

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

In the arbitration proceeding between

**BORDER TIMBERS LIMITED
TIMBER PRODUCTS INTERNATIONAL (PRIVATE) LIMITED
(FORMERLY "BORDER TIMBERS INTERNATIONAL (PRIVATE) LIMITED")
HANGANI DEVELOPMENT CO. (PRIVATE) LIMITED**

(CLAIMANTS)

V.

**REPUBLIC OF ZIMBABWE
(RESPONDENT)**

(ICSID CASE NO. ARB/10/25)

AWARD

Members of the Tribunal:

The Hon. L. Yves Fortier, P.C., C.C., Q.C., President
Professor David A.R. Williams, Q.C., Arbitrator
Mr. Michael Hwang, S.C., Arbitrator

Secretary to the Tribunal

Ms. Frauke Nitschke

Assistant to the Tribunal

Ms. Alison G. FitzGerald

Date of dispatch to the Parties: 28 July 2015

Representing the Claimants:

Steptoe & Johnson

Mr. Matthew Coleman
Mr. Kevin Williams (*until January 2014*)
Mr. Anthony Rapa
Ms. Helen Aldridge
Mr. Thomas Innes (*as of September 2013*)
5 Aldermanbury Square
London, EC2V 7HR, United Kingdom

and

Wiley Rein LLP

Mr. Charles O. Verril, Jr.
1776 K Street N.W.
Washington, D.C. 20006, U.S.A.

Representing the Respondent:

Attorney General's Office

The Honourable Johannes Tomana (*Attorney General until February 2015*)
Advocate Prince Machaya (*Deputy Attorney General until February 2015 when he was appointed Attorney General*)
Ms. Fortune Chimbaru
Ms. Elizabeth Sumowah
Ms. F.C. Maxwell (*until July 2013*)
Ms. Sophia Christina Tsvakwi (*until May 2013*)
5th Floor, Block A
New Government Complex
Cnr. Samora Machel Ave/Fourth St.
P. Bag 7714, Causeway
Harare, Republic of Zimbabwe

and

Kimbrough & Associés (*as of December 2012*)

Mr. Philip Kimbrough
Mr. Tristan Moreau
51, Avenue Raymond Poincaré
75116 Paris, France

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Glossary of Terms

2005 Constitutional Amendment	Constitution of Zimbabwe Amendment (No. 17) Act 2005 (CLEX-19).
2013 Constitution	Constitution of Zimbabwe (Draft 17 July 2012) (CLEX-331).
ACAC	Accumulated Current Actual Cost.
Adam	The youngest child of Elisabeth and Rüdiger von Pezold, Adam Friedrich Carl Leopold Franz Severin von Pezold.
Additional Claims	Claims raised by the von Pezold Claimants in the Claimants' Reply relating to water rights and permits.
Adult Children Claimants	The children of Elisabeth and Rüdiger von Pezold, excluding their youngest child, Adam. 1. Anna Eleonore Elisabeth Webber (née von Pezold), 2. Heinrich Bernd Alexander Josef von Pezold, 3. Maria Juliane Andrea Christiane Katharina Batthány (née von Pezold), 4. Georg Philipp Marcel Johann Lukas von Pezold, 5. Felix Alard Moritz Hermann Kilian von Pezold and 6. Johann Friedrich Georg Ludwig von Pezold.
ASEAN Agreement	The 1987 ASEAN Agreement.
BITs	A collective term for the German BIT and Swiss BIT .
Border	Border Timbers Limited.
Border Claimants	The Claimants in ICSID Case No. ARB/10/25, being 1. Border Timbers Limited; 2. Timber Products International (Private) Limited (formerly Border Timbers International (Private) Limited); and 3. Hangani Development Co. (Private) Limited.
Border Companies	The companies incorporated under the laws of the Republic of Zimbabwe within the Border Estate , i.e. the Border Claimants , namely: 1. Border Timbers Limited; 2. Timber Products International (Private) Limited (formerly Border Timbers International (Private) Limited); and 3. Hangani Development Co. (Private) Limited
Border Estate	The Border Estate includes five sub-estates or plantations, which comprise 28 properties (the Border Properties). There are three sawmills on the Border Properties: the Tilbury Estate Sawmill, the Sheba Estate Sawmill and the Charter Estate Sawmill. The Border Estate also includes two non-plantation properties on which are located a pole treatment plant and two factories (the Paulington factory and the BTI factory).
Border International	Timber Products International (Private) Limited (formerly Border Timbers International (Private) Limited).
Border Properties	The 28 properties that comprise the Border Estate plantations, and which are included in the Claimants' Memorial, Table 6, as updated in the Claimants' Reply, Annex 2.
Border Shares	The combined share capital of the Border Companies .
CIO	Central Intelligence Organisation of the Republic of Zimbabwe.
Claimants	Reference to the "Claimants", for purposes of the present Award, without further specification, is a reference to both the von Pezold Claimants of Case No. ARB/10/15 and the Border Claimants of Case No. ARB/10/25.
Claimants' Properties	A collective term for the Zimbabwean Properties and the Residual Properties .
Constitution	The Constitution of Zimbabwe, originally published as a Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom).
DRC	Depreciated Replacement Cost.
ECCHR	European Centre for Constitution and Human Rights.

ECHR	European Court of Human Rights.
Elisabeth	Elisabeth Regina Maria Gabriele von Pezold.
Estates	A collective term for the Forrester Estate , Border Estate and Makandi Estate .
FET	Fair and Equitable Treatment.
FIC	Foreign Investment Committee of the Republic of Zimbabwe.
FMV	Fair Market Value.
Forrester Companies	The companies incorporated under the laws of the Republic of Zimbabwe within the Forrester Estate , namely 1. Forrester Holdings (Private) Limited; 2. Forrester Estate (Private) Limited; and 3. Forrester Silk (Private) Limited.
Forrester Estate	A tobacco growing and curing operation comprising ten properties.
Forrester Loans	Loans extended to the Zimbabwean Companies or otherwise to investments in Zimbabwe by Elisabeth between 1994 and 1998.
Forrester Properties	The ten properties that comprise the Forrester Estate , and which are listed in the Claimants' Memorial, Table 1.
Forrester Shares	The combined share capital of the Forrester Companies .
FPS	Full Protection and Security.
FTP	Free Transfer of Payments.
FTLRP	Fast Track Land Reform Programme, a phase during the Land Reform Programme.
German BIT	The bilateral investment treaty between the Republic of Zimbabwe and the Federal Republic of Germany signed on 29 September 1995 (CLEX-3).
German Protocol	The protocol to the German BIT signed on 29 September 1996 (CLEX-3).
ha	Hectares.
Hangani	Hangani Development Co. (Private) Limited.
Hearing	Joint hearing on jurisdiction, liability and <i>quantum</i> held at the World Bank Headquarters in Washington, D.C. from 28 October to 2 November 2013 for ICSID Case Nos. ARB/10/15 and ARB/10/25.
ICSID	International Centre for Settlement of Investment Disputes.
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings (April 2006).
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10.
IMF	International Monetary Fund.
Income-Generating Assets	The income-generating assets on the Residual Properties .
Joint First Session	Joint first session for ICSID Case Nos. ARB/10/15 and ARB/10/25 held on 7 February 2011.
Land Acquisition Act	Land Acquisition Act 1992.
LRP	Land Reform Programme.
Main Claims	Claims raised by the von Pezold Claimants and the Border Claimants in the Claimants' Memorial.
Makandi Companies	The companies incorporated under the laws of the Republic of Zimbabwe within the Makandi Estate , namely 1. Makandi Tea and Coffee Estates (Private) Limited; 2. Large Scale Investments (Private) Limited; 3. Chipinge Holdings (Private) Limited; 4. Coffee Estates (Private) Limited; and 5. Rusitu Valley Development Company (Private) Limited.
Makandi Estate	A mixed plantation, growing coffee, bananas, maize, macadamia nuts, avocados and timber, comprising nine properties.

Makandi Properties	The nine properties that comprise the Makandi Estate, and which are listed in the Claimants' Memorial, Table 10.
MDC	Movement for Democratic Change (a Zimbabwean political party).
MFN	Most-Favoured Nation.
NAFTA	North American Free Trade Agreement.
NSV	Net Standing Value.
Parent Claimants	1. Bernhard Friedrich Arnd Rüdiger von Pezold; and 2. Elisabeth Regina Maria Gabriele von Pezold.
Parties	Reference to the "Parties", for purposes of the present Award, without further specification, is a reference to both the von Pezold Claimants of Case No. ARB/10/15, the Border Claimants of Case No. ARB/10/25, and the Republic of Zimbabwe, being the Respondent in both cases.
PCIJ	Permanent Court of International Justice.
Petitioners	The ECCHR and four indigenous communities of Zimbabwe, who had sought leave to participate as <i>amicus curiae</i> in these proceedings.
Residual Properties	The Border, Makandi and Forrester properties which were not directly affected by the 2005 Constitutional Amendment, which are however now said to be worthless because they are not viable on their own (defined in further detail in the Award).
Respondent	The Republic of Zimbabwe, also referred to as the Government.
Rüdiger	Bernhard Friedrich Arnd Rüdiger von Pezold.
Section 5 Notice	Notice of proposed acquisition under Section 5 of the Land Acquisition Act 1992.
Section 8 Order	A statutory order issued pursuant to the Land Acquisition Act 1992, vesting title to property that had been subject to a Section 5 Notice in the State of Zimbabwe.
Settlers/War Veterans	The persons who settled on privately owned commercial land in Zimbabwe. As used by the Claimants, the term also refers to persons claiming to be "War Veterans" and other persons who had been promised, or expected, the provision of land by the Respondent pursuant to the Land Reform and Resettlement Programme.
Swiss BIT	The bilateral investment treaty between the Republic of Zimbabwe and the Swiss Confederation signed on 15 August 1996 (CLEX-5).
Swiss Family Claimants	The von Pezold Claimants , save for Rüdiger
UN	The United Nations.
von Pezold Claimants	The Parent Claimants , the Adult Children Claimants and Adam von Pezold , i.e.: 1. Bernhard Friedrich Arnd Rüdiger von Pezold; 2. Elisabeth Regina Maria Gabriele von Pezold; 3. Anna Eleonore Elisabeth Webber (née von Pezold); 4. Heinrich Bernd Alexander Josef von Pezold; 5. Maria Juliane Andrea Christiane Katharina Batthány (née von Pezold); 6. Georg Philipp Marcel Johann Lukas von Pezold; 7. Felix Alard Moritz Hermann Kilian von Pezold; 8. Johann Friedrich Georg Ludwig von Pezold; 9. and Adam Friedrich Carl Leopold Franz Severin von Pezold
Water Permits	The 20-year permits relating to the use of public water for agricultural purposes, which in January 2000 replaced the previous Water Rights pursuant to the Water Act 1998.
Water Rights	The rights created by the Water Act 1976 relating to the use of public water for agricultural purposes, later converted in January 2000 into Water Permits pursuant to the Water Act 1998.
ZANU-PF	Zimbabwe African National Union – Patriotic Front (a Zimbabwean political party).
ZIA	Zimbabwe Investment Authority.
ZIC	Same as for ZIA : the Zimbabwe Investment Authority.

Zimbabwean Companies	A collective term for the Forrester, Border and Makandi Companies .
Zimbabwean Company Shares	The combined share capital of the Zimbabwean Companies .
Zimbabwean Note	Note from the Zimbabwean Minister of Finance to the Ambassador of the Federal Republic of Germany dated 18 September 1996 (CLEX-3).
Zimbabwean Properties	The Border, Makandi and Forrester properties directly affected by the 2005 Constitutional Amendment (defined in further detail in the Award). ¹

¹ Cf. The definition of "Zimbabwean Properties" as used by the Claimants in their Memorial comprised "the Forrester Properties, the Border Properties and the Makandi Properties". See Mem., Glossary.

I Introduction

1 The present Award settles disputes that have arisen between the Border Claimants, defined below, and the Republic of Zimbabwe (“Zimbabwe” or the “Respondent”) and that have been submitted to arbitration pursuant to the dispute settlement provision of the bilateral investment treaty entered into between the Swiss Confederation and Zimbabwe on 15 August 1996 (the “Swiss BIT”).

2 This case is, at its heart, a land dispute, but one with deep context and history. As will be seen, although the dispute, the subject of this arbitration, relates primarily to the alleged expropriation in the 21st century by Zimbabwe of land and other property held by the von Pezold Claimants further to its Land Reform Programme (“LRP”), it can only be fully understood if one casts one’s mind back to the colonial era of the 20th century, when Zimbabwe was known as Southern Rhodesia.

3 Following Zimbabwe’s independence and the election of Robert Mugabe as President in 1980, the land policies of the Rhodesian era which favored the white minority population were reversed and replaced with land policies favouring the black indigenous population. Those policies, accompanied by the invasions of private land by settlers, feature prominently in this arbitration.

4 Oftentimes during these proceedings, members of the Tribunal had to remind themselves that their remit was not one of a commission of inquiry into what has been described as “the March of History”, but rather strictly that of an Arbitral Tribunal mandated to adjudicate a dispute or disputes in accordance with the Convention of the International Centre for Settlement of Investment Disputes (“ICSID”) and applicable law. This, the Tribunal has sought to do.

II The Conjoined Proceedings

5 As will be seen later², two identically composed Tribunals were constituted to hear disputes in two separate arbitrations: ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25. During the Joint First Session of the two Tribunals on 7 February 2011, the Parties to ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25 agreed that these cases would be heard together, although they would not be formally consolidated, and that the two Tribunals would render two separate Awards in relation to each case.

6 In fact, during nearly four years of proceedings, the two cases were heard together and the Parties submitted joint pleadings and evidence, the Respondent in particular rarely specifying which arguments or submissions related to the von Pezold Claimants or to the Border Claimants, as defined below.

² See below at paras. 15–16.

- 7 As a result of these unique conjoined and intertwined proceedings, each Tribunal now renders a separate Award which contains not only the decision of each Tribunal on every question submitted to it, together with the reasons upon which each decision is based, but also the decision of the other Tribunal on every question submitted to it, together with the reasons upon which those decisions are based.
- 8 A detailed procedural history of these cases, setting out the basis for the Tribunal's approach to the preparation of the present Award, as well as the conduct of the proceedings, follows.

III Procedure

A. The Registration of the Requests for Arbitration

- (1) The von Pezold Arbitration
- 9 On 11 June 2010, ICSID received a Request for Arbitration from Bernhard Friedrich Arnd Rüdiger von Pezold ("**Rüdiger**") and Elisabeth Regina Maria Gabriele von Pezold ("**Elisabeth**") (together, the "**Parent Claimants**") and their children, Anna Eleonore Elisabeth Webber (née von Pezold), Heinrich Bernd Alexander Josef von Pezold, Maria Juliane Andrea Christiane Katharina Batthány (née von Pezold), Georg Philipp Marcel Johann Lukas von Pezold, Felix Alard Moritz Hermann Kilian von Pezold, Johann Friedrich Georg Ludwig von Pezold (together the "**Adult Children Claimants**") and Adam Friedrich Carl Leopold Franz Severin von Pezold ("**Adam**") (collectively, the "**von Pezold Claimants**"):
- 10 Save for Rüdiger, who is German and claims only under the German BIT, all of the von Pezold Claimants are both German and Swiss nationals, and therefore advance their claims under both the German BIT and the Swiss BIT.
- 11 The Secretary-General of ICSID registered the von Pezold Request for Arbitration on 8 July 2010. The case was assigned ICSID Case No. ARB/10/15.
- (2) The Border Arbitration
- 12 On 3 December 2010, ICSID received a Request for Arbitration from Border Timbers Limited ("**Border**"), Timber Products International (Private) Limited³ ("**Border International**") and Hanganí Development Co. (Private) Limited ("**Hanganí**") (collectively, the "**Border Claimants**"), invoking the

³ Formerly "Border Timbers International (Private) Limited". By communication dated 1 December 2014, counsel for the Border Claimants informed the Tribunal that the second Claimant in ICSID Case No. ARB/10/25 had changed its name from "Border Timbers International (Private) Limited" to "Timber Products International (Private) Limited". The Respondent objected to this name change by letter dated 2 July 2015. Following submissions by the parties, the Tribunal, on 13 July 2015, rejected the Respondent's request to retain the same names of the Parties as listed in these proceedings until 1 December 2014, having been provided with a certificate indicating the name change issued by the relevant Zimbabwean authorities.

ICSID arbitration provisions of the Swiss BIT. The Border Claimants are all companies incorporated in Zimbabwe, but claim Swiss nationality through their collective alleged control by the von Pezold Claimants.

13 On 10 December 2010, the Border Claimants supplemented their Request for Arbitration, in response to an inquiry by ICSID. The Secretary-General of ICSID registered the Border Request for Arbitration, as supplemented, on 20 December 2010. The case was assigned ICSID Case No. ARB/10/25.

14 Reference to the "Claimants", for purposes of the present Award, without further specification, is a reference to both the von Pezold Claimants of Case No. ARB/10/15 and the Border Claimants of Case No. ARB/10/25. Similarly, reference to the "Parties", for purposes of the present Award, without further specification, refers to both the von Pezold Claimants of Case No. ARB/10/15, the Border Claimants of Case No. ARB/10/25, and the Republic of Zimbabwe.

B. Constitution of the two Tribunals

15 As agreed by the Parties, the Tribunal in ICSID Case No. ARB/10/15 was to consist of three arbitrators, one appointed by each Party and the President of the Tribunal to be appointed by the two co-arbitrators. The Tribunal was constituted on 9 December 2010 in accordance with Article 37(2)(a) of the ICSID Convention and the ICSID 2006 Arbitration Rules. It was composed of The Hon. L. Yves Fortier, P.C., C.C., Q.C. (a national of Canada), appointed by agreement of the co-arbitrators to serve as President, Professor David A.R. Williams, Q.C. (a national of New Zealand), appointed by the von Pezold Claimants, and Professor A. Peter Mutharika (a national of Malawi), appointed by the Respondent. Mr. Marco Tulio Montañés-Rumayor was appointed as Secretary of the Tribunal. Ms. Frauke Nitschke replaced Mr. Montañés-Rumayor as Secretary of the Tribunal on 25 January 2011.

16 By letters of 28 December 2010 and 3 January 2011, the Parties agreed that the Tribunal in the Border Arbitration, ICSID Case No. ARB/10/25, was to consist of three arbitrators, one appointed by each Party and the third, presiding arbitrator, appointed by agreement of the Parties. The Parties further agreed that the composition of the Tribunal in ICSID Case No. ARB/10/25 was to be identical to the one constituted in ICSID Case No. ARB/10/15. The Tribunal in the Border Arbitration was constituted on 20 January 2011 in accordance with Article 37(2)(a) of the ICSID Convention and the ICSID Arbitration Rules. On the same day, Ms. Frauke Nitschke was appointed as Secretary to the two Tribunals.

