ICSID Annulment Committee Confirms Award Against Zimbabwe

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Overview

I. OVERVIEW AND SHORT SUMMARY

1. On 21 November 2018, an Annulment Committee constituted under the ICSID Convention dismissed Zimbabwe’s application to annul the award of US$195 million issued against it on 28 July 2015 in the case of Bernhard von Pezold and Others v Zimbabwe, ICSID Case No. ARB/10/15. In its annulment application, Zimbabwe argued that the original Tribunal denied it the right to be heard, and was partial as evidenced by its conduct at the oral hearing and due to the fact that the President of the Tribunal was also the Chair of the World Bank Sanctions Board. The Annulment Committee held as follows. The Tribunal gave Zimbabwe ample opportunity to be heard; the parties do not have a right to an unlimited opportunity to be heard. The President of the Tribunal disclosed during the arbitration his position as the Chair of the Sanctions Board, but Zimbabwe failed to act on that information before the arbitration proceeding closed and therefore waived its right to do so. The Committee also noted that, in any event, the Sanctions Board cannot sanction States and that the Sanctions Board had not applied any sanctions to World Bank projects in Zimbabwe. There was no evidence on the record to indicate that the Tribunal had been partial and indeed at the end of the arbitration hearing, when asked by the President, Zimbabwe confirmed that it had had its day in court and had been treated fairly.

II. BACKGROUND

2. Pursuant to the award, Zimbabwe was found to have breached the bilateral investment treaties that it has with each of Germany and Switzerland when it expropriated the von Pezolds’ property in 2005 pursuant its Land Reform Programme, and also treated the von Pezolds unfairly and inequitably in regard to their foreign exchange earnings. The most significant finding of the award was that Zimbabwe expropriated the von Pezolds’ property because of the colour of their skin. The award ordered Zimbabwe to return the expropriated properties and to pay damages within ninety days of the award, and in the event that Zimbabwe failed to return the properties, to pay damages of US$195 million plus interest and costs. Zimbabwe did not return the properties, and therefore US$195 million plus costs and interest is due.

III. THE ANNULMENT DECISION

3. In October 2015, Zimbabwe applied to have the award annulled on the following eight grounds, which were dismissed by the Annulment Committee for the following reasons.
4. General findings: The grounds of annulment in Article 52 of the ICSID Convention are exclusive and the applicant carries the burden of proof in establishing any of the annulment grounds. Annulment is an extraordinary remedy and not an appeal from the legal or factual findings of the arbitral tribunal; the object is not to test the substantive correctness of the award. Annulment can only be successful if there is a fundamental flaw in the award, or in the proceeding that led to the award, that falls under one or more of the annulment grounds in Article 52. It is not the function of an ICSID annulment committee to review the factual findings of the tribunal or its decision on the merits. Pursuant to Arbitration Rule 34(1), it is the tribunal, and not the ICSID annulment committee, that is the judge of the admissibility of evidence and its probative value. 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 reargue the case on the merits.

5. Zimbabwe’s First Ground was that, in breach of Article 52(1)(d) of the ICSID Convention, the Tribunal committed a serious departure from a fundamental rule of procedure by allegedly denying Zimbabwe the right to be heard in regard to Zimbabwe’s allegation that the von Pezolds’ investments were illegal. In particular, that the Tribunal did not permit Zimbabwe to make that allegation in its final (additional) pleading. The Annulment Committee dismissed this Ground, finding that the Tribunal gave Zimbabwe numerous opportunities to plead its case on illegality out of time in additional pleadings, beyond the usual two per party, but Zimbabwe failed to do so despite having all of the relevant information available to it. Therefore, it was reasonable for the Tribunal not to permit Zimbabwe to raise new arguments on illegality in its final (additional) pleading. 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. Further, Zimbabwe could not raise arguments on illegality in the annulment proceedings that were not raised in admissible pleadings in the arbitration proceedings.

6. Zimbabwe’s Second Ground was that, in breach of Article 52(1)(d) of the ICSID Convention, the Tribunal committed a serious departure from a fundamental rule of procedure by reason of the President of the Tribunal (Mr Yves Fortier) allegedly failing to disclose his role as Chair of the World Bank Sanctions Board until 31 October 2013 (during the oral hearing), when he had held that position since May 2012. The Annulment Committee noted that the Sanctions Board has no jurisdiction to impose sanctions on States and that no sanctions have been imposed by the Sanctions Board in connection with any World Bank projects in Zimbabwe. The Annulment Committee also considered that Zimbabwe’s case appears to be that any position involving sanction powers 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. The Annulment Committee considered that this was a broad proposition, and was certainly not one that Zimbabwe had demonstrated would create a prima facie basis for disqualification. In any event, Zimbabwe never made an application to disqualify Mr Fortier under Article 57 of the ICSID Convention before the arbitral proceedings closed (as required by Arbitration Rule 9(1), if it wished to do so) despite being informed by Mr Fortier of his position at the Sanctions Board before the proceedings closed. The Annulment Committee rejected Zimbabwe’s argument that a proposal for disqualification during the period between the hearing and the close of proceedings would have been futile. Therefore, further to Arbitration Rule 27, Zimbabwe was held to have waived its right to challenge Mr Fortier. As such, the Second Ground was dismissed.

