on that application."[105]

93. In the circumstances, the Committee considers that, if the Secretary-General refuses to register an annulment application because it does not meet the relevant requirements of the ICSID Convention and the ICSID Arbitration Rules, enforcement of the award is not provisionally stayed, even if the annulment application contains a request for a provisional stay of enforcement. In other words, a provisional stay of enforcement is always subject to the registration of the annulment application which contains it. However, it does not necessarily follow that, if an annulment application meets the relevant requirements and is registered, a provisional stay of enforcement must be considered to have taken effect from the date of registration; this would imply that the lapse of time between the date of filing and the date of registration of an annulment application would fall exclusively on the applicant's account, even if the applicant has no control over the registration process.

94. Based on these considerations, the Committee concludes that a provisional stay of enforcement must be considered to take effect from the date of filing with the ICSID Secretariat of an annulment application, subject to its subsequent registration by the ICSID Secretariat. If the ICSID Secretariat finds that an annulment application complies with the relevant requirements under the ICSID Convention and the ICSID Arbitration Rules and registers it, any request for a provisional stay of enforcement of an award contained with it must be considered to have taken effect from the date of receipt by the ICSID Secretariat of the annulment application or, if the initial filing was not complete, from the date of receipt by the ICSID Secretariat of the complete annulment application. In the present case, this date is 23 October 2015, which is the date when the ICSID Secretariat

[104] See Note C to Arbitration Rule 54 of the annotated notes to the ICSID Regulations and Rules, 1968, Doc. ICSID/4/Rev. 1.

[105] *Ibid.*

acknowledged receipt of the remaining documents supporting the Applicant's Annulment Application, which the Secretariat had received two days earlier, on 21 October 2015.

95. Accordingly, the Committee finds that the Restitution Window cannot be considered as having closed, and that the provisional stay of enforcement took effect within the 90-day period envisioned in the Award.

96. Having concluded that the lifting of the stay will also apply to the Applicant's obligation to restore the Claimed Properties in accordance with paragraph 1020.1 of the Award, the Committee must determine the date on which the Restitution Window will close. The Committee has carefully considered the issue, including in view of its findings regarding the non-recoupment risk as set out below, and finds that the entire 90-day Restitution Window must be considered as being reinstated as a result of the lifting of the stay of enforcement and that, accordingly, the 90-day period within which the Applicant is to comply with its restitution obligation should start running from the date of dispatch of this Decision to the Parties. The Committee notes that a contrary conclusion would effectively penalize the Applicant for the exercise of its right to seek annulment of the Award, which would not be in accordance with the letter and spirit of Article 52 of the ICSID Convention.[106] In reaching this conclusion, the Committee is mindful of the unusual circumstances of this case, which involves not only an obligation to reinstate the Claimed Properties, but also an alternative obligation relating to the amount of compensation awarded.

97. As to the risk of non-recoupment of the collected amounts in the event the Award is annulled, while the Parties do not agree that there is such a risk, the Respondents suggest that any risk of non-recoupment can be eliminated by way of an appropriate escrow arrangement. Accordingly, the Respondents have indicated in their written submissions and again confirmed at the Hearing that they would be willing to place any funds paid

[106] It would be unreasonable to count the time spent by an applicant preparing its annulment application against the applicant when that time was well within the window provided under Article 52(2), as this would effectively result in imposing an obligation on an applicant to enforce an award while preparing a challenge of the award and a request for provisional stay.

under the Award in an escrow account pending the outcome of these annulment proceedings. The Respondents note that "[p]revious *ad hoc* committees have regarded such arrangements as sufficient to 'effectively eliminate[]' any risk of possible non-recoupment."[107]

98. The Committee agrees that, in the circumstances of this case, an escrow arrangement would appropriately balance the Parties' legitimate interests pending the completion of these annulment proceedings. Accordingly, the Committee directs the Parties to engage in discussions with a view to agreeing on an appropriate escrow arrangement. The Committee will provide the necessary procedural directions in due course by separate procedural order.

[107] Respondents' Skeleton Arguments on Stay, para. 61 (citing VPBLEX-031, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award dated 5 March 2009, para. 83).

IV. DECISION

99. For the reasons set forth above, the Committee decides as follows:

(1) The Applicant's request for the continued stay of the enforcement of the Award rendered on 28 July 2015 is rejected;

(2) The provisional stay is lifted as of the date of this Decision;

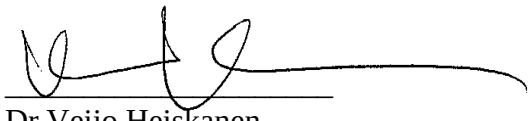
(3) The Applicant has 90 days as of the date of dispatch of this Decision to comply with paragraph 1020.1 of the Award;

(4) Any funds paid by the Applicant or collected by the Respondents in consequence of the Award, and any documents establishing title to the Claimed Properties, be placed in escrow until the conclusion of these annulment proceedings;

(5) The Parties are directed to engage in discussions with a view to agreeing on an appropriate escrow arrangement; and

(6) The decision on the allocation of costs is reserved until the conclusion of these annulment proceedings.

On behalf of the *ad hoc* Committee



Dr Veijo Heiskanen
President of the *ad hoc* Committee
Date: 24 April 2017