C. The Joint First Session and Hearing the Cases Together

- 17 In accordance with ICSID Arbitration Rule 13(1), a first session was held on 7 February 2011 in London, England. Pursuant to an agreement by the Parties, the first session was held as a joint first session for ICSID Case Nos. ARB/10/15 and ARB/10/25 (the "**Joint First Session**").
- 18 The Joint First Session considered matters listed on a provisional agenda circulated by the Secretary of the two Tribunals on 25 January 2011. The Claimants submitted their positions regarding the items on the provisional agenda in writing on 4 February 2011. No written response to the provisional agenda was received from the Respondent prior to the Joint First Session.
- 19 The Joint First Session was attended in person by the three Members of the two Tribunals, the Secretary to the Tribunals, and Messrs. Matthew Coleman, Kevin Williams, Anthony Rapa and Ms. Helen Aldridge of Steptoe & Johnson, and Mr. Charles O. Verrill, Jr. of Wiley Rein LLP. As agreed by the Parties, the Respondent's representatives, Advocate Prince Machaya, and Mmes. Sophia Christina Tsvakwi, Fatima Chakupamambo Maxwell, and Elizabeth Sumowah, participated by video-conference from Harare, Zimbabwe.
- 20 In their letter of 4 February 2011, and at the Joint First Session, the Claimants confirmed that the two Tribunals were properly constituted, and that they did not have any objection to the appointment of any member of the two Tribunals. During the Joint First Session, the Respondent also confirmed that the two Tribunals were properly constituted, and that it did not have any objection to the appointment of any member of the two Tribunals.
- 21 Following a proposal by the Tribunals during the Joint First Session that Ms. Renée Thériault serve as assistant to the Tribunals in these two proceedings, and the Parties' subsequent agreement thereto, Ms. Thériault was appointed to serve as Assistant to the two Tribunals. In February 2012, with the agreement of the Parties, Ms. Alison FitzGerald replaced Ms. Thériault to serve as Assistant to the two Tribunals.
- 22 During the Joint First Session, as reflected in the Summary Minutes of the Joint First Session of the two Arbitral Tribunals⁴ the Parties further agreed *inter alia* to follow the procedural approach for the two cases as proposed by the Claimants in their letter of 4 February 2011:

22.1 Case Bernhard von Pezold & Ors v The Republic of Zimbabwe ICSID Case No. ARB/10/15, and case Border Timbers Limited & Ors v The Republic of Zimbabwe ICSID Case No. ARB/10/25 shall be heard together (but not formally consolidated).

⁴ The Summary Minutes of the Joint First Session of the two Arbitral Tribunals were transmitted to the parties on 30 March 2011, following the parties' agreement on the appointment of the Tribunals' assistant.

22.2 The Claimants will submit joint pleadings, but will separately address those issues within a pleading where circumstances distinct to particular Claimants and/or case necessitate separate treatment.

22.3 Each witness statement and expert report shall state whether it applies to one case or the other case.

22.4 The Tribunal shall issue separate awards in relation to each case but may nevertheless discuss these arbitrations in any award or procedural order as a single set of proceedings, except where circumstances distinct to particular Claimants necessitate separate treatment.

- 23 This latter agreement of the Parties was confirmed by the Tribunals in their Procedural Order No. 13 issued on 23 December 2014⁵.

D. Reconstitution of the two Tribunals

- 24 On 6 June 2011, ICSID notified the Parties that Professor A. Peter Mutharika had submitted his resignation as arbitrator in both ICSID Case Nos. ARB/10/15 and ARB/10/25, and that the two proceedings were suspended in accordance with ICSID Arbitration Rule 10(2) until the vacancies resulting from Professor Mutharika's resignation had been filled. On 1 July 2011, ICSID notified the Parties pursuant to ICSID Arbitration Rule 8(2) that the Tribunals had consented to Professor Mutharika's resignations in the two proceedings and that, in accordance with ICSID Arbitration Rule 11(1), the vacancy on the Tribunals resulting from Professor Mutharika's resignation shall be promptly filled by the same method by which Professor Mutharika's appointments had been made.
- 25 By letter of 13 July 2011, the Respondent appointed Mr. Rajsoomer Lallah as arbitrator in the two proceedings. By letter of 25 July 2011, ICSID notified the Parties that Mr. Lallah was unavailable to accept the appointments and invited the Respondent to proceed to appoint another arbitrator in these two proceedings. On 12 August 2011, the Respondent appointed Professor An Chen, a national of the People's Republic of China, as arbitrator in the two proceedings, and Professor Chen subsequently accepted his appointments. The two Tribunals were reconstituted on 15 September 2011, and the proceedings resumed pursuant to ICSID Arbitration Rule 12.
- 26 On 19 May 2013, ICSID notified the Parties pursuant to ICSID Arbitration Rule 10(1) that Professor An Chen had submitted his resignation as arbitrator in these two proceedings. The proceedings were subsequently suspended in accordance with ICSID Arbitration Rule 10(2). The two Tribunals consented to Professor Chen's resignation on 20 May 2013 pursuant to ICSID Arbitration Rule 8(2), and the Respondent was invited to appoint an arbitrator to each of the two Tribunals.

⁵ Reproduced as Annex 13 to the present Award.

27 On 1 July 2013, the Respondent appointed Mr. Michael Hwang, a national of Singapore, to fill the vacancy on the two Tribunals. Mr. Hwang subsequently accepted his appointments. The two Tribunals were reconstituted on 3 July 2013, and the proceedings resumed pursuant to ICSID Arbitration Rule 12.

E. Written and Oral Procedure

28 During the Joint First Session held on 7 February 2011, the Respondent had stated that it did not intend to file any objections to jurisdiction, and that it agreed with the timetable proposed by the Claimants in their letter of 4 February 2011, which consisted of a schedule for two rounds of written pleadings on the merits (involving the filing of a Memorial, a Counter-Memorial, a Reply and a Rejoinder), to be followed by an oral procedure on the merits. As discussed below, the Respondent did, in fact, raise objections to jurisdiction.

29 Accordingly, following the Joint First Session, the procedural calendar for the written and oral procedure was amended multiple times, either following an agreement by the Parties, or as directed by the Tribunal.

(1) The Written Procedure

a) The Parties' principal written pleadings

30 The Parties' principal written pleadings, as contemplated by the Parties' original agreement to two rounds of written pleadings, are listed at numbers 1-4 in the table below. As discussed in more detail in the context of Procedural Order No. 3, dated 11 January 2013, and contrary to the indication made during the Joint First Session, the Respondent filed objections to jurisdiction in its Rejoinder. In light of the Tribunal's ruling in Procedural Order No. 3, which admitted into the record those objections pleaded by the Respondent in its Rejoinder, and subsequent directions from the Tribunal, the Parties filed further written submissions. The Parties' further written submissions are listed at numbers 5-25, which are also set out below:

<u>No.</u>	<u>Pleading</u>	<u>Party</u>	<u>Date</u>	<u>Abbreviation</u>
1.	Memorial on the Merits	Claimants	15 November 2011.	Mem.
2.	Counter-Memorial on the Merits	Respondent	11 August 2012	CM
3.	Reply on the Merits and Ancillary Claims	Claimants	12 October 2012	Reply
4.	Rejoinder on the Merits, including Objections to Jurisdiction to the Claimants' Original Claim & Observations on Ancillary Claims	Respondent	14 December 2012	Rejoinder

<u>No.</u>	<u>Pleading</u>	<u>Party</u>	<u>Date</u>	<u>Abbreviation</u>
5.	Observations on the Rejoinder and a Response to Observations on Ancillary Claims	Claimants	1 March 2012	Surrejoinder
6.	Response to Observations on the Rejoinder	Respondent	19 April 2013	Rebutter
7.	Updated Request for Relief	Claimants	15 May 2013	
8.	Corrected <i>Quantum</i>	Claimants	15 May 2013	
9.	Re-Rebutter (i.e., addendum to the Respondent's 19 April 2013 Submission)	Respondent	15 August 2013	Re-Rebutter
10.	Response to Re-Rebutter (i.e. observations on the Respondent's submission of 15 August 2013)	Claimants	9 September 2013	Re-Rebutter Response
11.	Observations on the Claimants' Updated Request for Relief	Respondent	9 September 2013	
12.	Updated <i>Quantum</i> Reply	Respondent	9 September 2013	
13.	Reply to Response to Re-Rebutter (i.e., response to the Claimants' submission of 9 September 2013)	Respondent	26 September 2013	Re-Rebutter Reply
14.	Response to the Respondent's submission of 9 September 2013	Claimants	26 September 2013	Claimants' 9 September Response
15.	Skeleton Argument	Claimants	14 October 2013	Cl. Skel.
16.	Skeleton Argument	Respondent	14 October 2013	Resp. Skel.
17.	Post-Hearing Brief	Claimants	7 May 2014	Cl. PHB
18.	Post-Hearing Brief	Respondent	7 May 2014	Resp. PHB
19.	Statement on Inadmissible Material Contained in Post-Hearing Brief	Claimants	6 June 2014	Statement on Inadmissible Material
20.	Response to Statement on Inadmissible Material	Respondent	2 July 2014	Response to Statement on Inadmissible Material

No.	Pleading	Party	Date	Abbreviation
21.	Reply to Response to Statement on Inadmissible Material	Claimants	9 July 2014	Reply to Response to Statement on Inadmissible Material
22.	Claimants' Submission on Costs and Confirmation of Separate Awards	Claimants	1 December 2014	Cl. Costs Submission
23.	Respondent's Submission on Costs and Fees	Respondent	1 December 2014	Resp. Costs Submission
24.	Claimants' Comments on Respondent's Costs Submission of 1 December 2014	Claimants	18 December 2014	Cl. Reply Costs Submission
25.	Respondent's Reply to Claimants' Submission on Costs and Fees	Respondent	18 December 2014	Resp. Reply Costs Submission

31 The voluminous nature of the Parties' pleadings and evidence cannot be overstated. The Parties have filed approximately 3,000 pages of pleadings alone. The motion practice in these two cases has also been extensive, adding hundreds of additional pages to these arbitrations in procedural orders and directions and contributing to the overall lengthening of the procedure.

b) Instruments issued by the Tribunal in the course of the proceedings

(i) Procedural Order No. 1

32 Procedural Order No. 1⁶, dated 31 October 2011, related to document production and disposed of certain outstanding requests for documents made by the Claimants.

(ii) President's Directions of 13 June 2012

33 On 12 June 2012, the Claimants brought an urgent application for provisional measures pursuant to ICSID Arbitration Rule 39 relating to a request for disclosure of documents made outside of the procedure agreed between the Parties and recorded in the Minutes of the Joint First Session.

34 On 13 June 2012, the President of the Tribunal issued directions concerning the Claimants' 12 June 2012 application pursuant to para. 5.3 of the Summary Minutes of the Joint First Session, including, *inter alia*, a proposed briefing schedule.

⁶ Reproduced as Annex 1 to the present Award.

35 On 20 June 2012, the Respondent indicated that it did not see a need to file any observations in this matter and undertook that any future requests for disclosure would comply with the disclosure regime ordered by the Tribunal at the Joint First Session. The Claimants filed observations on the Respondent's 20 June 2012 letter on the same day expressing some residual concern. The Tribunal considered, however, that, in view of the Respondent's undertaking, the Claimants' application had become moot.

(iii) Procedural Order No. 2

36 Procedural Order No. 2, dated 26 June 2012⁷, disposed of a petition by the European Centre for Constitution and Human Rights ("ECCHR") and four indigenous communities of Zimbabwe for leave to participate as *amicus curiae* ("Petitioners"). Specifically, the ECCHR and the indigenous communities petitioned the Tribunal (i) for permission to file a written submission as joint *amici curiae*; (ii) for access to the key arbitration documents; and (iii) for permission to attend the oral hearings and to reply to any specific questions of the Tribunal on the written submissions.

37 The Claimants opposed the petition on several substantive grounds and noted that the Parties had agreed during the Joint First Session that no non-disputing party submissions would be made. The Claimants therefore took the position that the Tribunal had no residual discretion under Article 44 of the ICSID Convention to admit any such submissions into the record. The Respondent advised that, while the Parties had agreed that ICSID Arbitration Rule 37(2) would not apply to these proceedings, it had not anticipated that there could be any person or organisation with an interest in the matter apart from the Parties. The Respondent further stated that it had no objection to the Petitioners being allowed to file written submissions provided they fell within the scope of ICSID Arbitration Rule 37(2) and did not impinge on or amount to a challenge to the sovereignty and territorial integrity of Zimbabwe.

38 The Tribunal denied the petition in its entirety. The Tribunal held that it had the discretion, upon consulting with the Parties, to allow a non-disputing party to file a written submission pursuant to ICSID Arbitration Rule 37(2), provided that certain minimum criteria were met. In this case, the Tribunal considered that the circumstances of the petition gave rise to legitimate doubts as to the independence or neutrality of the Petitioners, and that none of the criteria set out in ICSID Arbitration Rule 37(2) had been satisfied. The Tribunal further considered that, in light of the Tribunal's conclusions with respect to the application to file a written submission, it was unnecessary for the Tribunal to consider the subsidiary requests for access to documents and to attend the hearings in these proceedings. The Tribunal noted, however, that, pursuant to ICSID Arbitration Rule 32(2), where a party objects to the request of a non-disputing party to attend the

⁷ Reproduced as Annex 2 to the present Award.

hearings in a proceeding, a tribunal has no discretion to grant such a request over that party's objection, and that, accordingly, the Petitioners' request to attend the hearings in these proceedings must be denied in any event, as the Claimants had objected thereto.

(iv) Procedural Order No. 3

39 Procedural Order No. 3, dated 11 January 2013 ("PO No. 3")⁸, disposed of an urgent application brought by the Claimants on 20 December 2012 in connection with jurisdictional challenges and new defences allegedly pleaded by the Respondent in its Rejoinder, filed with the Tribunal on 14 December 2012. The Claimants sought an order that the alleged jurisdictional challenges and new defences, insofar as they related to the Claimants' case as pleaded in the Memorial, were inadmissible or, alternatively, an order directing (i) that the jurisdictional challenges be joined to the merits of the cases and an additional round of briefing on these and the new defences be scheduled; (ii) that certain documents in support of the Rejoinder be produced; and (iii) that new, mutually acceptable hearing dates be set.

40 Following two rounds of written submissions by the Parties, the Tribunal admitted the Respondent's challenges to jurisdiction, certain of which related to ancillary claims raised by the Claimants in their Reply, and others of which related to the Claimants' case as pleaded in the Memorial, having found "special circumstances" to exist within the meaning of ICSID Arbitration Rule 26(3), and joined all of the challenges to jurisdiction to the merits of the two cases. Among the special circumstances, the Tribunal noted the retention by the Respondent of external counsel, Mr. Philip Kimbrough of Kimbrough & Associés, notified by the Respondent on 14 December 2012.

41 The Tribunal further vacated the February 2013 hearing dates and, in consultation with the Parties, confirmed new hearing dates from 10 to 14 June 2013 (also preserving a sixth hearing day as per the Parties' agreement). Finally, the Tribunal ordered the Respondent to provide copies of documents referred to in its Rejoinder and directed a new briefing schedule in connection with the new jurisdictional objections and the Respondent's comments on the Claimants' ancillary claims.

(v) Procedural Order No. 4

42 Procedural Order No. 4, dated 16 March 2013 ("PO No. 4")⁹, disposed of an urgent application for an order for provisional measures pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, which was brought by the Claimants on 6 March 2013. The application related to the appearance of a number of persons on one of the Claimants' properties in Zimbabwe, and the Claimants requested that the Tribunal "order the Respondent to instruct its police force to

⁸ Reproduced as Annex 3 to the present Award.

⁹ Reproduced as Annex 4 to the present Award.

prevent people from coming onto the Claimants' Estate, and to the extent that those people have already arrived on the Claimants' Estate, to remove them, unless those people are authorised by the Claimants".

- 43 Following several written submissions by the Parties, the Tribunal issued PO No. 4, noting the Respondent's statement that it had instructed its police to maintain the *status quo* as of the date on which the Claimants had initiated ICSID proceedings, and to ensure that a certain person not interfere with the Claimants' operations on the said property. The Tribunal also noted the Respondent's statement that the provincial police had undertaken to act on any reports they received in relation to this matter and the Claimants' confirmation that the police had progressively taken steps since the date of the Claimants' application to ensure the removal of the persons in question from the property and that certain food stocks and harvested crops had been restored with the assistance of the police. In light of the Respondent's undertakings, the Tribunal saw no basis to order the relief requested and dismissed the application. The Tribunal noted, however, that it did not take a view on the merits of the application given the factual matrix presented by the Parties, and that its ruling was without prejudice to any further application that either Party might seek to bring should that factual matrix change. Finally, the Tribunal strongly encouraged both Parties to conduct themselves in such a manner as to avoid further aggravation of the dispute between them in order to ensure the orderly progress of the proceedings.

(vi) Procedural Order No. 5

- 44 Procedural Order No. 5, dated 3 April 2013 ("PO No. 5")¹⁰, disposed of an urgent application brought by the Claimants on 8 March 2013 for an order for provisional measures pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, relating to an alleged plan by the Respondent's Central Intelligence Organisation ("CIO") to kill one of the Claimants, Mr. Heinrich von Pezold.
- 45 On 8 March 2013, the President of the Tribunal issued, pursuant to para. 5.3 of the Summary Minutes of the Joint First Session, preliminary directions directing the Respondent to immediately take all necessary measures to protect the life and safety of the Claimants from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent (the "**Protection Measures**"), and to allow the Claimants to participate, insofar as it might be possible, in the planning and the implementation of the Protection Measures. The preliminary directions also contained a briefing schedule for the Parties' written observations.

¹⁰ Reproduced as Annex 5 to the present Award.

46 Following two rounds of written submissions, the Tribunal issued PO No. 5, finding that the Claimants had adduced sufficient *prima facie* evidence that instructions to kill Mr. Heinrich von Pezold had been issued to the CIO, and found that the measures which the Claimants sought were urgent and necessary, noting that any action of any member, organ or agent of the Respondent or any person or entity instructed by the Respondent which could endanger the life and safety of the Claimants, in particular the life and safety of Mr. Heinrich von Pezold, was capable of causing irreparable prejudice to their right to participate in the present proceedings. The Tribunal further found that any prejudice caused to the Respondent by issuing an order for provisional measures was far less than the risk to the life and safety of Mr. Heinrich von Pezold.

47 The Tribunal hence confirmed its interim directions issued on 8 March 2013, and ordered the Respondent to periodically report on the Protection Measures adopted by the Respondent. In summary, the Tribunal directed: (i) that the Respondent immediately take all necessary measures to protect the life and safety of the Claimants and, in particular, Mr. Heinrich von Pezold and his family, from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent; (ii) that the Respondent allow the Claimants to participate, insofar as it might be possible, in the planning and the implementation of such Protection Measures; and (iii) that the Respondent report in writing to the Tribunal on the 15th of each subsequent month until the beginning of the hearing scheduled to commence on 10 June 2013, on the status of the Protection Measures adopted.

(vii) Procedural Order No. 6

48 Procedural Order No. 6, dated 22 July 2013 ("PO No. 6")¹¹, relates to an urgent application for an order for provisional measures pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1), by which the Claimants requested the Tribunal to order the Respondent to instruct its police force to prevent all persons from coming onto certain of the Claimants' Estates, and to the extent that certain persons had already arrived onto the Estates, to remove them, unless their presence was authorized by the Claimants.

49 Following written submissions by the Parties, the Tribunal ruled that, on the evidence provided, the Tribunal was not satisfied that the criteria for the grant of provisional measures, in particular those of urgency and necessity, were met, and that, in light of the factual situation presented, the broad relief requested by the Claimants was required. The Tribunal dismissed the application without prejudice to any future application that they might wish to bring should the factual circumstances

¹¹ Reproduced as Annex 6 to the present Award.

change, and reiterated their strong encouragement of the Parties to conduct themselves in a manner so as to avoid further aggravation of the disputes between them.

(viii) Procedural Order No. 7

50 Procedural Order No. 7, dated 8 August 2013 ("PO No. 7")¹², disposed of an application by the Claimants relating to (i) a new jurisdictional objection allegedly pleaded by the Respondent for the first time in its pleading filed on 19 April 2013 (the "Rebutter" listed in the table above); and (ii) "new" evidence filed in support thereof and in support also of a prior jurisdictional objection raised in the Respondent's Rejoinder. The Claimants subsequently amended this application by agreeing to the admission of the "new" evidence for a limited purpose, and sought a further written procedure to respond to that evidence.

51 Following several written submissions by the Parties, the Tribunal decided to dismiss the Claimants' objections, and directed an additional pleading schedule for the Parties with regard to certain of the Respondent's objections.

(ix) Procedural Order No. 8

52 On 25 September 2013, the Tribunal issued Procedural Order No. 8 ("PO No. 8")¹³, disposing of a "procedural request" brought by the Respondent on 22 September 2013 in connection with its submission due on 23 September 2013, further to the supplemental briefing schedule directed by the Tribunal in PO No. 7. In essence, the Respondent requested an extension of the page limit of its submission, arguing that the Claimants had raised three new arguments in their 9 September 2013 submission.