7. Zimbabwe’s Third Ground was that, in breach of Article 52(1)(a) of the ICSID Convention, the Tribunal was not properly constituted by reason of Mr Fortier’s alleged partiality. The Third Ground was based on the same facts as the Second Ground. Zimbabwe alleged that Mr Fortier not only was perceived as being partial as a result of his position at the World Bank Sanctions Board, but he also acted de facto in a partial manner, in particular during the hearing. The Annulment Committee held that, in so far as Zimbabwe relied in support of this ground on the mere fact of Mr Fortier’s position at the Sanctions Board, pursuant to Arbitration Rule 27, Zimbabwe had waived its right to challenge Mr Fortier for the same reasons as given under the Second Ground. Further, the Committee could not see Mr Fortier’s conduct during the arbitration proceedings, including the hearing, any evidence of lack of impartiality; it noted that Zimbabwe had itself confirmed at the end of the hearing that it had had its day in court and had been treated fairly. Therefore, the Third Ground was dismissed.

8. Zimbabwe’s Fourth Ground was that, in breach of Article 52(1)(d) of the ICSID Convention, the Tribunal committed a serious departure from a fundamental rule of procedure by reason of the President of the Tribunal (Mr Yves Fortier) allegedly failing to disclose his role as Chair of the World Bank Sanctions Board. The Annulment Committee held that it need not take a view on whether or not Mr Fortier was required to disclose his position at the Sanctions Board because, in any event, Mr Fortier did disclose his position during the arbitration. Zimbabwe had not been 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. Thus, Zimbabwe had an opportunity to be heard, but it did not use that opportunity. Therefore, the Fourth Ground was dismissed.

9. Zimbabwe’s Fifth Ground was that, in breach of Article 52(1)(b) of the ICSID Convention, the Tribunal manifestly exceeded its powers by applying customary international law and Zimbabwean law when deciding on Zimbabwe’s necessity defence and thus failed to apply Ad Article 3(a) of the Protocol to the Germany-Zimbabwe BIT and Articles 7(1) and 7(2)(b) of the Switzerland-Zimbabwe BIT. The Annulment Committee held that a review of Zimbabwe’s pleadings and the award established that Zimbabwe’s Fifth Ground must fail.
10. Zimbabwe’s Sixth Ground was that, in breach of Article 52(1)(b) of the ICSID Convention, the Tribunal manifestly exceeded its powers by failing to apply the applicable law to the illegality defence. The Annulment Committee held that the law which Zimbabwe alleged was not applied (that concerning exchange control) was never raised by Zimbabwe in an admissible pleading during the arbitration and therefore the Sixth Ground must fail.

11. Zimbabwe’s Seventh Ground was that, in breach of Article 52(1)(b) of the ICSID Convention, the Tribunal manifestly exceeded its powers by wrongly characterising Zimbabwe’s illegality defence as an objection to admissibility rather than jurisdiction. The Annulment Committee noted that in the arbitration Zimbabwe characterised its illegality defence as an objection to admissibility rather than jurisdiction, and the Tribunal treated it accordingly while at the same time acknowledging that it was immaterial whether it was characterised as going to jurisdiction or admissibility. Given the position that Zimbabwe had taken in the arbitration, it could not now seek to contradict it. In any event, Zimbabwe had failed to show or indeed argue how characterising Zimbabwe’s illegality argument as an objection to jurisdiction rather than admissibility would have resulted in a different outcome, or that the alleged excess of jurisdiction was manifest. Therefore, the Seventh Ground was dismissed.

12. Zimbabwe’s Eighth Ground was that, in breach of Article 52(1)(e) of the ICSID Convention, the Tribunal failed to state the reasons on which the award was based in that it did not address Zimbabwe’s illegality argument. However, the Annulment Committee held that Zimbabwe had failed on a threshold issue since it had failed to refer to Article 52(1)(e) in its annulment application in the first place. Therefore, in so far as Zimbabwe’s annulment application did not mention Article 52(1)(e), it did not comply with Article 52(2) and Arbitration Rule 50(1)(c)(iii). Accordingly, the Annulment Committee concluded that the Eighth Ground was time-barred and as such inadmissible.

IV. TAKEAWAY POINTS

13. The von Pezold ICSID annulment decision reiterates what many other annulment decisions have held: it is not the function of an ICSID annulment committee to review the factual findings of the tribunal or its decision on the merits or to question the admissibility of evidence and its probative value in the arbitration; and challenges to arbitrators must be made promptly and before the arbitration proceedings close. However, it is the first ICSID annulment decision to hold that parties do not have a right to an unlimited opportunity to be heard (although this will be no surprise to practitioners). It is also the first decision to hold that the annulment application must specifically refer to which of the five grounds of annulment is being invoked in Article 52(1) by the applicant (it is not enough to merely plead facts in the annulment application and at a later date invoke one of those grounds).

Steptoe & Johnson acted for the Claimants in the arbitration and annulment proceedings.

Practices

Investor-State Arbitration

International Arbitration