53 The Tribunal noted that the Respondent had been afforded ample opportunity to present its case and to defend the Claimants' claims. The Tribunal recalled PO No. 3, by which all of the Respondent's challenges to jurisdiction, including those responsive to claims pleaded in the Claimants' Memorial, pleaded for the first time in the Rejoinder, were admitted. The Tribunal further recalled that, in PO No. 7, the Respondent was allowed to raise additional jurisdictional objections at an even later stage of the proceedings, and was given an opportunity to present those objections cogently in a supplemental pleading to its Rebutter, and was also given a right of reply to the Claimants' 9 September 2013 submission. The Tribunal also noted that it was not persuaded that it was necessary or appropriate at this stage to reopen the directions set out in PO No. 7 so as to afford the Respondent additional pages to plead its reply to the Claimants' 9 September 2013 submission. The Tribunal further noted that it was of the view that in so denying the Respondent's

¹² Reproduced as Annex 7 to the present Award.

¹³ Reproduced as Annex 8 to the present Award.

request, the Respondent's right to be heard was not in any way impinged, noting that the Respondent would, in addition to the opportunities afforded to it to express its views in writing, also have the opportunity to make submissions on both law and evidence in respect of these objections during the oral hearing, and in any post-hearing procedures that might be agreed by the Parties and the Tribunal, or decided by the Tribunal.

(x) Procedural Order No. 9

54 In Procedural Order No. 9, dated 15 October 2013 ("PO No. 9")¹⁴, the Tribunal ruled on the admissibility of the various materials that were the subject of two applications brought by the Respondent on 2 October 2013 and 12 October 2013 respectively. The details of these applications and how they were disposed of by the Tribunal in PO No. 9 are set out in Section VI.F(2) of the present Award.

(xi) Procedural Order No. 10

55 Procedural Order No. 10, dated 24 February 2014 ("PO No. 10")¹⁵, disposed of the Parties' proposed corrections to the transcripts made at the oral procedure. In PO No. 10, the Tribunal further decided to admit onto the record the post-hearing materials filed by the Respondent in response to questions posed by the Tribunal during the hearing (see below Section III.E.(2)). Finally, PO No. 10 also established the post-hearing procedure, i.e., that the Parties were to file their post-hearing briefs within 60 days from receipt of the corrected hearing transcript, and that either Party could file a brief statement with the Tribunal within 30 days from receipt of the other Party's post-hearing submission, identifying any material that that Party considered inadmissible in the other Party's submission. Finally, the Respondent's request for an extension of time for the filing of its post-hearing submission was denied.

(xii) Procedural Order No. 11

56 Procedural Order No. 11, dated 15 July 2014 ("PO No. 11")¹⁶, disposed of the Respondent's communicated intention to file a reply to the Claimants' observations to the Respondent's procedural statement dated 2 July 2014 (the "**Respondent's 2 July Procedural Statement**"), and submitted in reply to the Claimants' procedural statement on inadmissibility. Although not presented with an application by the Respondent to file such a reply, the Tribunal communicated to the Parties by way of PO No. 11 that there was no need for another round of submissions and no special circumstances existed within the meaning of ICSID Arbitration Rule 26(3); to the extent applicable,

¹⁴ The Tribunal considers the Respondent's request to re-open PO No. 9 in paras. 347 to 402 of the present Award.

¹⁵ Reproduced as Annex 10 to the present Award.

¹⁶ Reproduced as Annex 11 to the present Award.

that would justify allowing the Respondent a further written submission beyond what had been granted to it through the Tribunal's other procedural orders and directions.

(xiii) Procedural Order No. 12

57 Procedural Order No. 12, dated 5 September 2014 ("PO No. 12")¹⁷, disposed in part of certain procedural requests made by the Respondent in its 2 July Procedural Statement. The Tribunal denied procedural requests (vi), (vii), (viii), (ix) and (x), which related to the alleged "emergence of new evidence" in the form of assertions purportedly made by the Claimants in their 6 June Statement on Inadmissibility, and held in reserve procedural requests (i), (ii), (iii), (iv) and (v) to be disposed of in this Award (see below Section VI.F.(4)).

(xiv) Procedural Order No. 13

58 As noted earlier, during the Joint First Session of the two Tribunals on 7 February 2011, the Parties agreed that, while the two cases would be heard together, they would not be formally consolidated and each Tribunal would issue a separate award in relation to each case.

59 In fact, as the Tribunal wrote at the outset of the present Award, during nearly four years of proceedings, the two cases have been heard together and the Parties have abided, most of the time but not always, by their original agreement as reflected in the Minutes of the Joint First Session by submitting joint pleadings and evidence, the Respondent in particular rarely specifying which arguments or submissions related to the von Pezold Claimants or to the Border Claimants.

60 As a result of this unique situation, on 20 October 2014, the Tribunal invited the Parties to provide their views on whether a single award or two separate awards should be rendered in these conjoined proceedings.

61 On 1 December 2014, the Claimants confirmed that, in their view, it was "imperative" that separate awards be rendered. They wrote:

Indeed, the issue of separate awards is not only a right in circumstances where there are separate proceedings, but also an imperative in these cases in order to protect the rights of the von Pezold Claimants, i.e. the claimants in ICSID Case No. ARB/10/15. The imperative arises because in the event of a single award, during the enforcement phase cooperation between all of the Claimants would be necessary. Such cooperation is likely to be impossible in the event that the Respondent takes control of the Border Company Claimants, which it may do in order to jeopardise the enforcement of a single award or for other reasons.

¹⁷ Reproduced as Annex 12 to the present Award.

62 The Respondent, on 18 December 2014, requested that a single award be rendered. The Respondent submitted:

The discussion has taken place in a unified manner, without any clear distinction in issues, briefing or oral argument. Even the Exhibits were unified and not distinguished as between cases. The matters are so intertwined that it is appropriate to resolve all issues as a single award.

63 In Procedural Order No. 13 dated 23 December 2014 ("PO No. 13")¹⁸, the Tribunal found that, while the matters in issue in the two proceedings were indeed intertwined, in that they arose from substantially the same events, "from a practical perspective and as a matter of principle", the von Pezold Claimants and the Border Claimants, having filed their claims independently of each other, should also be able to pursue enforcement of any award independently of each other.

64 Accordingly, the Tribunal confirmed in PO No. 13 that "a separate award shall be rendered for each proceeding in ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25".

65 Nevertheless, the Tribunal recalls that the matters at issue in these two cases arise from substantially the same events and that the Parties, as mentioned earlier, have submitted joint pleadings and evidence.

66 In the circumstances, as will be seen, the Tribunals render two separate awards which, in many respects, are identical but, where required by the terms of the ICSID Convention and/or by the pleadings of either Party, are case specific.

(2) The Oral Procedure

67 During the Joint First Session held on 7 February 2011, it was originally agreed that a hearing on liability and *quantum* was to be held in Washington, D.C. from 28 May to 1 June 2012, with 2 June 2012 in reserve.

68 Following the resignation of Professor Mutharika, the May/June 2012 hearing dates were vacated. On 27 October 2011, following the reconstitution of the Tribunal with Professor Chen filling the vacancy created by Professor Mutharika's resignation, the hearing on liability and *quantum* was rescheduled to take place in Singapore from 18 to 22 February 2013 (with 23 February 2013 in reserve).

¹⁸ Reproduced as Annex 13 to the present Award.

69 As indicated above, these second hearing dates were vacated by the Tribunal in PO No. 3. New hearing dates, also for a hearing in Singapore, were scheduled for 10 to 14 June 2013 (with 15 June 2013 in reserve).

70 Following the resignation of Professor Chen, the June 2013 hearing dates were also vacated. During a telephone conference of the President of the Tribunal with the Parties on 21 May 2013, new hearing dates were tentatively agreed, subject to the availability of the Respondent's new party-appointed arbitrator, for 28 October to 1 November 2013 in Washington, D.C. (with 2 November 2013 in reserve). The tentative hearing dates and new hearing venue were confirmed following the reconstitution of the two Tribunals with the addition of Mr. Hwang.

71 A hearing on jurisdiction, liability and *quantum* was held at the World Bank Headquarters in Washington, D.C. from 28 October to 2 November 2013 (the "Hearing").

72 The following persons attended the Hearing on behalf of the Claimants:

Mr. Heinrich von Pezold

Mr. Bernhard (Rüdiger) von Pezold

Mrs. Elisabeth von Pezold

Mr. Matthew Coleman, Steptoe & Johnson

Mr. Kevin Williams, Steptoe & Johnson

Mr. Anthony Rapa, Steptoe & Johnson

Ms. Helen Aldridge, Steptoe & Johnson

Mr. Charles Verrill, Jr., Wiley Rein

Mr. Thomas Innes, Steptoe & Johnson

Ms. June Booth, Steptoe & Johnson

Mr. Kenneth Schofield, Border Timbers Limited

Mr. Gideon Theron, Commercial Farmers' Union

Mr. Simon van der Lingen, Border Timbers Limited

Mr. George Bottger, Border Timbers Limited

Mr. Anthony Levitt, RGL Forensics

Mr. Richard Jenks, RGL Forensics

Ms. Helen Swain, RGL Forensics

Professor Stephen Chan, SOAS University

Mr. Alan Stephenson, Mills Fitchett

Mr. Paul Christopher Paul, Wintertons

Ms. Amanda von Pezold

Ms. Elba Schofield

Attending on behalf of the Respondent were:

The Honourable Douglas T. Mombeshora, Minister of Lands and Rural Resettlement

Mr. Wellington Mvura, Aid to Minister Mombeshora

Ms. Sophia Christina Tsvakwi, Permanent Secretary, Ministry of Lands and Rural Resettlement

Ms. Elizabeth Sumowah, Legal Advisor, Ministry of Lands and Rural Resettlement

Prince Machaya, Deputy Attorney General, Civil Division Attorney General's Office

Ms. Fortune Chimbaru, Chief Law Officer, Civil Division Attorney General's Office

Ms. Fatima Maxwell, Judge, Labour Court

Mr. Philip Kimbrough, Kimbrough & Associés

Mr. Tristan Moreau, Kimbrough & Associés

Minister Didymus Mutasa, Minister of State in the Office of the President and Cabinet

Mr. Onias C. Masiwa, Chief Inspector Exchange Control

Mr. Grasio Nyaguse, Director, Policy, Planning and Coordination, Ministry of Economic Planning and Development

Mr. Sifelani Moyo, Director, Ministry of Local Government, Public Works and National Housing

Dr. Joseph Kanyekanye, Group CEO, Allied Timbers

H.E. Ambassador Mapuranga Machivenyika, Embassy of the Republic of Zimbabwe in Washington, D.C.

Mr. Whatmore Goora, Embassy of the Republic of Zimbabwe in Washington, D.C.

Mr. Richard Chibuwe, Embassy of the Republic of Zimbabwe in Washington, D.C.

73 The following fact witnesses were called to testify during the Hearing: for the Claimants – Elisabeth [Tr. Day 2, pp. 417-475]; Mr. Heinrich von Pezold [Tr. Day 2, pp. 475-604]; Mr. Gideon Theron [Tr. Day 3, pp. 621-659]; Rüdiger [Tr. Day 3, pp. 660-705]; Mr. Kenneth Schofield [Tr. Day 3, pp. 706-759]; Mr. Simon van der Lingen [Tr. Day 3, pp. 763-804]; and Mr. George Bottger [Tr. Day 3, pp.

806-829]; for the Respondent – Ms. Sophia Tsvakwi [Tr. Day 4, pp. 1168-1257] and Minister Didymus Mutasa [Tr. Day 5, pp. 1332-1417].

74 The following expert witnesses were called to testify during the Hearing: for the Claimants - Mr. Paul Paul [Tr. Day 3, pp. 830-902]; Professor Stephen Chan [Tr. Day 3, pp. 902-970]; Mr. Alan Stephenson [Tr. Day 4, pp. 986-1057]; Mr. Anthony Levitt [Tr. Day 4, pp. 1057-1163]; for the Respondent - Mr. Onias Masiwa [Tr. Day 5, pp. 1275-1332]; Prince Machaya [Tr. Day 5, pp. 1444-1499]; Mr. Grasiyo Nyaguse [Tr. Day 5, pp. 1502-1578]; Mr. Sifelani Moyo [Tr. Day 6, pp. 1592-1676]; and Mr. Joesph Kanyekanye [Tr. Day 6, pp. 1687-1871].

75 Mr. Guy Lafferty, Mr. Juerg Kaempfer, Mr. John Gadzikwa, Mr. Alex Masterson, Mrs. Anna Webber, Mrs. Maria Batthyány, Mr. Georg von Pezold, Mr. Felix von Pezold, Mr. Johann von Pezold, Mr. Adam von Pezold, Mr. Henrik Olivier, Mr. Duncan Hamilton, Mr. Adrian de Bourbon, Dr. Albrecht Conze and Mr. Nicholas Shaxson submitted fact written evidence and Mr. Charles Laurie, Mr. Arthur Daugherty, Mr. John Robertson, Mr. Jason Ridley, Professor Dan Sarooshi submitted expert reports in support of the Claimants' case, but were not called to testify at the Hearing. Similarly, Mr. Nixon Kutsaranga, Mr. Upenyu Mavatu, Mr. Richard Patrick Chitondwe, Mr. Lovemore Makunun'unu, Mr. Maxwell Chasakwa, Mr. Rodwell Muzite and Chief Chadworth Ringisai Chikukwa submitted fact written evidence in support of the Respondent's case but were not called to testify orally.

76 On 30 October 2013, counsel for the Respondent informed the Tribunal that Minister Didymus Mutasa, whose presence at the Hearing had been requested by the Claimants, was unable to attend the Hearing in-person due to delays in the issuance of a travel visa by the United States Government. Accordingly, arrangements were made for Minister Mutasa to be examined by video-conference from the World Bank's office in Harare, in the presence of Ms. Joy Berry, staff member at ICSID, and a representative of each Party (see Tr. Day 4, pp. 981-983).

(3) The Post-Hearing Procedure

77 On 22 November 2013, the Claimants filed their proposed corrections to the Hearing transcript and identified those portions of the transcript which they submitted contain inadmissible evidence and/or submissions. As the Respondent requested, and was granted, an extension of time to file its proposed corrections to the Hearing transcript, the Claimants' proposed corrections and excisions relating to inadmissible evidence and/or submissions were transmitted to the Tribunal and the Respondent on 29 November 2013, following the Respondent's filing of its proposed corrections.

78 On 29 November 2013, the Respondent filed its proposed corrections to the transcript, along with responses to questions raised by the Tribunal during the Hearing, supported by those documents

that the Respondent had undertaken to provide following the Hearing relating to Zimbabwean land audits and the *travaux préparatoires* of the German BIT.

79 By letter of 2 December 2013, the Tribunal invited the Parties to confer and seek to agree corrections to the transcript that were editorial in nature, advising the Tribunal of any such agreement by 16 December 2013. The Tribunal also invited the Claimants to file any observations they had on the Respondent's answers to the Tribunal's questions, which had been posed during the Hearing, regarding land audits and the *travaux préparatoires* of the German BIT by 23 December 2013. The Tribunal invited the Respondent to file a reply to the Claimants' observations by 6 January 2014; however, the Respondent elected not to file such reply.

80 All of the aforementioned post-hearing matters, among others, were resolved by PO No. 10.

81 On 7 May 2014, the Parties filed post-hearing briefs with the Tribunal¹⁹. In accordance with PO No. 10, the Claimants filed, on 6 June 2014, their statement regarding material contained in the Respondent's Post-Hearing Brief which they considered inadmissible.

82 On 20 October 2014, the Tribunal requested detailed costs submissions, which were duly filed by the Parties on 1 December 2014. The Tribunal also invited the Parties to file a simultaneous round of reply submissions on costs, by 18 December 2014, which were also duly filed.

83 On 3 February 2015, pursuant to Rule 38(1) of the ICSID Arbitration Rules, the Tribunal declared the proceedings closed in both the von Pezold and the Border arbitrations.

84 On 2 June 2015, the Tribunal came to the conclusion that it would be unable to draw up and sign the Award(s) by 3 June 2015, being 120 days after closure of the proceedings. Accordingly, pursuant to Rule 46 of the ICSID Arbitration Rules, the Tribunal then extended this period by a further 60 days and so notified the Parties.

F. The BITs

85 The treaties under which the Claimants advance their claims are the German BIT, signed on 29 September 1995, and which entered into force on 14 April 2000²⁰, together with the Protocol to the German BIT which was signed on 29 September 1995 (the "**German Protocol**"), and the Swiss BIT, signed on 15 August 1996, and which entered into force on 9 February 2001, together with the Protocol to the Swiss BIT which was signed on 15 August 1996.

¹⁹ The Tribunal considers the Respondent's request, in its Post-Hearing Brief, to re-open PO No. 9 in Section VI.F (2) below.

²⁰ This description is without prejudice to the Claimants' submission that the German BIT provisionally applied by agreement of the BIT Contracting Parties as from 18 September 1996. See above Section VI.E.

86 The Parties' arbitration agreements are contained in the respective BITs. Article 11 of the German BIT provides as follows in connection with the settlement of disputes arising under the treaty between a Contracting State and an investor of a Contracting State:

**Settlement of Investment Disputes between a Contracting Party
and an Investor of the Other Contracting Party**

(1) Disputes between a Contracting Party and a national or company of the other Contracting Party concerning an investment of such national or company in the territory of the former Contracting Party shall as far as possible be settled amicably between the parties concerned.

(2) If the dispute is not settled within six months of the date when it is raised by one of the parties in dispute, it shall, at the request of the national or company concerned, be submitted for arbitration. Each Contracting Party hereby consents to submit the dispute to arbitration. Unless the parties in dispute agree otherwise, the dispute shall be submitted for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18th March, 1965. The arbitral tribunal constituted pursuant to the said Convention shall reach its decisions on the basis of this Agreement, any treaties in force between the Contracting Parties, such rules of general international law as may be applicable, and the domestic law of the Contracting Party in the territory of which the investment in question is situated.

(3) The award shall be binding on the parties and shall not be subject to any appeal or remedy other than that provided for in the said Convention. The award shall be enforced in accordance with the domestic law of the Contracting Party in the territory of which the investment in question is situated.

(4) During arbitration proceedings or proceedings for the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the national or company concerned has received compensation under an insurance contract in respect of all or part of his or its damage or losses.

87 Article 10 of the Swiss BIT provides as follows in connection with the settlement of disputes arising under the treaty between a Contracting State and an investor of a Contracting State:

**Disputes between a Contracting Party and an investor of the other
Contracting Party**

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 11 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States.

Each party may start the procedure by addressing a request to that effect to the Secretary-General of the Centre as foreseen by Article 28 and 36 of the above-mentioned Convention. Should the parties disagree on whether conciliation or arbitration is the most appropriate procedure, the investor concerned shall have the final decision.

(3) The arbitral tribunal shall decide on the basis of the present Agreement and other relevant agreements between the Contracting Parties; the terms of any particular agreement that has been concluded with respect to the investment; the law of the Contracting State party to the dispute, including its rules on the conflict of laws; such rules of international law as may be applicable.

(4) The Contracting Party which is a party to the dispute shall not at any time during the procedures assert as a defence its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.

(5) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to the arbitration of the Centre unless the other Contracting Party does not abide by and comply with the award rendered by the arbitral tribunal.

(6) The arbitral award shall be final and binding for the parties involved in the dispute and shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located.

G. The Parties' Respective Prayers for Relief

88 The von Pezold Claimants seek declaratory relief and restitution plus compensation, or compensation alone, for the alleged violations by the Respondent of the terms of the German and Swiss BITs²¹. In particular, the von Pezold Claimants seek the following relief from this Tribunal (see Cl. Corrected Request for Relief, Section II):

Declaratory Relief - Jurisdiction

8.1 In relation to the von Pezold Claimants, a declaration that:

8.1.1 the German BIT provisionally applied from 18 September 1996;

8.1.2 the Tribunals have jurisdiction over their claims;

8.1.3 the Respondent is estopped from denying that the German BIT applies to their investments;

8.1.4 further or alternatively to the relief requested in para 8.1.3 above, the Respondent is estopped from denying that their investments were specifically approved by the Respondent's competent authorities at the time of their admission, or denying any other facts (whether true or not) that may prevent the German BIT from being applicable to their investments;"

Declaratory Relief – Respondent's defences

8.2 In relation to the von Pezold Claimants, a declaration that all of the Respondent's defences are denied and dismissed.

Declaratory Relief – MFN

8.3 In relation to the Claimant Rüdiger, a declaration that he may invoke the German MFN Clauses to:

²¹ Rüdiger von Pezold seeks relief solely under the German BIT. But see para. 88, 8.3 below.

8.3.1 rely on Article 6(1) of the Swiss BIT, to the extent that Article accords more favourable treatment than Article 4(2) of the German BIT (non-discrimination and expropriation);

8.3.2 rely on Article 5(5) of the Danish BIT, to the extent that Article accords more favourable treatment than Ad Article 4 of the German Protocol (impairment of shares);

8.3.3 rely on Articles 5(1) and 5(2) of the Danish BIT, to the extent those articles accord more favourable treatment than Article 4(2) of the German BIT (compensation at fair market value for lawful expropriation);

8.3.4 be accorded restitution in kind, which is the more favourable treatment that has been granted to other foreign investors, and which has not been granted to him;

8.4 In relation to the **Swiss Family Claimants**, a declaration that they may invoke the MFN Clauses to:

8.4.1 rely on Article 5(5) of the Danish BIT, to the extent that Article accords more favourable treatment than Ad Article 4 of the German Protocol, and Article 6(2) of the Swiss BIT (impairment of shares);

8.4.2 rely on Articles 5(1) and 5(2) of the Danish BIT, to the extent those Articles accord more favourable treatment than Article 4(2) of the German BIT, and Article 6(1) of the Swiss BIT (compensation at fair market value for lawful expropriation);

8.4.3 be accorded restitution in kind, which is the more favourable treatment that has been granted to other foreign investors, and which has not been granted to them.

Declaratory Relief – Breaches of the BITs

8.5 In relation to the **von Pezold Claimants**, a declaration that the Respondent has breached the following Articles of the **German BIT**:

8.5.1 Article 4(2) by unlawfully expropriating the von Pezold Claimants' investments and returns in that it has not observed the Conditions Permitting Expropriation;

8.5.2 Alternatively, Article 4(2) by expropriating the von Pezold Claimants' investments and returns in that it has not observed the Conditions Permitting Expropriation;

8.5.3 Article 2(1) by failing to accord fair and equitable treatment to the von Pezold Claimants, their investments and their returns;

8.5.4 Article 2(2) by taking unreasonable, arbitrary and discriminatory measures that impaired the management, maintenance use, enjoyment and disposal of the von Pezold Claimants' investments and their returns;

8.5.5 Article 4(1) by failing to accord the von Pezold Claimants, their investments and their returns full protection and security;

8.5.6 Article 5, 6(1) & (2) by failing to allow the free transfer of payments in connection with the von Pezold Claimants' investments; and

8.6 In relation to the **von Pezold Claimants**, a declaration that the Respondent has breached Article 5(5) of the **Danish BIT** (as applicable through the operation of the MFN Clauses) by impairing or diminishing the fair market value

of the von Pezold Claimants' shares in the Forrester Companies, the Border Company Claimants and the Makandi Companies without the payment of prompt, adequate and effective compensation;

8.7 In relation to the **Swiss Family Claimants**, a declaration that the Respondent has breached the following Articles of the **Swiss BIT**:

8.7.1 Article 6(1) by unlawfully expropriating the Swiss Family Claimants' investments and returns in that it has not observed the Conditions Permitting Expropriation;

8.7.2 Alternatively, Article 6(1) by expropriating the Swiss Family Claimants' investments and returns in that it has not observed the Conditions Permitting Expropriation;

8.7.3 Article 4(1) failing to accord fair and equitable treatment to the Swiss Family Claimants, their investments, and their returns;

8.7.4 Article 4(1) by taking unreasonable and discriminatory measures that impaired the management, maintenance, use, enjoyment, extension, and disposal of the Swiss Family Claimants' investments and returns;

8.7.5 Article 4(1) by failing to accord the Swiss Family Claimants, their investments and returns full protection and security;

8.7.6 Article 5 by failing to allow the free transfer of payments relating to the Swiss Family Claimants' investments; and

Declaratory Relief – Breaches of International Law

8.8 In relation to the **von Pezold Claimants**, a declaration that the Respondent:

8.8.1 in applying the Land Reform and Resettlement Programme to the von Pezold Claimants has grossly and/or systematically failed to fulfil its obligation arising under a peremptory norm of general international law, namely not to discriminate against people based on race or colour, and the consequences as stated in Article 41 of the ILC Articles apply;

8.8.2 has breached customary international law by expropriating the von Pezold Claimants' investments without the observance of the principles that expropriation under customary international law must be for a public purpose, be non-discriminatory, observe due process of law, and be accompanied by payment of prompt, adequate and effective compensation.

Declaratory Relief – Breaches of Zimbabwean Law

8.9 In relation to the **von Pezold Claimants**, a declaration that the Respondent in applying the Land Reform Programme to the von Pezold Claimants has breached s. 18(1) and s. 23 of the Constitution.

Declaratory Relief – As to Election

8.10 In relation to the **von Pezold Claimants**, a declaration that they may elect to be awarded Heads of Loss 1, 2, 5, 9, 10, 14, and 15 in **Corrected Annex 1** in the amounts as assessed on the date of breach or on the current date, whichever may be higher after interest has been applied. All other Heads of Loss in **Corrected Annex 1**, in so far as they relate to the von Pezold Claimants, shall be assessed on the date of breach.

Declaratory Relief – Damage Caused by Respondent

8.11 In relation to the **von Pezold Claimants**, a **declaration** that the breaches of the BITs, international law and Zimbabwean law as pleaded in **paragraphs 8.5 to 8.9 above** have damaged the productive capacity and infrastructure of the Forrester Estate, the Border Estate and the Makandi Estate and thereby caused losses to the von Pezold Claimants, entitling the von Pezold Claimants, through restitution and compensation, to be put into the position that they would have been in had those breaches not occurred.

Restitution in kind and compensation, or compensation alone

(a) Restitution in kind and compensation

8.12 In relation to the **von Pezold Claimants**, in regard to the Forrester, Border and Makandi Estates, **ordering** the Respondent:

8.12.1 to reinstate the companies listed in **Table 1, Table 6 and Table 10 in the Memorial** (as amended, "**The Tables**"), within 45 days of the dispatch of the Tribunal's award ("**the Restitution Window**"), with the full legal title (unencumbered) (or alternatively to issue equivalent new legal title (unencumbered)), and the exclusive control, to each of the properties that they respectively owned (as listed in the Tables) before they were expropriated by the Respondent pursuant to the Constitutional Amendment, together with the Water Rights and the Permits listed respectively in **Table 1 and Table 3** of the Reply (this relief is hereafter referred to as "**the Restitution**"), and, in addition, within 60 days of the dispatch of the Tribunal's award, to pay those of the von Pezold Claimants, as specified below, compensation in the following sums:

Concerning the Forrester Estate

8.12.1.1 US\$37,372,172 divided equally between the Parent Claimants or in such other manner of allocation that they may prefer;

8.12.1.2 US\$7,186,302 or alternatively, US\$8,697,776 to Elisabeth or in such other manner of allocation as Elisabeth may prefer;

Concerning the Border Estate

8.12.1.3 US\$42,222,481 divided as follows – 44% to each of the Parent Claimants, 12% divided equally between the Adult Children Claimants, or in such other manner of allocation that they may prefer; or

In the alternative, compensation alone

8.12.2 in the alternative to the relief requested in **para. 8.12.1 above**, or if the Restitution is not made in full within the Restitution Window, to pay, within 60 days of the dispatch of the Tribunal's award, the von Pezold Claimants compensation in the following sums:

8.12.2.1 in relation to the Forrester Estate, US\$61,874,400, divided equally between the Parent Claimants or in such other manner of allocation that they may prefer;

8.12.2.2 in relation to the Forrester Estate, US\$7,186,302 or alternatively, US\$8,697,776, to Elisabeth or in such other manner of allocation as Elisabeth may prefer;

8.12.2.3 in relation to the Border Estate, US\$130,848,074, divided as follows – 44% to each of the Parent Claimants, 12% divided equally between the Adult Children Claimants, or in such other manner of allocation that they may prefer;

8.12.2.4 in relation to the Makandi Estate, compensation in the sum of US\$13,930,012, divided equally between the Parent Claimants or in such other manner of allocation that they may prefer.

Moral damages

8.13 In relation to the von Pezold Claimants, ordering the Respondent to pay them moral damages of US\$13,000,000, allocated as US\$5,000,000 to Heinrich and US\$1,000,000 to each of the other von Pezold Claimants;

Interest

8.14 In relation to the **von Pezold Claimants**, ordering the Respondent to pay them compound interest on any damages, save for moral damages, at the rate of 21.5%, compounded every six months, from the dates as stated in the Second Levitt Report, and as indicated in **Corrected Annex 1**, until the date of payment, or alternatively at an interest rate of 9.8%, or alternatively at an interest rate of LIBOR plus 4%, compounded at the same intervals, payable over the same periods;

Costs and further or additional relief

8.15 In relation to the **von Pezold Claimants**, ordering the Respondent to pay them (in the currency incurred) all costs and expenses of this arbitration, including the fees and expenses of the Tribunal, experts and the cost of legal representation, plus interest thereon until the date of payment; and

8.16 Further or additional relief as may be appropriate under the applicable law. [citations/footnotes and Annex omitted]

89 The Border Claimants seek declaratory relief and restitution plus compensation, or compensation alone, for the alleged violations by the Respondent of the terms of the Swiss BIT. In particular, the Border Claimants seek the following relief from this Tribunal (see Cl. Corrected Request for Relief, Section III):

Declaratory Relief - Jurisdiction

9.1 In relation to the **Border Company Claimants**, a declaration that:

9.1.1 the Tribunals have jurisdiction over their claims;

Declaratory Relief – Respondent’s defences

9.2 In relation to the **Border Company Claimants**, a declaration that all of the Respondent’s defences are denied and dismissed;

Declaratory Relief – MFN

9.3 A declaration that the **Border Company Claimants** may invoke the Swiss MFN Clauses to:

9.3.1 rely on Article 5(5) of the Danish BIT, to the extent that Article accords more favourable treatment than Article 6(2) of the Swiss BIT (impairment of shares);

9.3.2 rely on Article 6 of the German BIT, to the extent that Article accords more favourable treatment than Article 5 of the Swiss BIT (free transfer of payments);

9.3.3 rely on Articles 5(1) and 5(2) of the Danish BIT, to the extent those Articles are more favourable than Article 6(1) of the Swiss BIT (compensation at fair market value for lawful expropriation);

9.3.4 be accorded restitution in kind, which is the more favourable treatment that has been granted to other foreign investors, and which has not been granted to them.

Declaratory Relief – Breaches of the BITs

9.4 In relation to the **Border Company Claimants** a declaration that the Respondent has breached the following Articles of the **Swiss BIT**:

9.4.1 Article 6(1) by unlawfully expropriating the Border Company Claimants' investments and returns in that it has not observed the Conditions Permitting Expropriation;

9.4.2 Alternatively, Article 6(1) by expropriating the Border Company Claimants' investments and returns in that it has not observed the Conditions Permitting Expropriation;

9.4.3 Article 4(1) by failing to accord fair and equitable treatment to the Border Company Claimants, their investments, and their returns;

9.4.4 Article 4(1) by taking unreasonable and discriminatory measures that impaired the management, maintenance, use, enjoyment, extension, and disposal of the Border Company Claimants' investments and their returns;

9.4.5 Article 4(1) by failing to accord the Border Company Claimants, their investments and returns full protection and security;

9.4.6 Article 5 by failing to allow the free transfer of payments relating to the Border Company Claimants' investments.

9.5 In relation to **Border**, a declaration that the Respondent has breached Article 5(5) of the Danish BIT (as applicable through the operation of the Swiss MFN Clauses) by impairing or diminishing the fair market value of Border's shares in Hangani and Border International without the payment of prompt, adequate and effective compensation.

Declaratory Relief – Breaches of International Law

9.6 In relation to the **Border Company Claimants**, a declaration that the Respondent:

9.6.1 in applying the Land Reform and Resettlement Programme to the Border Company Claimants has grossly and/or systematically failed to fulfil its obligation arising under a peremptory norm of general international law, namely not to discriminate against people based on race or colour, and the consequences as stated in Article 41 of the ILC Articles apply;

9.6.2 has breached international law by expropriating the Border Company Claimants' investments without the observance of the principles that expropriation under customary international law must be for a public purpose, be non-

discriminatory, observe due process of law, and be accompanied by payment of prompt, adequate and effective compensation.

Declaratory Relief – Breaches of Zimbabwean Law

9.7 In relation to the **Border Company Claimants**, a declaration that the Respondent in applying the Land Reform Programme to the Border Company Claimants has breached s18(1)57 and s2358 of the Constitution.

Declaratory Relief – As to Election

9.8 In relation to the **Border Company Claimants**, a declaration that they may elect to be awarded Heads of Loss 9 and 10 in **Corrected Annex 1** in the amounts as assessed on the date of breach or on the current date, whichever may be higher after interest has been applied. All other Heads of Loss in **Corrected Annex 1**, in so far as they relate to the Border Company Claimants, shall be assessed on the date of breach.

Declaratory Relief – Damage Caused by Respondent

9.9 In relation to the **Border Company Claimants**, a declaration that the breaches of the BITs, international law and Zimbabwean law as pleaded in **paras 9.4 to 9.7 above** have damaged the productive capacity and infrastructure of the Border Estate and thereby caused losses to the Border Company Claimants, entitling the Border Company Claimants, through restitution and compensation, to be put into the position that they would have been in had those breaches not occurred.

Restitution in kind and compensation, or compensation alone

(a) Restitution in kind and compensation

9.10 In relation to the **Border Company Claimants**, ordering the Respondent:

9.10.1 to reinstate Border Timbers Limited and Hangan Development Co. (Private) Limited, within 45 days of the dispatch of the Tribunal's award ("**the Restitution Window**"), with the full legal title (unencumbered) (or in the alternative to issue equivalent new legal title (unencumbered)) and the exclusive control, to each of the properties that they respectively owned (as listed in **Table 6 in the Memorial**, as amended) before they were expropriated by the Respondent pursuant to the Constitutional Amendment (this relief is hereafter referred to as "**the Restitution**"), and, in addition, within 60 days of the dispatch of the Tribunal's award, to pay compensation of US\$48,817,76160 allocated to Border Timbers Limited or in such manner of allocation that the Border Company Claimants may prefer; or

(b) In the alternative, compensation alone

9.10.2 In the alternative to the relief requested in **paragraph 9.10.1 above**, or if the Restitution is not made in full within the Restitution Window, to pay, within 60 days of the dispatch of the Tribunal's award, the Border Company Claimants compensation of US\$151,286,939 61 allocated to Border Timbers Limited or in such manner of allocation that the Border Company Claimants may prefer.

Moral damages

9.11 **Ordering** the Respondent to pay the **Border Company Claimants** moral damages of US\$5,000,000, allocated to Border Timbers Limited or in such manner of allocation that the Border Company Claimants may prefer;

Interest

9.12 **Ordering** the Respondent to pay the **Border Company Claimants** compound interest on any damages, save for moral damages, at the rate of 21.5%, compounded every six months, from the dates as stated in the Second Levitt Report, and as indicated in **Corrected Annex 1**, until the date of payment, or alternatively at an interest rate of 9.8%, or alternatively at an interest rate of LIBOR plus 4%, compounded at the same intervals, payable over the same periods;

Costs and further or additional relief

9.13 **Ordering** the Respondent to pay the **Border Company Claimants** (in the currency incurred) all costs and expenses of this arbitration, including the fees and expenses of the Tribunal, and experts, and the cost of legal representation, plus interest thereon until the date of payment; and

9.14 Further or additional relief as may be appropriate under the applicable law. [citations/footnotes and Annex omitted]

90 The Respondent opposes the von Pezold and Border Claimants' respective requests for relief and asks that all of the foregoing requests be denied (see the Respondent's Corrected Request for Relief of 9 Septmeber 2013):

RESPONDENT RESPECTFULLY REQUESTS THE ARBITRAL TRIBUNAL TO DECLARE:

1 THAT THE FOLLOWING FACTS RELEVANT TO JURISDICTION ARE ON THE RECORD

1.1 *that consent is the cornerstone of ICSID jurisdiction and must be in writing*

1.2 *that consent of the parties to ICSID jurisdiction takes the form of the provisions of the Swiss BIT and the German BIT*

1.2.1 *that Article 9 of the German BIT applies in its entirety*

1.2.2 *that Article 2 of the Swiss BIT applies*

1.3 *that Respondent had in place at all relevant times*

1.3.1 *FIC / ZIC / ZIA Foreign Investment approval procedures*

1.3.2 *Stock Exchange Rules*

1.3.3 *Exchange Control Regulations*

1.4 *that Claimants did not comply with Local Law procedures, in particular Foreign Investment Regulations, Stock Exchange Rules and Exchange Control Regulations, to confer "foreign investor" status on their acquisitions of holdings*

1.5 *that Claimants have not produced any writing which proves their respect of the provisions of Article 9 a) of the German BIT, as regards Foreign Investment Regulations, Stock Exchange Rules and Exchange Control Regulations*

1.6 *that Claimants have not produced any writing which proves their respect of the provisions of Article 9 b), as regards Foreign Investment Regulations*

1.7 that Claimants have not produced any writing which proves their respect of the provisions of Article 2 of the Swiss BIT, as regards in particular Foreign Investment Regulations, Stock Exchange Rules and Exchange Control Regulations

1.8 that Claimants have not proven any valid approval -- whether prior to their confidential acquisitions or thereafter, such as subsequent to entry into force of the Swiss BIT or the German BIT.

1.9 that the provisions of the Swiss BIT and the German BIT that are to be upheld -- by both the party claiming protected investor status and the Host State -- include all of the terms of the BIT particularly Article 9 a) and Article 9 b) of the German BIT and Article 2 of the Swiss BIT

1.10 that Claimants have not proven any waiver of the provisions of the German and the Swiss BITs, binding on the State of Zimbabwe

1.11 that Claimants have not proven that the State of Zimbabwe solicited these investments.

1.12 that Claimants have not proven estoppel

1.13 that Illegality vitiates consent

2 THAT AS TO JURISDICTION THERE ARE SIX LEGALLY-DISTINCT REASONS THESE ARBITRAL TRIBUNALS HAVE NO JURISDICTION

2.1 that Claimants' acquisitions do not meet the "in accordance with the laws of the Host State" condition to Respondent's consent under Article 2 of the Swiss BIT, as Claimants did not comply with local laws, rules and regulations that existed at all relevant times:

- 2.1.1 Cap on holdings under Zimbabwe Stock Exchange Regulations
- 2.1.2 Zimbabwe Exchange Control Regulations
- 2.1.3 Zimbabwe Foreign Investment Regulations

2.2 that Claimants' acquisitions do not meet the "in accordance with the laws of the Host State" condition to Respondent's consent under Article 9a of the German BIT, as Claimants did not comply with:

2.2.1 Local laws, rules and regulations that existed at all relevant times:

- 2.2.1.1 Cap on holdings under Zimbabwe Stock Exchange Regulations
- 2.2.1.2 Zimbabwe Exchange Control Regulation
- 2.2.1.3 Zimbabwe Foreign Investment Regulations

2.2.2 The "specific approval" requirement of Article 9b) of the German BIT for an ition to constitute a "foreign investment" incorporated into Local Law by means of the treaty being ratified and thus also applicable under Article 9a) of the German BIT

2.3 that Claimants' acquisitions are not a protected investment but a mere "holding" of a "portfolio"

2.4 that Claimants' acquisitions do not meet the "Specific approval" condition to Respondent's consent under Article 9 b) of the German BIT

2.5 *that there is no consent by Respondent to ICSID protection for Claimants' acquisitions as per the ICISD Convention and as per ICSID case law*

2.6 *that the dispute does not arise out of an "investment" within the meaning of the ICISD Convention*

2.6.1 *that Claimants have not made any "new" investment as foreseen by the State Parties at the time of entering into the BITs*

2.6.2 *that Claimants have not proven any contribution to the economy of the Host State and drained off the riches of the Host State into a nebulous maze of tax havens, thereby weakening the economy of the Host State*

2.6.3 *that Claimants' confidential holdings are merely commercial interests in the nature of a portfolio, not a protected investment*

2.6.4 *that Claimants' own argument shows that their acquisitions did not involve risk, so not a protected investment*

2.6.5 *that Claimants' indirect claims are not within ICSID jurisdiction*

3 THAT, EVEN IF JURISDICTION, THE SIX REASONS SET FORTH IN SECTIONS 2.1 THROUGH 2.6 ABOVE ALSO CAUSE CLAIMANTS' CONFIDENTIAL ACQUISITIONS NOT TO BE PROTECTED INVESTMENTS AS TO THE MERITS

3.1 *that Claimants did serious due diligence*

3.2 *that Claimants did not seek or have any guarantee other than local law*

4 THAT EVEN IF JURISDICTION, THERE ARE THREE LEGALLY-DISTINCT FOUNDATIONS UPON WHICH ZIMBABWE LAND REFORM MEASURES CONSTITUTE NON-PRECLUDED MEASURES

4.1 *that Zimbabwe Land Reform is a Non-Precluded Measure as « force majeure » under ILC draft Article 23*

4.1.1 *that the massive-popular-uprisings-all-across-Zimbabwe were spontaneous, contrary to Government plans and are part of the overwhelming and ineluctable March of History*

4.1.2 *that the Zimbabwean Government was not in favor of the massive-popular-spontaneous-ineluctable-uprisings-all-across-Zimbabwe*

4.1.3 *that no one -- including Claimants and the members of these Arbitral Tribunals -- can be sure in their deepest conscience that had they been in a position in the Zimbabwean Government and had they ordered police -- including CFU reserve police troops -- to suppress the massive-popular-spontaneous-ineluctable-uprisings-all-across-Zimbabwe that an Egypt or Syria style internal massacre would not have occurred*

4.1.4 *that the State of Zimbabwe was correct in not ordering its police to fire on the population of Zimbabwe*

4.1.5 *that President Mugabe and the Government, faced with the circumstances imposed upon them by the massive-popular-spontaneous-ineluctable- uprisings-all-across-Zimbabwe managed a difficult situation as best they could and have worked for the good of the Zimbabwean People*

4.1.6 that the Zimbabwean Government was cautious and reasonable towards the masses of land-hungry Zimbabweans who marched with sticks and stones

4.1.7 that War veterans are neither "thugs," nor "rubber stamps" nor are they "the State"

4.1.8 that War veterans' and the land-hungry masses' hostility to the Government's slow pace of land reform forced the Government to embark on Fast Track Land Reform,

4.1.9 that the Zimbabwean Government was cautious and reasonable towards European Landed Gentry

4.1.10 that in particular, the Zimbabwean State acted cautiously and reasonably as concerns Claimants, as Respondent's granted Claimants eight years of substantially unencumbered use of the Forrester Estate, the Border Estate and the Makandi Estate

4.1.11 that the massive-popular-spontaneous-ineluctable-uprisings-all-across- Zimbabwe were for Respondent an irresistible force

4.2 *that Zimbabwe Land Reform is a Non-Precluded Measure as «distress» under ILC draft Article 24 as Respondent's recognition of the overwhelming force of the masses saved countless lives of persons entrusted to the Host State's care*

4.3 *that Zimbabwe Land Reform is a Non-Precluded Measure as «necessity» under ILC draft Article 25 as it avoided grave danger to the essential interests of the State*

4.3.1 that such emergency crisis threats were sufficiently grave to trigger application of the State of Necessity defence

4.3.2 that the events of massive-popular-spontaneous-ineluctable-uprisings-all- across-Zimbabwe in their historic context were an emergency or crisis out of the ordinary day-to-day functioning of the State from 16 February 2000 through 16 March 2013 through 16 March 2013

4.3.3 that the massive-popular-spontaneous-ineluctable-uprisings-all-across-Zimbabwe ongoingness of the State of Zimbabwe

5 THAT EVEN IF JURISDICTION, ZIMBABWE LAND REFORM IS A NON-PRECLUDED MEASURE AS "PUBLIC ORDER" UNDER GERMAN BIT

5.1 *that the German BIT excludes from BIT protection for the investor decisions made by the Host State in order to maintain "public order"*

5.2 *that "public order" properly has the broad German definition and not the narrow North American definition*

5.3 *that the massive-popular-spontaneous-ineluctable-uprisings-all-across-Zimbabwe constituted an emergency or crisis, with threats sufficiently grave to trigger application of the BIT "public order" exception*

6 THAT IN THE EVENT THE ARBITRAL TRIBUNALS FIND EITHER CLAIMANTS' FAILURE TO RESPECT ARTICLE 2B) "SPECIFIC APPROVAL" REQUIREMENT OR THAT ZIMBABWE LAND REFORM IS A NON-PRECLUDED MEASURE AS PER THE "PUBLIC ORDER" PROVISION OF THE GERMAN BIT, NO APPLICATION OF THE SWISS BIT IS POSSIBLE

6.1 *that Claimant Rudiger cannot benefit from any protection under the Swiss BIT*

6.2 *that Claimants have not proven the percentage holdings owned directly, indirectly, beneficially or which are "controlled" or "handled" by Claimant Rudiger, so no accurate determination of damages is sufficiently certain under the Swiss BIT*

6.3 *that there is insufficient proof upon which any award might be granted*

7 THAT THE FACTS AND LAW PRECLUDE WRONGFULNESS UNDER THE SWISS BIT, THE GERMAN BIT AND INTERNATIONAL LAW

7.1 *that as the uprisings of the Zimbabwean people were, massive, popular, spontaneous and ineluctable, Zimbabwe Land Reform is a "Public Purpose" which excludes "wrongfulness"*

7.1.1 *that Zimbabwe Land Reform increased well-being of Zimbabweans and has been successful*

7.1.1.1 *that the interests of the Zimbabwean people have been and are being served by the Land Reform Programme*

7.1.1.2 *that the interests of the Zimbabwean women have been and are being served by the Land Reform Programme*

7.1.1.3 *that the future holds promise in part thanks to Zimbabwe Land Reform*

7.1.1.4 *that a successful revolution begets its own legality and the Zimbabwean Revolution has succeeded*

7.1.1.5 *that Fast Track Land Reform has attenuated history of violence in Zimbabwe*

7.2 *that Claimants' negative arguments to cancel public purpose are not sound*

7.2.1 *that publicity is not the basis of law*

7.2.2 *that Respondent did not discriminate against people based on race or colour*

7.2.3 *that Zimbabwe Land Reform has advanced Human rights for Zimbabweans*

7.2.4 *that human rights treaties recognize limitations on otherwise protected rights for specified, overarching public policy reasons, such as security and public order*

7.2.5 *that the popular uprisings are not attributable to the State of Zimbabwe*

7.2.6 *that controlling squatters has never been successful, whomever attempts to evict the locals from their ancestors' land*

7.2.7 *that Claimants' other arguments that Zimbabwe's Fast Track Land Reform violated BIT protections must fail as to:*

7.2.7.1 *Fair and Equitable Treatment*

7.2.7.2 *Full protection and Security*

7.2.7.3 *Compensation: the Zimbabwean State granted Claimants eight years of substantially unencumbered use of the Forrester Estate, the Border Estate and the Makandi Estate,*

which meets the requirement of prompt, adequate and effective compensation

7.2.7.4 Zimbabweans are not either subsistence farmers or corrupt elite

7.3 *that Claimants' position as to its legitimate expectations is unfounded and any legitimate expectations Claimants might have do not contradict*

7.3.1 *the lack of "wrongfulness" of the taking*

7.3.2 *"Public Order"*

7.3.3 *"Essential Interests" interpretations*

7.4 *that Claimants' anachronistic model cannot be propulsed into the future*

7.5 *that the Respondent did not breach any terms of the BITs that apply to it*

7.6 *that the taking was lawful*

8 THAT NO INDEMNITIES, COMPENSATION, DAMAGES OR INTEREST IS DUE FOR REASON:

8.1 *that Claimants' acquisitions do not meet the "in accordance with the laws of the Host State" condition to Respondent's consent under Article 2 of the Swiss BIT*

8.2 *that Claimants' acquisitions do not meet the "in accordance with the laws of the Host State" condition to Respondent's consent under Article 9a of the German BIT*

8.3 *that Claimants' acquisitions do not meet the "Specific approval" condition to Respondent's consent under Article 9 b) of the German BIT*

8.4 *that Claimants' acquisitions are not a protected investment but a mere "holding" of a "portfolio"*

8.5 *that there is no consent by Respondent to ICSID protection for Claimants' acquisitions as per the ICISD Convention and ICSID case law*

8.6 *that the dispute does not arise out of an "investment" within the meaning of the ICISD Convention*

8.7 *that a legitimate public purpose suffices to qualify the measure, the Land Reform Programme and the ensuring police power decisions in the case at hand, as being a normal exercise of police powers and hence non compensable, irrespective of the magnitude of its effects on the investment*

9 THAT FROM 16 FEBRUARY 2000 THROUGH 16 MARCH 2013 ANY INDEMNITIES, COMPENSATION, DAMAGES OR INTEREST THAT MIGHT OTHERWISE BE AWARDED ARE SUSPENDED AND ANY CALCULATIONS ONLY COMMENCE AS FROM 17 MARCH 2013

9.1 *that a state of emergency began in Zimbabwe on 16 February 2000, continued thereafter, and ended on 16 March 2013*

9.2 *that any amounts that might otherwise be due or payable during this period are excused during that period of suspension*

10 AS TO CLAIMANTS' REQUEST FOR INDEMNITIES, COMPENSATION AND DAMAGES

10.1 *that Claimants' monetary claims are not properly founded for the legal reasons discussed above, are ill-advised as to evaluation and should be denied:*

10.1.1 that Dr Kanyekanye has demonstrated that Claimants' forestry assumptions on which their claims are based are incorrect

10.1.2 that Dr Kanyekanye has determined the value of the Border Estate

10.1.3 that Mr. Moyo has determined the maximum valuations of the Forrester, Makandi and Border Estates

10.2 *that subsidiarily, were the Arbitral Tribunals to find that any portion of Claimants' claims were protected, the following amounts are the maximum amount of indemnities, compensation and damages*

10.2.1 that Mr Moyo's final corrected expert valuations prove that the maximum valuation:

10.2.1.1 of the Forrester Estate is:
Land: \$ 5 123 436
Equipment and Infrastructure: \$12 062 898

10.2.1.2 of the Makandi Estate is:
Land: \$ 1 115 000
Equipment and Infrastructure: \$ 9 269 308

10.2.2 that the shareholding valuation of Border is the only quoted price value

10.2.2.1 Dr Kanyekanye established the Border share valuation at \$6 763 044, the quoted price value

10.2.2.2 Mr Moyo corrected his valuation opinion to state that the share valuation figure established by Dr Kanyekanye should prevail \$6 763 044, the quoted price value

10.2.3 provided, however, that should be deducted from these maximum amounts, the valuations included in those maximum totals the following properties that were not taken:

10.2.3.1 Paulington \$ 3 193 678,80

10.2.3.2 BIT Factory \$ 3 045 993,00

10.2.3.3 Pole Treatment Plant \$ 358 134,00

10.2.3.4 Border Timbers Head Office Complex \$ 3 423 030,60

10.2.3.5 For the avoidance of doubt, the total valuations regarding properties not taken is \$10 020 836,40

10.2.4 that for the avoidance of doubt, that the maximum total for Forrester, Makandi and Border combined is thus \$34 333 686

10.3 *that subsidiarily, should the Arbitral Tribunal not accept the quoted price value of Border shares, Mr Moyo and Respondent stand by Mr Moyo's asset valuation of the Border Estate set out in paragraph 13 of R-80:*

10.3.1.1 land: \$ 6 011 685

10.3.1.2 equipment and infrastructure: \$22 386 761

10.4 *that according to their damage presentation Claimants failed to mitigate damages other than by profiting from use of the Properties for eight years after September 2005*

10.5 *that as to Claimant's request for restitution in kind and compensation, or in the alternative, compensation*

10.5.1 that Respondent is unable to reinstate the companies as requested

10.5.2 that restitution is not possible and the end of the State of Emergency on 16 March 2013 cannot give rise to measures which would re-create the State of Emergency such as restitution or additional compensation to Claimants

10.6 *that there is no justification for the award of any moral damages*

10.7 *As to the rate of interest on any amounts that might be due:*

10.7.1 that 21.5% interest is unconscionable and must be denied

10.7.2 that 9.8% interest is unconscionable and must be denied

10.7.3 that LIBOR plus 4% interest is unconscionable and must be denied

10.7.4 that LIBOR plus 2% is the highest rate that can be applied

10.8 *As to compounding of interest on any amounts that might be due:*

10.8.1 that no compounding is appropriate in this case

10.8.2 that were interest to be compounded, it should not be compounded more than annually

10.8.3 that were the Arbitral Tribunals nevertheless to find any indemnities, compensation, damages or interest to be due, the Arbitral Tribunals should consider Respondent's grant to Claimants of eight years of quasi unencumbered use of the Forrester Estate, the Border Estate and the Makandi Estate, properties belonging to the State of Zimbabwe since 2005 to constitute:

10.8.4 compensation for the taking

10.8.5 payment of any interest or other amounts due

10.9 *that each party shall bear its own costs both as to its attorneys' fees and as to ICSID costs and fees*

11 **THAT EACH OF THE DECLARATIONS SOUGHT BY THE CLAIMANTS ARE WITHOUT MERIT AND MUST BE DENIED**

[footnotes omitted]

IV Factual Background

91 This Tribunal sets out below a brief summary of the factual basis for its decisions in the present Award. Where disputed by the Parties, the Tribunal has established these facts primarily from the contemporaneous documentation adduced in evidence by the Parties, supplemented by the testimony of their factual and expert witnesses (both oral and written) as provided to the Tribunal in this arbitration. This summary does not purport exclusively to cover all relevant facts relied on by the Tribunal in reaching its decision.

A. Introduction

92 This case is, at its heart, a land dispute, but one with deep context and history. The “land question” in Zimbabwe, formerly Southern Rhodesia (“**Rhodesia**”), began in the late 1800s with the arrival of Cecil John Rhodes on the area controlled at the time by King Lobengula. During the period of colonial rule, land in Rhodesia was subdivided into white areas, or white commercial farms, and tribal trust lands where those native to the land were forced to live.

93 The result of Rhodesian-era land policies and colonial oppression was nothing short of devastating on the indigenous population and gave way to a violent and persistent struggle for “liberation”, expressed as follows by Minister Didiymus Mutasa, a witness in these proceedings for the Respondent (see Mutasa I, para. 15):

... [O]ur existence in our own country, on our own land in the days before liberation, was a very sad existence indeed. Our land was taken away, our friends, who were talking about farms, are talking about farms which didn't come from heaven for them, but farms which they expropriated from our forefathers, from our ancestors, many not so long ago, where many of us were already living. They did not expect us to sit back and smile and enjoy what they were doing, and indeed, we did not sit back and enjoy. We had to mount a liberation struggle, and I am happy to say that I am one of those who participated in the liberation struggle.

94 This “liberation struggle” led to the Lancaster House Conference in 1979, and the birth of a new independent State – the Republic of Zimbabwe.

95 The Lancaster House Agreement established Zimbabwe’s first Constitution, which provided for, among other things, robust private property rights. The newly formed Government of Zimbabwe, ultimately led by President Robert Mugabe following his election as President in February 1980, committed to suspend the institution of land reform for 10 years following Zimbabwe’s independence.

96 As at 1980, 15.5 million hectares (“ha”) of Zimbabwe’s total area (i.e., 39.6 million ha) were dedicated to large scale commercial farming. Title to this land was held by approximately 6,000 white farmers. 6.4 million ha were comprised of Communal Land, largely devoted to subsistence

farming by the indigenous population, and the remaining land was divided between small scale commercial operations, national parks, State land and urban settlements.

B. The Land Reform Programme

(1) The First Phase

97 During Phase I of the LRP, the Government of Zimbabwe aimed to acquire on a “willing buyer – willing seller” basis 8.3 million ha of agricultural land from large-scale farms in order to resettle 162,000 families. Little progress was made toward this goal during the first 10 years of independence.

98 The Government enacted the *Land Acquisition Act* in 1992, which gave the Government the power to acquire land and other immovable property compulsorily for certain purposes, including the acquisition of agricultural land for resettlement purposes. Accordingly, this ended the period of time during which agricultural land could only be acquired by the State on a willing buyer – willing seller basis.

99 The *Land Acquisition Act* provided for notice to be given of the proposed acquisition (a “**Section 5 Notice**”) and a process whereby the acquisition could be challenged. If a Section 5 Notice was challenged, the Government was required to make an application to the appropriate municipal court, seeking either authorization to issue a Section 8 Order, which would vest title in the land to the State, or confirmation of a Section 8 Order if one had already been issued.

100 The *Land Acquisition Act* established that “fair compensation” must be paid for any land acquired for resettlement purposes “within a reasonable time”.

101 The Constitution was amended in 1996 to confirm that protection continued for the property rights of foreign nationals under international investment treaties despite the LRP. Specifically, Section 16(9b) provided as follows:

(9b) Nothing in this section shall affect or derogate from—

(a) any obligation assumed by the State; or

(b) any right or interest conferred upon any person;

in relation to the protection of property and the payment and determination of compensation in respect of the acquisition of property, in terms of any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organisations.

[Subsection inserted by section 7 of Act No. 14 of 1996 – Amendment No. 14]
[emphasis added]

102 By 1997, however, the Government had only acquired 3.5 million ha and had only resettled 71,000 families.

(2) The Second Phase

103 In 1998, the Government hosted a land donor conference, during which the issue of compensation for land reform for resettlement was discussed, with a view to securing a stronger commitment from the international community to support Zimbabwe's land reform efforts. The timing of the conference coincided with Zimbabwe's shift into Phase II of the LRP, in which it intended to accelerate the pace of land acquisition for resettlement.

104 Phase II was itself composed of several phases, including an "Inception Phase" during which the Government stated its intention to acquire an additional 2.1 million ha of agricultural land beyond the original planned 8.3 million ha. The pace of land acquisition during this phase continued, however, to be slow, in part due to a lack of funds to compensate land owners for land acquired from them.

105 The slow pace of land reform, two decades after independence, led to mounting frustration among those Zimbabweans who had fought for independence. The Government responded by adopting measures to further accelerate land reform and resettlement.

106 In February 2000, a new draft Constitution was put in a referendum to the people of Zimbabwe, which would have permitted the Government to compulsorily acquire land without compensation. The draft Constitution was rejected. The timing of the referendum on the Constitution coincided with the emergence of a new political party in Zimbabwe, the Movement for Democratic Change ("MDC"), formed by a broad coalition of civil society groups in opposition to President Mugabe's Zimbabwe African National Union – Patriotic Front ("ZANU-PF") party. Following the rejection of the draft Constitution, the first "Invasions" of white-owned farms began in Masvingo Province, near the capital of Harare, and gradually spread across the country (see below Section IV.C.).

107 The Government subsequently launched, on 15 July 2000, the Fast Track Land Reform Programme ("FTLRP"). Another shift in land acquisition principles occurred as part of this phase of land reform. The Constitution was amended through the enactment of Section 16A, which changed the compensation regime for the acquisition of land, permitting the Government to compensate landowners only for "improvements" to agricultural land, as opposed to the land itself. Section 16A provided as follows:

16A Agricultural land acquired for resettlement

(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance -

(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;

and accordingly—

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable --

(a) the history of the ownership, use and occupation of the land;

(b) the price paid for the land when it was last acquired;

(c) the cost or value of improvements on the land;

(d) the current use to which the land and any improvements on it are being put;

(e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;

(f) the resources available to the acquiring authority in implementing the programme of land reform;

(g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and

(h) any other relevant factor that may be specified in an Act of Parliament.

[Section inserted by section 3 of Act 5 of 2000 – Amendment No. 16] [emphasis added]

108

Through Section 16A the burden of compensating land owners for the acquisition of their land was also shifted by the Government onto the “former colonial power” (i.e., Great Britain) and Zimbabwe

absolved itself under Zimbabwean law of any duty to compensate landowners for the value of agricultural land acquired for resettlement purposes, save for "improvements".

109 The *Land Acquisition Act* was amended accordingly to remove compensation for agricultural land acquired compulsorily by the State.

C. The Invasions

110 As noted above, the "Invasions" of predominantly white-owned farms also marked the beginning of the FTLRP. The Tribunal has considered the various accounts of these "Invasions" presented by the Parties. The Tribunal considers the evidence given by Professor Stephen Chan on the Invasions to be instructive and helpful, particularly as it was not challenged by the Respondent on cross-examination.

111 Professor Chan is a Professor of International Relations and Dean of Law and Social Sciences at the School of Oriental & African Studies at the University of London, and Eminent Scholar in Global Development 2010, of the International Studies Association. Beyond academia, Professor Chan's career includes work for government and international organizations, with a special focus on Africa, including the Republic of Zimbabwe. In the 1970s, Professor Chan was a civil servant with the Commonwealth Secretariat and served as an observer of the 1979 negotiations leading to Zimbabwe's independence. From January to March 1980, Professor Chan conducted the reconnaissance for, and helped anchor, the Commonwealth Observer Group charged with the validation of the electoral process leading to Zimbabwe's independence. Professor Chan resided in Africa from 1980 to 1985, and has, for the past 35 years, visited Zimbabwe nearly every year to talk with politicians, civil servants, military personnel and other influential persons to obtain firsthand knowledge of the political, social and economic developments in Zimbabwe. His credentials are impressive and, in addition to being a well-qualified expert, he is able to speak, to some extent, from first-hand experience on the matters at hand.

112 From Professor Chan's evidence, as corroborated and supplemented by other accounts on the record, the Tribunal finds the following facts to have been established on the evidence:

- (a) the Invasions of predominantly white-owned commercial farms began in the Province of Masvingo on 16 February 2000, and quickly spread to other parts of Zimbabwe;
- (b) the Invasions were a response to political events, such as the failed draft Constitution proposed by the Mugabe Government in February 2000, and the slow pace of land reform;
- (c) the Invasions were not anticipated and, at the beginning, were disorganized and "inchoate", by which the Tribunal understands that the Invasions at this stage were incipient;

- (d) the Invasions were accompanied by a racial rhetoric that was overwhelmingly anti-white;
- (e) as the Invasions continued and expanded across Zimbabwe, logistical support and supplies appear to have been provided by organs of the Zimbabwean Government to persons coming onto private land (i.e., the "Settlers/War Veterans").

113 Several judgments by the Zimbabwean courts also record that, during 2000, the police took little or no action in respect of the acts of the invaders, despite multiple court orders declaring the Invasions to be unlawful and directing the police to ensure that the invaders vacated the farms. Moreover, ZANU-PF officials, public servants, the CIO and the Army were found to have actively supported, encouraged, transported and financed the Settlers/War Veterans. In *CFU v. Minister of Lands & Ors*, 2000 (2) ZLR 469(5), the Zimbabwean High Court held that, as a result of the Invasions, farmers and their employees had been denied protection of the law under s. 18 of the Constitution²² and discriminated against on the basis of affiliation with or support for an opposition political party (i.e., the MDC). The Court summarized the Invasions in early 2000 as follows (see *CFU v. Minister of Lands & Ors*, 2000 (2) ZLR 469(5), p. 477, CLEX-76):

In February 2000, a referendum was held on a proposed new Constitution for Zimbabwe. The defeat of that proposal was followed "within a matter of days by the beginning of a series of land invasions. Although these began as a supposedly peaceful demonstration they quickly gathered such momentum that it became obvious that the exercise was actually being driven by or had been taken over by Government" (Hasluck).

The story of these demonstrations/invasions is set out in graphic detail in the CFU's papers, more particularly in Mr Hasluck's affidavits. Murders (in the early stages), serious assaults, trespass, arson, stock-theft, poaching and malicious injury to property became rife throughout the commercial farming areas. The reaction of the police was either nil or negligible, with isolated exceptions. War veterans, landless peasant farmers and unemployed youths moved onto farms, ferried in some cases in Government vehicles, encouraged by party politicians. Some were aggressive, forcing the farmers to flee, burning down workers' houses, forbidding the reaping or planting of crops. Others cut fences and cut down trees to make temporary shelters. Others again were more passive, simply making temporary shelters for themselves and leaving when the subsidy they were given ran out. The situation throughout the commercial farming areas remained, and remains, tense and volatile. The harassment continues and in many cases has intensified.

114 As regards the Claimants' Estates (described below) in particular, Mr. Heinrich von Pezold's evidence confirms the passive role of the police in addressing the Settlers'/War Veterans' activity and the active involvement of government officials and agents in supporting and providing resources for invaders on the Estates (see Heinrich I, paras. 575-586).

²² Section 18 of the 2005 Zimbabwean Constitution provides that "every person is entitled to protection of the law", (see CLEX-019).

115 All three of the Claimants' Estates have been invaded and Settlers/War Veterans who invaded the
Estates remain in occupation of certain portions of the Estates.

D. The 2005 Constitutional Amendment

116 The Constitution was again amended in 2005 (the "2005 Constitutional Amendment") by enacting
Section 16B, which provided, in relevant part, as follows:

16B Agricultural land acquired for resettlement and other purposes

(1) In this section -

...
(a) all agricultural land --

(i) that was identified on or before the 8th July, 2005, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or

(ii) that is identified after the 8th July, 2005, but before the appointed day, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purpose, including, but not limited to --

A. settlement for agricultural or other purposes; or

B. the purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources;
or

C. the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B;

is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land --

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

(4) As soon as practicable after the appointed day, or after the date when the land is identified in the manner specified in subsection (2)(a)(iii), as the case may be, the person responsible under any law providing for the registration of title over land shall, without further notice, effect the necessary endorsements upon any title deed and entries in any register kept in terms of that law for the purpose of formally cancelling the title deed and registering in the State title over the land.

(5) Any inconsistency between anything contained in --

(a) a noticed itemised in Schedule 7; or

(b) a notice relating to land referred to in subsection (2)(a)(ii) or (iii);

and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in terms of that provision.

(6) An Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in this section or other State land.

(7) This section applies without prejudice to the obligation of the former colonial power to pay compensation for land referred to in this section that was acquired for resettlement purposes.

[Section inserted by section 2 of Act 5 of 2005 – Amendment No. 17.] [emphasis added]

117 The effect of Section 16B was to acquire and vest in the State title to every property in Zimbabwe in relation to which a Section 5 Notice had been issued on or before 8 July 2005, if the Notice was identified in Schedule 7 of the amended Constitution. The right that had previously existed to challenge the acquisition of land was removed. Section 16B(6) also criminalized the continued possession or occupation of land expropriated pursuant to the 2005 Constitutional Amendment.

E. The Claimants' Interests in Zimbabwe

118 The measures allegedly taken by the Respondent against the von Pezold Claimants relate to three large properties located in Zimbabwe, namely the Forrester Estate, the Border Estate and the Makandi Estate (the "Estates"). The measures allegedly taken by the Respondent against the Border Claimants relate exclusively to the Border Estate.

(1) The Forrester Estate

119 The Forrester Estate is essentially a tobacco growing and curing operation set on 22,000 ha of land and spread across ten properties located in the Province of Mashonaland Central in the North of

Zimbabwe (the "**Forrester Properties**")²³. It is the biggest tobacco operation of its kind in Zimbabwe, if not southern Africa, and, according to the Claimants, has a long record of success. In addition to tobacco, the Forrester Estate has 3,325 head of cattle, citrus, row crops (maize, wheat, barley, sorghum and soya beans), and peas.

120 The von Pezold Claimants, through a combination of direct and indirect holdings, own 100% of the issued share capital of the local companies within the Forrester Estate. These companies are: Forrester Holdings (Private) Limited; Forrester Estate (Private) Limited (which is the operating company); and Forrester Silk (Private) Limited (collectively "**the Forrester Companies**"). Further, the von Pezold Parent Claimants own 100% of the issued share capital of the local company, Northern Tobacco (Private) Limited, which buys all of the tobacco of the Forrester Estate and some other tobacco growers:

121 In 1988, the Parent Claimants acquired 99% of Forrester Estate (Private) Ltd. which, at the time, owned nine of the ten Forrester Properties. The Parent Claimants acquired the remaining 1% in 1998.

122 In 1991, the Parent Claimants acquired 100% of Forrester Silk (Private) Ltd. which, in 1996, directly acquired the last of the ten Forrester Properties.

123 In 1997, the Parent Claimants acquired 22.22% of the class "B" shares of Forrester Estate (Private) Ltd. Also in 1997, the Adult Children Claimants acquired 66% of the class "B" shares of Forrester Estate (Private) Ltd. and Adam von Pezold acquired 11.11% of the class "B" shares of Forrester Estate (Private) Ltd.

124 Finally, in 2004, the Parent Claimants acquired 100% of Northern Tobacco (Private) Limited.

125 The Parent Claimants' interest in the Forrester Estate is, today, held through a trust - the "Habakuk" trust - of which the Parent Claimants are the sole beneficiaries. The Tribunal has considered the chain of ownership and sequence of acquisition of the von Pezold Claimants' interest in the Forrester Estate and is satisfied as to their claimed ownership of the Estate.

(2) The Border Estate

126 The Border Estate is an integrated forestry plantation comprising 28 properties with pine and eucalyptus (gum) plantations (referred to as the "**Border Properties**")²⁴ and three sawmills set on 47,886 ha of land and located in the Province of Manicaland in the East of Zimbabwe. In addition,

²³ A list of the ten Forrester Properties is provided in the Claimants' Memorial, Table 1.

²⁴ The 28 Border Properties are identified in the Claimants' Memorial, Table 6, which was corrected by the Claimants in their Reply, para. 396 and Annex 2. This table is reproduced as Annex A to the Operative Part of the present Award.

the Border Estate includes two non-plantation properties comprising a pole treatment plant and two factories²⁵, located on the outskirts of the town of Mutare, which is also in the Province of Manicaland.

127 The von Pezold Claimants (save for Adam) indirectly own 86.49% of the issued share capital of the local companies within the Border Estate²⁶. These companies are the Border Claimants, namely Border, Border International (both of which are operating companies) and Hangani. Border owns all of the issued share capital of Border International and Hangani.

128 In 1992, the Parent Claimants acquired 25.65% of Border, which directly and indirectly owns all of the Border Properties and factories within the Border Estate.

129 In 2000, the Parent Claimants acquired an additional 10.33% of Border. In this same year, the Adult Children Claimants acquired 10% of Border. Between 2001 and 2002, the Parent Claimants acquired a further 2.39% of Border, and in 2003, a further 37.57% of Border.

130 In 2004, the Parent Claimants acquired an additional 0.048% of Border, while Heinrich von Pezold acquired 0.23% of Border.

131 In 2006 and 2007, the Parent Claimants again increased their interest in Border by 0.15% and 0.13% respectively for each year.

132 The Parent Claimants acquired their interest in the Border Estate indirectly through eight separate corporate vehicles or "purchasing structures". Most of the acquisitions were effected through nominee companies of the Habakuk Trust (Roanne (Nominees) Ltd. and Roanne Securities Ltd.).

133 The Adult Children Claimants also acquired their interest in the Border Estate indirectly through Kingdom Nominees (Private) Limited, which ceased to function by 2010 and, (for the purpose of holding in trust approximately half of the shares acquired in Border in 2000) was replaced by Roanne (Nominees) Limited.

134 The Tribunal has considered the complex chain of ownership and sequence of acquisition of the von Pezold Claimants' (save for Adam) and Border Claimants' interest in the Border Estate and is satisfied as to the claimed ownership of both sets of Claimants over the Estate.

²⁵ The related properties are identified in the Claimants' Memorial, Table 6, properties Nos 21 and 22, as corrected in the Claimants' Reply, para. 396, and Annex 2 (See Annex A to the Operative Part of the present Award).

²⁶ The Parent Claimants own 76.26% of Border.

(3) The Makandi Estate

135 The Makandi Estate is 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 ("the **Makandi Properties**")²⁷ located in the Province of Manicaland in the East of Zimbabwe.

136 The Parent Claimants, through a joint venture, - subject to one exception²⁸ - indirectly own 50% of the issued share capital of the local companies within the Makandi Estate, which are: Makandi Tea and Coffee Estates (Private) Limited; Large Scale Investments (Private) Limited; Chipinge Holdings (Private) Limited; Coffee Estates (Private) Limited; and Rusitu Valley Development Company (Private) Limited (of which they own 44.4%) ("the **Makandi Companies**").

137 In July 2005, the Parent Claimants acquired a 40% stake in the Makandi Companies, save for Rusitu Valley Development Company (Private) Ltd., of which they acquired 35.52%.

138 Between January and May 2006, the Parent Claimants increased their shareholding in the Makandi Estate to 50%, save for Rusitu Valley Development Company (Private) Ltd., in which they increased their interest to 44.4%. The Parent Claimants acquired their 50% interest in the Makandi Tea and Coffee Estates (Private) Ltd. through a joint venture that they entered into with the Høegh Family, a Norwegian family, which held the Parent Claimants' interest for them beneficially. As part of the joint venture, certain assets jointly owned were consolidated into Rift Valley Holdings Ltd., a Mauritius holding company which is indirectly owned 50/50 by the Parent Claimants and the Høeghs.

139 The Tribunal has considered the chain of ownership and sequence of acquisition of the Parent Claimants' interest in the Makandi Estate and is satisfied as to their claimed ownership of the Estate.

F. Zimbabwe's Acquisition of the Claimants' Estates

(1) Border Estate

140 Section 5 Notices were issued pursuant to the *Land Acquisition Act* in respect of 21 of the 28 Border Properties. Section 8 Orders were also issued in relation to a number of the Border Properties, all of which were either withdrawn by the Respondent or annulled by the local courts.

²⁷ The nine Makhandi Properties are identified in the Claimants' Memorial, Table 10.

²⁸ The Parent Claimants own 50% of 88.8% of Rusitu Valley Development Company (Private) Limited.

- 141 On 14 September 2005, 21 of the 28 Border Properties²⁹ were acquired by the Respondent pursuant to the Constitutional Amendment, because they were subject to at least one Section 5 Notice that was identified in Schedule 7 of the Constitution.
- 142 The remaining seven properties, including the Sheba sawmill³⁰, and the two non-plantation properties with the two factories and the pole treatment plant³¹, although not compulsorily acquired under the Constitution, are, however, said to be worthless now because they are not viable on their own³².
- 143 The von Pezold Claimants' (save for Adam) share capital in the Border Claimants is now also said to be worthless because the assets of the Border Companies, namely the Border Properties, have nearly all been acquired and the balance rendered worthless by the 2005 Constitutional Amendment.
- 144 For the same reason, the share capital owned by Border in each of Border International and Hanganani is said to be worthless.
- 145 It is clear that no compensation was paid by the Government for these compulsory acquisitions.

(2) Makandi Estate

- 146 Prior to the Parent Claimants acquiring an interest in the Makandi Estate, Section 5 Notices were issued to seven of the nine Makandi Properties. All Section 8 Orders issued against the Makandi Estate properties were either withdrawn by the Respondent or not confirmed by the courts.
- 147 On 14 September 2005, six of the nine Makandi Properties were acquired by the Government pursuant to the 2005 Constitutional Amendment, because they were all subject to at least one

²⁹ These 21 properties are identified in the Claimants' Memorial, Table 6, as corrected in the Claimants' Reply, and are those 21 Border Properties which are not marked with an asterisk, i.e. Farm Tilbury, Welgelegen, Imbeza Estate, Penhalonga Tree Plot, Tunnes Rus, Tyrconnel East of Tyrconnel, Imbeza Valley Lot 8, Remainder of Nyaronga Manor, Remainder of Sheba, Remainder of Walmer, Mahugara of Epsom, Remainder of Epsom, Cambridge Estate, Glacier of Weltevreden, Groenkop Extension, Middelpunt of Jantia, Remaining Extent of Sawerombi, Sawerombi West of Sawerombi, Verlos of Weltevreden, Welgegund Estate, and Weltevreden Estate (see Annex A to the Operative Part of the present Award).

³⁰ These seven properties are identified in the Claimants' Memorial, Table 6, as corrected in the Claimants' Reply, and are those seven Border Properties which are marked with an asterisk, namely: Subdivision B Portion of Epsom (Sheba), Pioneer Farm (Sheba), Farm Lambton (Sheba), Harris Ville (Sheba), Stand 45 Penhalonga Township (Imbeza), Greater Zingeni (Imbeza) and Farm Dunstan (Tilbury). See also the Claimants' Reply Memorial, para. 219, footnote 402 (see Annex A to the Operative Part of the present Award).

³¹ These two properties are identified as properties Nos. 21 and 22 in the Claimants' Memorial, Table 6, as corrected in the Claimants' Reply (See Annex A to the Operative Part of the present Award).

³² It should be noted that properties Nos. 21 and 22 in the Claimants' Memorial, Table 6, as corrected in the Claimants' Reply, are not marked with an asterisk, which seems to suggest that these properties were directly affected by the Constitutional Amendment (see Annex A to the Operative Part of the present Award). However, given the Claimants' explanations in paras. 481 and 850 of their Memorial, the Tribunal is satisfied that these two properties were indeed not directly affected by the Constitutional Amendment but are said to be worthless as they are not viable on their own. See Claimants' Memorial, paras. 481 and 850.

Section 5 Notice that had been identified in Schedule 7 of the Constitution³³. Also said to have been acquired at this time are the Water Permits attaching to the Makandi Estate (see Table 3 of the Claimants' Reply).

148 Similar to the Border Estate, the remaining three properties³⁴, although not compulsorily acquired under the Constitution, are said to be worthless now because they are not viable on their own.

149 By way of the 2005 Constitutional Amendment, the Respondent is also said to have compulsorily acquired the Parent Claimants' share acquisition rights (i.e., to acquire further shares in the Makandi Estate) (the "**Makandi Acquisition Rights**") for the reasons expressed above.

150 Finally, the Parent Claimants' share capital in the Makandi Companies is now said to be worthless because the assets of the Makandi Companies, namely the Makandi Properties, have nearly all been compulsorily acquired and the balance rendered worthless by the 2005 Constitutional Amendment.

151 It is clear that no compensation was paid by the Government for these compulsory acquisitions.

(3) Forrester Estate

152 Section 5 Notices were issued pursuant to the *Land Acquisition Act* to all ten of the Forrester Properties. Section 8 Orders were also issued in relation to a number of the Forrester Properties, all of which were either withdrawn by the Government or annulled by the local courts.

153 On 14 September 2005, all ten of the Forrester Properties were acquired by the Government pursuant to the Constitutional Amendment, because they were all subject to at least one Section 5 Notice that had been identified in Schedule 7 of the Constitution. Also said to have been acquired at this time are the Water Permits attaching to the Forrester Estate (see **Table 1** of the Claimants' Reply).

154 The von Pezold Claimants' share capital in the Forrester Companies is now said to be worthless because the assets of the Forrester Companies, namely the Forester Properties, have been compulsorily acquired.

155 It is clear that no compensation was paid by the Government for these compulsory acquisitions.

³³ These six properties are identified in the Claimants' Memorial, Table 10 and are those six properties which are not marked with an asterisk, i.e., Smaldeel Estate, Lot 2A Chipinga, Subdivision A of Chipinga, Subdivision C of Chipinga, Lot 4 of Fortuna, and Rusitu.

³⁴ These three properties are identified in the Claimants' Memorial, Table 10 and are those three properties which are marked with an asterisk, namely Christina Estate, Lot 3 of Clearwater Estate, and the Waterfall Estate See also the Claimants' Reply Memorial, para. 219, footnote 403.

156 Other assets from the Forrester Estate are also alleged to have been acquired by the Respondent, such as maize seized by the Grain Marketing Board in January 2002, for which the von Pezold Claimants say they were only partially compensated.

(4) Summary

157 In summary, as a result of the 2005 Constitutional Amendment, all ten of the Forrester Properties (see Table 1 of the Claimants' Memorial), 21 of the 28 Border Properties, two of which contain a sawmill (see Table 6 of the Claimants' Memorial corrected by the Claimants in their Reply) and six of the nine Makandi Properties (see Table 10 of the Claimants' Reply) were acquired by the Respondent. These properties are collectively referred to by the Tribunal as the "**Zimbabwean Properties**".

158 In addition, according to the Claimants, the remaining seven Border Properties, one of which contains the Sheba sawmill, and two further properties with the two pole factories and the pole treatment plant (see above para. 142 and Table 6 in the Claimants' Memorial, as corrected) and the remaining three Makandi Properties (see above para. 148) are said to be worthless since they are not viable on their own. These properties are collectively referred to as the "**Residual Properties**".

G. The Claimants' Position Today

159 According to the Claimants, all of the Estates continue to operate today as going concerns and are "thriving", although the Forrester and Border Estates continue to recover from the Invasions and the LRP, which the Claimants say has affected productivity. However, as the majority of properties on the three Estates were allegedly expropriated pursuant to the 2005 Constitutional Amendment, and the remaining properties and assets are said not to be viable on their own, the Claimants take the position that they have, in effect, been reduced to "mere licensees at the will of the Respondent" (see Heinrich I, paras. 298, 470) and, as a result, are unable to receive any value for the Estates by way of a share or asset sale. These matters are discussed in detail below.

H. The State of Land Reform in Zimbabwe Today

160 It is estimated that there are approximately 400 white farmers remaining in Zimbabwe today, farming 117,409 ha of land. This may be compared to the approximately 4,500 white farmers on 4,800 large scale commercial farms, covering 11.9 million ha of land, present in Zimbabwe in 1999. Save for a few instances, it is not really disputed by the Parties that the majority of land farmed by white farmers was compulsorily acquired without compensation pursuant to the LRP.

161 It is not disputed that farms acquired from white farm owners are now occupied by black farmers, senior members of the Zimbabwean Government and/or members of their families, ZANU-PF, the

military and civil services. The Parties do, however, take different positions on the fairness of such land being allocated to Government officials and their families, the extent of such allocations, and the significance of this, if any, for the legality of the LRP.

162 In 2012, a new Constitution was put to the Zimbabwean people in a referendum, and subsequently enacted into law in early 2013 (the "2013 Constitution") (see CLEX-331; Tr. Day 4, pp. 1190-1191). On the matter of agricultural land, addressed in Chapter 16 of the 2013 Constitution, the principles relating to compensation for land acquired by the Respondent were again changed, this time to provide expressly for the full compensation of any "indigenous Zimbabwean" whose agricultural land was acquired, in contradistinction to the compensation of non-indigenous Zimbabweans. The 2013 Constitution also reaffirmed that foreign nationals protected by a BIT whose agricultural land had been acquired are entitled to full compensation for that land pursuant to the terms of the BIT. Specifically, Chapter 16.8 of the draft 2013 Constitution³⁵ provided as follows:

16.8 Compensation for acquisition of previously-acquired agricultural land

(1) Any indigenous Zimbabwean whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State for the land and any improvements that were on the land when it was acquired.

(2) Any persons whose agricultural land was acquired by the State before the effective date and whose property rights at that time were guaranteed or protected by an agreement concluded by the Government of Zimbabwe with the government of another country, is entitled to compensation from the State for the land and any improvements in accordance with that agreement.

(3) Any person, other than a person referred to in subsection (1) or (2), whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State only for improvements that were on the land when it was acquired.

....

163 During the Hearing, Ms. Tsvakwi, a fact witness for the Respondent, confirmed that an "indigenous Zimbabwean" within the meaning of the 2013 Constitution is a black farmer or black Zimbabwean (see Tr. Day 4, p. 1191).

V Issues to be Determined

164 The issues before the Tribunal for determination may be grouped into 15 categories and are briefly summarized below. This list of issues is drawn principally from the Claimants' identification of

³⁵ A copy of the final amended Constitution, enacted in 2013, was not placed on the record. The Tribunal understands, however, that the provision relating to compensation for the acquisition of previously-acquired agricultural land is not materially different from the draft on the record in the arbitration, CLEX-331.

issues in their Skeleton Argument. The list comprises issues in relation to both the von Pezold Claimants and the Border Claimants. No serious objection or alternative list has been advanced by the Respondent, and the Tribunal finds the below list to be comprehensive.

A. Jurisdiction: The issue of jurisdiction is comprised of at least the following questions:

- (1) Does the Tribunal have jurisdiction under the ICSID Convention?
- (2) Does the Tribunal have jurisdiction over the von Pezold Claimants' claims (save for those of Rüdiger) under the Swiss BIT?
- (3) Does the Tribunal have jurisdiction over the von Pezold Claimants' claims under the German BIT?

B. Admissibility: The issue of admissibility is comprised of the following questions:

- (1) The Approvals Objection:
 - (a) Is the Approvals Objection an admissibility or jurisdictional issue?
 - (b) What is the effect of Ad Article 2(a) of the German Protocol on Article 9(b) of the German BIT?
 - (c) Does the Contracting Parties' subsequent practice inform the meaning of Article 9(b)?
 - (d) If approval was required, (i) what constitutes "approval" by Zimbabwe's "competent authorities"? (ii) has such approval been given? (iii) can the von Pezold Claimants utilise the German MFN clauses to rely on the more favourable provisions of the Swiss and Danish BITs? (iv) is the Respondent estopped from denying that approval has been given?
- (2) The Illegality Objection:
 - (a) What breaches come within the scope of the so-called "Legality Articles"?
 - (b) Have the Claimants committed such breaches?
 - (c) In any event, is the Respondent estopped from denying that the investments were made in accordance with applicable laws?

- C. Attribution: The issue of attribution is comprised of the following questions:
- (1) Are the acts of the Settlers/War Veterans attributable to the Respondent pursuant to Article 8 or Article 11 of the ILC Articles?
 - (2) Are the "declarations, political speeches and similar acts of communication" of government officials and the President of the Respondent attributable to the Respondent?
 - (3) Are "only the official acts by the State's officials" attributable to the Respondent?
- D. Proportionality, Regulation and Margin of Appreciation: The issues of proportionality, regulation and margin of appreciation are comprised of the following questions:
- (1) Is the proportionality principle applicable? If so, has the Respondent acted proportionally?
 - (2) Is it relevant that a measure was regulatory?
 - (3) Is the principle of margin of appreciation applicable?
- E. Expropriation: The issue of expropriation is comprised of the following questions:
- (1) What is the test for direct expropriation?
 - (2) What is the test for indirect expropriation?
 - (3) Were the following expropriated, either directly or indirectly:
 - the Water Rights (Forrester Estate)
 - the Zimbabwean Properties³⁶
 - Residual Properties³⁷, [including] the factories, the pole treatment plant and the Sheba sawmill (Border and Makandi Estates)
 - Shares and Other Investments
 - the Loans

³⁶ The Tribunal recalls its definition of the "Zimbabwean Properties" set out above at para. 157.

³⁷ The Tribunal recalls its definition of the "Residual Properties" set out above at para. 158.

- Forrester's tobacco and its proceeds of sale
 - Forrester Estate's US Dollar bank deposits from tobacco sales
 - Border Estate's US Dollar export proceeds
 - US Dollars from Border's account
 - Makandi Acquisition Rights
- (4) Were any of the expropriations carried out for (a) a public purpose, (b) in a non-discriminatory manner; and (c) with due process?

F. Fair and Equitable Treatment: The issue of Fair and Equitable Treatment ("FET") gives rise to the following questions:

- (1) Is the FET standard in the German and Swiss BITs equivalent to the customary international law minimum standard of treatment?
- (2) What is the content of the FET standard in (a) the German BIT; and (b) the Swiss BIT?
- (3) Does Article 3(a) of the German Protocol (CLEX-3) exclude certain conduct from the FET standard?
- (4) Has the FET standard been breached in regard to the application of:
- new legislation to the Forrester Water Rights?
 - the LRP to the Zimbabwean Properties³⁸ and shares in the Zimbabwean Companies?
 - the foreign exchange policy to the loans?
 - the foreign exchange policy to the proceeds of the sales?
- (5) To what extent are legitimate expectations relevant to the Claimants' causes of action?

³⁸ The issue relates to the Zimbabwean and Residual properties as defined by this Tribunal. See above, paras. 157 and 158 and the Ct. Skel. para. 138.

- (6) What is the relationship between legitimate expectations, business risk and political risk?
- (7) What were the Respondent's assurances and the legitimate expectations they engendered?
- (8) Is a balancing required between the Claimants' legitimate expectations and the "Common Interest of the Zimbabwean People"? If so, what is the relevance and result of this balancing exercise to the Claimants' causes of action?

G. Non-Impairment: The issue of non-impairment gives rise to the following questions:

- (1) What amounts to unreasonable, discriminatory or arbitrary measures under the non-impairment standard in the German and Swiss BIT respectively?
- (2) Have such measures from the Respondent impaired the management, maintenance, use, enjoyment or disposal of the Claimants' investments?

H. Full Protection and Security: The issue of Full Protection and Security ("FPS") gives rise to the following questions:

- (1) What is the scope of the FPS standard in (a) the German BIT; and (b) the Swiss BIT?
- (2) Is the Respondent in breach of either FPS standard?
- (3) Are there circumstances which curtail the Respondent's obligations pursuant to the FPS standards?
- (4) What is the Respondent's obligation under section 18 of the Constitution?

I. Free Transfer of Payments: The issue of Free Transfer of Payments ("FTS") gives rise to the following questions:

- (1) What is the scope of the free transfer standard in (a) the German BIT; and (b) the Swiss BIT?
- (2) Has the Respondent breached either standard?

J. Necessity: The issue of necessity gives rise to the following questions:

- (1) Was the LRP a Non-Precluded Measure because of necessity?

(2) If so, what is the effect of this defence if successfully invoked?

K. Causation: The issue of causation gives rise to the following question:

(1) In the event the Claimants suffered a loss as a result of any of the above alleged treaty breaches, did the Respondent cause the Claimants' losses?

L. Remedies: The issue of remedies (if liability and causation are decided in favour of the Claimants) is comprised of the following questions:

(1) Restitution

- Under what circumstances will restitution be ordered?
- Is restitution mandatory because of the special circumstances of these cases?
- Would an award of restitution give rise to a (or the return of a) state of emergency in Zimbabwe?
- If so, should restitution be awarded?

(2) Compensation

- What is the standard of compensation and date of assessment for:
 - lawful expropriation; and
 - unlawful expropriation and non-expropriatory breaches
- What is the most appropriate valuation method to be applied?
- Has the method been applied accurately?
- What matters are to be disregarded when assessing compensation?
- Did the Respondent's breaches cause the Claimants' losses?
- Are moral damages due?
- What amount of compensation is due?
- Is the Respondent's ability to pay damages relevant?

- Is the Claimants' alleged failure to mitigate their losses relevant?
- When is compensation due?

M. Interest: The issue of interest is comprised of the following questions:

- (1) What rate of interest is due on any sums determined to be payable?
- (2) Is interest to be compound or simple?
- (3) Over what period is interest payable?

N. Declaratory Relief: The issue of declaratory relief requires the Tribunal to consider whether the Claimants are entitled to the declarations set out in their Corrected Request for Relief, dated 10 May 2013; and

O. Costs: Finally, the issue of costs requires the Tribunal to consider the reasonableness of the costs claimed and the appropriate allocation (if any) of the costs of these arbitration proceedings as between the Parties.

VI Parties' Positions, Tribunal's Analysis & Findings

165 The Tribunal shall now discuss and determine each of these issues in turn.

166 The Parties' written and oral submissions in these arbitrations are extensive, as explained above. The Tribunal has, where convenient, reproduced or summarized parts of those submissions in the body of the Award; however, it is not possible to incorporate the entirety of the Parties' submissions, both written and oral, made in the course of these proceedings. The Tribunal has nonetheless considered the full submissions of the Parties in identifying the principal issues and in arriving at its decisions on those issues in this Award.

A. Preliminary Matters

167 Before turning to the specific issues identified above, the Tribunal wishes to address certain preliminary matters, including: (1) the law applicable to the merits of the present disputes; (2) the allocation of the burden of proof; and (3) the standard of proof.

(1) Applicable Law

168 Article 42 of the ICSID Convention states, in relevant part, as follows:

- (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement,

the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

.....

169 The present dispute, in the context of the von Pezold arbitration (ICSID Case No. ARB/10/15), has been submitted to arbitration pursuant to the Swiss BIT and the German BIT. The present dispute, in the context of the Border arbitration (ICSID Case No. ARB/10/25), has been submitted to arbitration pursuant to the Swiss BIT only.

170 Article 10(3) of the Swiss BIT provides that "[t]he arbitral tribunal shall decide on the basis of the present Agreement and other relevant agreements between the Contracting Parties; the terms of any particular agreement that has been concluded with respect to the investment; the law of the Contracting State party to the dispute, including its rules on the conflict of laws; such rules of international law as may be applicable".

171 Article 11(2) of the German BIT provides that "[t]he arbitral tribunal constituted pursuant to the said Convention shall reach its decisions on the basis of this Agreement, any treaties in force between the Contracting Parties, such rules of general international law as may be applicable, and the domestic law of the Contracting Party in the territory of which the investment in question is situated".

172 The Tribunal will revert to the applicable law and, in particular, the application of Zimbabwean law, where appropriate, in its discussion of the issues below.

(2) Burden of Proof

173 The Parties have addressed the Tribunal on burden of proof in the particular context of jurisdiction. However, the same principles as discussed below apply *mutatis mutandis* to the Parties' respective positions advanced on the merits of the case as well.

174 The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. Conversely, the Claimants must prove any facts asserted in response to the Respondent's objections and bear the overall burden of establishing that jurisdiction exists.

175 The main exception to the above rule is where a rebuttable presumption exists. Although it is unclear, the Respondent appears to be arguing that a rebuttable presumption exists such that the production of "relevant facts" will establish a *prima facie* case, to be affirmatively disproven by the Claimants.

176 The Tribunal is not aware of any rebuttable presumption operating in relation to objections to jurisdiction, and the Respondent has not offered any authority for this proposition. The Tribunal therefore considers that no such presumption applies, and that the general principle applies to require the Respondent to produce sufficient evidence to establish its objections to jurisdiction.

(3) Standard of Proof

177 In general, the standard of proof applied in international arbitration is that a claim must be proven on the "balance of probabilities". There are no special circumstances that would warrant the application of a lower or higher standard of proof in the present case. It is also unclear what standard the Respondent considers should apply, if not the balance of probabilities.

178 The Tribunal does not consider there is any reason to depart from standard practice and both Parties must prove their claims on the balance of probabilities.

B. Jurisdiction under the ICSID Convention

(1) Introduction

179 Article 25 of the ICSID Convention provides as follows:

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

....

180 There are, essentially, four elements that must be satisfied to establish jurisdiction under Article 25:

- A legal dispute;

- Arising directly out of an investment;
- Between a Contracting State and a national of another Contracting State; and
- Consent in writing to submit the dispute to the Centre.

181 Each element is discussed in detail below.

(2) The Existence of the Legal Dispute

(i) Respondent's Position

182 The Respondent does not appear to question that the disputes between the Parties are properly characterized as legal disputes for the purposes of jurisdiction. The Respondent does, however, present a different characterization of the disputes and, in particular, a different narrative surrounding the nature and purpose of the LRP than that presented by the von Pezold and Border Claimants. For example, the Respondent stated in its Counter-Memorial (see CM, paras., 57-71):

The Land Reform Programme was and remains a genuine exercise for the redistribution of land and the resettlement of the landless majority. As will be observed from the afore going land to be redistributed was owned by white people and it is from them that it had to be taken for redistribution to the landless blacks.

The impatience of the landless masses reached boiling point in 2000 resulting in invasions which coincided with the rejection of the Draft Constitution. The invasions were never a policy nor were they an integral part of the Land Reform and Resettlement Programme as alleged by the Claimants in paragraphs 550 and 554 of the Memorial, but were a spontaneous reaction by the landless people. The Draft Constitution contained provisions relating to the acquisition of land for resettlement and placed the onus for providing compensation for the acquired farms on the former colonial power. The Government of Zimbabwe would now pay for infrastructural improvements on the land but not for the land itself.

When the Constitution was rejected it was yet another blow to the expectations of those who had sacrificed their lives for the return of land to the black people, the Liberation War Veterans (War Vets). It was now 20 years after gaining independence and there was little to show in terms of access to land for the majority of Zimbabweans.

The reasons for the rejection of the Draft Constitution were more political than anything else. They were not a rejection of the need for redistribution of land. The Fast Track Programme was accordingly launched on the 15th of July 2000. The acquisition of land and the resettlement of people was now to be undertaken in an accelerated manner with reliance on domestic resources.

The purpose of the Fast Track was to:

- Speed up the identification of land for compulsory acquisition. The target was not less than 5 million hectares of land for resettlement
- Accelerate the planning and demarcation of acquired land for resettlement

- Provide basic infrastructure (boreholes, dip tanks and access roads) and farmer support services (tillage and agricultural inputs)
- Simultaneously resettle people in all provinces to ensure that the reform programme was comprehensive and evenly implemented
- Provide secondary infrastructure such as schools, clinics and rural service centres.

During this Phase, land was acquired on a compulsory basis in accordance with the Land Acquisition Act [Chapter 20:10] as amended. ...

Initially, Government laid down a framework under which farms once gazetted for acquisition could be de-listed for valid reasons, for example, if the farms were plantation farms in the large scale production of tea, coffee, timber, citrus, sugar cane etc. Also included were agro- industrial properties involved in integrated production, farms in Export Processing Zones, farms belonging to church or mission organizations, conservancies and farms belonging to foreign nationals who are protected by BIPPAs.

Despite this goodwill on the part of Government some farm owners abused the delisting framework in a bid to frustrate the land reform process. Some farmers deliberately changed land use to avoid compulsory acquisition of their farms. For example some farmers shared their dairy cattle in order to be exempted. Others introduced wildlife onto agricultural land.

Former farm owners also made the process of land acquisition long and cumbersome. Because the Land Acquisition Act required the serving of notices to the owner and confirmation of acquisition through the Administrative Court, the former owners mounted all sorts of legal challenges including wrong citation of their names or companies to frustrate the acquisition.

These challenges slowed down the acquisition and resettlement process to a snail's pace. The court processes were now blocking meaningful progress in the Land Reform Programme. It became necessary to promulgate a law that promoted the goals and purposes of land reform in the Republic, a historical mandate (paragraph 552 Memorial). The Constitutional Amendment No 17 of 2005 was enacted to meet this need. It provided for compulsory acquisition of agricultural land without recourse to the courts save for issues of compensation for improvements.

...

The acquisition of nearly 11 million hectares from the previous 3, 5 million (by 2000) can be attributed to this change in the law. Overall over 14 million hectares have been acquired for resettlement to date and 145 775 A1 and 18 289 A2 beneficiaries resettled thereon. The most important goal of redressing the thorny reality of historical inequities in land ownership has been substantially achieved.

183 The Respondent thus frames the disputes with the von Pezold and Border Claimants in the context of a historical narrative arising out of Zimbabwe's colonial past.

(ii) Claimants' Position

184 The von Pezold and Border Claimants, by contrast, have described the background to the Parties' dispute as follows (see Cl. Skel., paras. 2, 5-8):

2. Zimbabwe's War of Independence ended in 1980. The Government subsequently encouraged reconciliation and foreign investment, including investment from the Claimants. During the period 1980 to 2000, 70% of all farms that existed at Independence had been bought and sold in the open market or purchased by the Respondent at the fair market value.

...

5. After Independence, land reform was a low priority for the Government. The Government's stated policy under the Land Reform Programme ("LRP") was to acquire no more than 8.3 million ha of the 15.5 million ha of commercial farm land (the great majority of which was owned by white Zimbabweans). As at 2000, it had acquired only 3.66 million ha. The post 2000 phases of the LRP are collectively referred to as the "aggressive phases".

6. From 2000 onward, the LRP had the aim of removing every white farmer from his or her land. In simple terms it was racist, breaching the prohibition against discrimination on grounds of race or colour – a peremptory norm of general international law. It also had the aim of allocating farms that had been expropriated to senior members of the government, ZANU-PF and the military and civil services. In particular, in February 2000, after losing a referendum (blamed on the white vote), the Respondent instigated the Invasion of commercial farms. If it did not instigate them then shortly after they commenced, it took control of them and encouraged them. The Invasions became an integral part of the LRP. In July 2000, the Respondent commenced Phase II, Fast Track of the LRP. Pursuant to this phase, the Respondent issued thousands of s5 Notices identifying properties for expropriation. However, the courts held that many of the s5 Notices were invalid. On 14 September 2005, the Respondent enacted s16B of the Constitution ("the Constitutional Amendment"). The effect of the Constitutional Amendment was to expropriate the farms of nearly every white farmer in Zimbabwe (of the 4,500 white farmers farming in 2000, today there are less than 200 whose farms have not been expropriated). Most of the Claimants' properties have been expropriated pursuant to the Constitutional Amendment.

7. The economic decline caused by the aggressive phases of the LRP led the Respondent to introduce a perverse foreign exchange policy, which has caused the Claimants significant losses. The Respondent's own courts have stated that the foreign exchange obtained through this policy was used by the Government for illegal purposes.

8. In parallel with the LRP, and indeed during it, the Respondent ratified a number of BITs, including the German BIT on 14 April 2000 (provisional entry into force was 18 September 1996) and the Swiss BIT on 9 February 2001. Property and compensation rights protected by BITs were given a special status under Zimbabwean law when s16(9b) of the Constitution was enacted in 1996. Further, the Government's LRP policy expressly excluded from expropriation properties covered by BITs, together with tea, coffee, timber and citrus plantations. On numerous occasions the Respondent acknowledged that the Claimants' investments were covered by the BITs, and stated that they would not be subjected to the LRP. Nevertheless, despite the Respondent stating in 2005, by way of a Note Verbale, that the Constitutional Amendment had not expropriated the Claimants' investments (and thereby confirming prior assurances), in 2007 the Respondent stated that they had been expropriated by the Constitutional Amendment. The Claimants accept that they have been expropriated.

185 The von Pezold Claimants (save for Rüdiger) and the Border Claimants present their "Main Claims" (i.e., those claims raised in the Memorial) as claims arising from the implementation of the LRP. They allege breaches of the Swiss BIT, customary international law and domestic law that

have caused them to suffer damage. The von Pezold Claimants also allege breaches of the German BIT that have caused them to suffer damage, and Rüdiger also alleges breaches of customary international law. The von Pezold Claimants allege the breach of the expropriation standard, the FET standard, the non-impairment standard, the FPS standard and the FTP standard of the Swiss BIT (save for Rüdiger) and the German BIT, and breach of the impairment or diminishment standard of the Danish BIT through the most-favoured nation (“MFN”) provisions of the Swiss and German BITs (see above para. 88, the von Pezold Claimants’ Request for Relief). The Border Claimants allege the same breaches of the Swiss BIT, customary international law and domestic law as the von Pezold Claimants.

- 186 The Parties’ dispute in connection with the von Pezold Claimants’ “Additional Claims” (i.e., those claims raised after submission of the Memorial and relating to water rights and permits) are raised solely under the German BIT³⁹. The first Additional Claim relates to water rights which attached to the Forrester Estate (the “**Water Rights**”) (see Reply, paras. 430-433, a list of the von Pezold Claimants’ Water Rights - Forrester Estate is reproduced in the Claimants’ Reply, Table 1):

Under the Water Act 1976, and its predecessors, the right to use “public water” for agricultural purposes, attached to the majority of the Forrester Properties and vested in the von Pezold Claimants. These rights to use public water are referred to as “Water Rights”. No charge was levied by the Respondent on the holders of Water Rights for the consumption of water, and once granted in their final form they were not to expire.

However, upon the commencement in January 2000 of the Water Act 1998 and the Zimbabwe National Water Authority Act 1998 (the “ZNWA Act”), the regulatory regime for the use of water changed significantly.

Pursuant to the Water Act 1998, Water Rights have been converted into “permits” (“Permits”). Permits to use water only last for a period of twenty years. Moreover, pursuant to the ZNWA Act, the Respondent is empowered to, and does in fact, charge significant amounts for water consumed for agricultural purposes.

- 187 The von Pezold Claimants allege that the Forrester Water Rights were directly expropriated by the Respondent on 1 January 2000 by the repeal of the *Water Act 1976* and the commencement of *the Water Act 1998* and, in particular, section 124 of the *Water Act 1998* which extinguished all Water Rights (replacing them instead with Water Permits). In the alternative, the von Pezold Claimants allege that, as a matter of customary international law and Article 4(2) of the German BIT, the Water Rights were indirectly expropriated by the Respondent on 1 January 2000 by the repeal of the *Water Act 1976* and the commencement of the *Water Act 1998*, in that the rights that exist under a Water Permit are so different and much-diminished from those that existed under a Water Right that the overall effect has been to cause a radical deprivation to the economical use and enjoyment of the von Pezold Claimants’ right to use public water on the Forrester Estate (see Reply, paras.

³⁹ It is recalled that all of the von Pezold Claimants are German nationals.

530-533). As well as compensation for the conversion of the Forrester Water Rights into Water Permits in the year 2000, the von Pezold Claimants also seek restitution of the resulting Water Permits (hereinafter referred to as the "**Forrester Water Permits**") (see Reply, para. 559). These Forrester Water Permits, as with the Makandi Water Permits discussed below, were allegedly expropriated along with the Forrester Properties pursuant to the 2005 Constitutional Amendment. The von Pezold Claimants therefore seek restitution of the Forrester Water Permits along with the Forrester Properties (see von Pezold Claimants' Corrected Request for Relief, para 8.12.1)⁴⁰.

188 The second Additional Claim relates to alleged expropriation of the Water Permits (created under the *Water Act 1998*) which attached to the Makandi Estate ("**Makandi Water Permits**") (see Reply, paras. 561-562). The von Pezold Claimants allege that the Makandi Water Permits were expropriated when the Makandi Properties were expropriated pursuant to the 2005 Constitutional Amendment. Unlike the Forrester Water Rights, the von Pezold Claimants do not bring a claim for expropriation of the Makandi Water Rights (through conversion into Water Permits in 2000) because they did not own a qualifying interest in the Makandi Estate at that time:

At the time that the Parent Claimants acquired their contractual and beneficial rights in the Makandi Estate in May 2005, the Water Rights that previously existed in relation to the Makandi Estate had already (in 2000) been converted into Permits Therefore the Claimants do not make any claims in relation to those prior Water Rights.

However, the Parent Claimants in seeking the restitution of the Makandi Properties also seek the restitution of the final Permits attaching to them. Without access to water through the Permits, the Parent Claimants will incur significant losses.

189 The Parent Claimants contend that the Water Permits are part of the Makandi Estate as they attached to the Makandi Properties as at the date the Parent Claimants obtained their interest in the Makandi Estate (see Reply, para. 563, a list of the von Pezold Claimants' Water Permits - Makandi Estate is reproduced in the Claimants' Reply, Table 3).

(iii) The Tribunal's Analysis

190 As noted above, fulfillment of the first element of Article 25 of the ICSID Convention, the existence of a legal dispute, is not contested. Simply put, the Parties' disputes in connection with the Main Claims arise from the implementation of the LRP and, in particular, from the enactment of

⁴⁰ Although the Forrester Water Permits are labelled "final Water Rights" in Table 1 of the Claimants' Reply (as are the Makandi Water Permits in Table 3 of the Claimants' Reply), it is clear from the context that what the von Pezold Claimants seek by way of restitution under para. 8.12.1 of the Corrected Request for Relief is restitution of the Forrester Water Permits existing in 2005, at the time the Forrester Properties were expropriated. The losses suffered by the von Pezold Claimants in the years 2000 and 2005 constitute separate heads of loss.

provisions of the 2005 Constitutional Amendment. The dispute in connection with the "Additional Claims" arises from a change in the legal regime governing water rights, i.e. the *Water Act 1976*.

191 The Tribunal finds that this first element of Article 25 is satisfied in respect of both the von Pezold and Border Claimants.

(3) Consent in Writing under the ICSID Convention

192 The Tribunal turns next to the fourth element of the Article 25 test, regarding consent, in view of the prominence of this element among the Respondent's objections.

(i) Respondent's Position

193 The main thrust of the Respondent's various jurisdictional objections is that it did not consent to the arbitration of the Claimants' claims in connection with the above disputes. The Respondent takes this position on the basis of its interpretation of the relevant BITs, as discussed in detail below.

(ii) Claimants' Position

194 The Claimants' expression of consent, detailed below, is said to be predicated on the advance consent extended by the Respondent in the dispute settlement provisions of the German and Swiss BITs.

195 The von Pezold Claimants state that they have expressed their consent to ICSID arbitration in at least two ways. First, in a letter dated 9 November 2009, addressed to the Zimbabwean Minister of Economic Planning and Investment Promotion (delivered on 30 November 2009) and the Zimbabwean Minister of Finance (delivered on 11 December 2009), each of the von Pezold Claimants (except Adam) through their counsel consented to submit the present legal dispute to ICSID arbitration. By letter dated 2 March 2010, addressed to the Zimbabwean Minister of Economic Planning and Investment Promotion (delivered on 17 March 2010) and the Zimbabwean Minister of Finance (delivered on 17 March 2010), Adam, through counsel, consented to submit the present legal dispute to ICSID arbitration. Second, in their Request for Arbitration, filed on 10 June 2010, the von Pezold Claimants restated and "ratified" their consent to submit the present legal dispute to ICSID arbitration (see Request for Arbitration, 10 June 2010, paras. 105-107; see also Reply, para. 505).

196 The Border Claimants similarly state that they have expressed their consent to submit the present legal dispute to ICSID arbitration in their Request for Arbitration, filed on 3 December 2010 (see Request for Arbitration, 3 December 2010, para. 95).

197 Accordingly, the Claimants take the position that:

- the date on which the parties in Case No. ARB/10/15 consented to submit their dispute to ICSID arbitration is 30 November 2009 (17 March 2010 for Adam) at the earliest, or as of the date of filing of the Request for Arbitration (i.e., 10 June 2010) at the latest (see Request for Arbitration, 10 June 2010, para. 108); and
- the date on which the parties in Case No. ARB/10/25 consented to submit their dispute to ICSID arbitration is 3 December 2010, the date on which the Border Claimants filed their Request for Arbitration (see Request for Arbitration, 3 December 2010, para. 96).

(iii) The Tribunal's Analysis

198 It is clear that the von Pezold Claimants and the Border Claimants have consented to the arbitrations. Both the German and Swiss BITs provide, in their respective dispute settlement provisions, that the Contracting Parties consent to submit disputes meeting certain criteria to arbitration under the ICSID Convention if they are not settled within six months of the date on which they were raised. Specifically, the dispute settlement provisions of the German and Swiss BITs provide as follows:

Article 11 of the German BIT

(1) Disputes between a Contracting Party and a national or company of the other Contracting Party concerning an investment of such national or company in the territory of the former Contracting Party shall as far as possible be settled amicably between the parties concerned.

(2) If the dispute is not settled within six months of the date when it is raised by one of the parties in dispute, it shall, at the request of the national or company concerned, be submitted for arbitration. Each Contracting Party hereby consents to submit the dispute to arbitration. Unless the parties in dispute agree otherwise, the dispute shall be submitted for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18th March, 1965. The arbitral tribunal constituted pursuant to the said Convention shall reach its decisions on the basis of this Agreement, any treaties to force between the Contracting parties, such rules of general international law as may be applicable, and the domestic law of the Contracting Party in the territory of which the investment in question is situated.

(3) The award shall be binding on the parties and shall not be subject to any appeal or remedy other than that provided for in the said Convention. The

Article 10 of the Swiss BIT

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 11 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States.

Each party may start the procedure by addressing a request to that effect to the Secretary-General of the Centre as foreseen by Article 28 and 36 of the above-mentioned Convention. Should the parties disagree on whether conciliation or arbitration is the most appropriate procedure, the investor concerned shall have the final decision.

(3) The arbitral tribunal shall decide on the basis of the present Agreement and other relevant agreements between the Contracting Parties; the terms of any particular agreement that has been concluded with respect to the investment; the law of

award shall be enforced in accordance with the domestic law of the Contracting Party in the territory of which the investment in question is situated.

the Contracting State party to the dispute, including its rules on the conflict of laws; such rules of international law as may be applicable.

(4) During arbitration proceedings or proceedings for the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the national or company concerned has received compensation under an insurance contract in respect of all or part of his or its damage or losses.

(4) The Contracting Party which is a party to the dispute shall not at any time during the procedures assert as a defence its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.

(5) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to the arbitration of the Centre unless the other Contracting party does not abide by and comply with the award rendered by the arbitral tribunal.

(6) The arbitral award shall be final and binding for the parties involved in the dispute and shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located.

199 Based on the foregoing provisions, it is equally clear that the Respondent has consented through the BITs, provided the relevant criteria are satisfied. The Tribunal so finds. The relevant criteria are discussed below.

C. Jurisdiction *Ratione Personae*

(1) The ICSID Convention

(i) Article 25(2)(a)

200 The Tribunal recalls that Article 25(2) of the ICSID Convention, which defines a national of another Contracting State for purposes of establishing jurisdiction, provides as follows:

...

2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties

have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

201 The von Pezold Claimants evidence their nationality for the purpose of satisfying Article 25(2)(a) by reference to their German and Swiss passports and national identity cards, the details of which are provided at para. 87 of the 10 June 2010 Request for Arbitration⁴¹. All of the von Pezold Claimants, save for Rüdiger, claim to be nationals of both Germany and Switzerland. Rüdiger claims to be a national of Germany.

202 In its Counter-Memorial, the Respondent admitted that all of the von Pezold Claimants, save for Rüdiger, are nationals of both Germany and Switzerland and that Rüdiger is a national of Germany. The Respondent also stated, however, that documents filed with Company House in Zimbabwe indicated that Heinrich von Pezold ("**Heinrich**") and Rüdiger were Zimbabwean citizens (see CM, para. 5).

203 The Respondent did not pursue this allegation in its subsequent pleadings, although in its Post-Hearing Brief it raised the matter again in the form of a misrepresentation argument.

204 In their Reply, the Claimants denied that Heinrich or Rüdiger has ever been a Zimbabwean citizen and explained that the documents relied upon by the Respondent reflected clerical errors made by the accountants who had filed them (see Reply, paras. 14-15). All of the von Pezold Claimants have also stated that none of them are Zimbabwean nationals (see Request for Arbitration, 10 June 2010, para. 114).

205 The Tribunal is satisfied on its review of the evidence that each of the von Pezold Claimants fulfils the nationality criteria under Article 25(2)(a) and the Tribunal therefore has jurisdiction *ratione personae* over the von Pezold Claimants under the ICSID Convention.

(ii) Article 25(2)(b)

a) Respondent's Position

206 The Respondent has asserted that Elisabeth's control of the Border Claimants is inadequate for the purpose of Article 25(2)(b) of the ICSID Convention, because it is indirect, and therefore the Border Claimants do not satisfy the nationality criteria of Article 25 of the ICSID Convention.

207 The Respondent relies on the decisions in *AMCO Asia Corporation & Others v. Indonesia* ("**Amco Asia**") (see ICSID Reports 389, Decision on Jurisdiction, 25 September 1983, CLEX-392) and *Tradex Hellas SA v. Republic of Albania* ("**Tradex**") (see ICSID Case No. ARB/94/2, Award, 29

⁴¹ See also C-1 to C-17, which contain copies of the relevant pages of the von Pezold Claimants' passports and identity cards.

April 1999, RLEX-11) for the proposition that indirect control does not constitute foreign control for the purposes of the Centre's jurisdiction (see Rejoinder, paras. 937-938). The Respondent notes that in *AMCO Asia* there were five degrees of intermediate control as between the putative foreign investor and the local entity, and here the "Claimants need even more than ten organograms to try to prove their control of the local companies" (see Rejoinder, para. 938). The Respondent also refers to the following passage in the *Tradex* award, a case which the Respondent contends presented a similar situation to the one in these cases (see Rejoinder, para. 939; Resp. Skel., para. 55, quoting *Tradex*, para. 118, RLEX-11):

In its summary of the investments it claims to have made (particularly in T III p. 7 seq.), *Tradex* mentions a number of investments not in Albania, but in other countries allegedly in favour of the Joint Venture. In this context, the Tribunal notes that, according to Art. 1(3) of the 1993 Law, only those investments qualify to be covered by that Law that are made 'in the territory of the Republic of Albania'. In principle, therefore, investments made by *Tradex* outside Albania do not qualify.

208 In its Rebutter (see Rebutter, para. 222), the Respondent referred to the tribunal's summary of the elements required to establish foreign control for ICSID jurisdiction in *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela ("Autopista")* (see ICSID Case No. ARB/00/15, Decision on Jurisdiction, CLEX-189):

The cases decided under Article 25(2)(b) establish that the "foreign control" referred to in the second clause of Article 25(2)(b) means foreign control by nationals of a Contracting State party to the Convention. Moreover, such "foreign control" must meet an objective standard (*Vacuum Salt Products Ltd. v. Government of the Republic of Ghana* (Case No. ARB/92/1) Award of February 16, 1994, 4 ICSID Reports 165 (1994), Ven. Auth. 9). As a result, an arbitral tribunal must take into account the true control relationship (*Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema, SARL v. the Democratic Republic of Congo* (Case No. ARB/98/7), Award Declining Jurisdiction of September 1, 2000, Ven. Auth. 2; *LETCO*, Ven. Auth. 6; *SOABI*, Ven. Auth. 8, Christopher Schreuer, Commentary on the ICSID Convention, 12 ICSID Review – FILJ 59 (1997) (Second Installment of Commentaries Discussing Article 25), 560, 562-563, Ven. Auth. 11).

209 The Respondent also referred to the tribunal's discussion of control in *Vacuum Salt Products Ltd. v. Republic of Ghana ("Vacuum Salt")* (see ICSID Case No. ARB/92/1, Award, 16 February 1994, CLEX-177) as follows (see Rebutter, para. 225, quoting *Vacuum Salt*):

The Tribunal notes, and itself confirms, that "foreign control" within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no "formula." It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control. How much is "enough," however, cannot be determined abstractly. Thus, in the course of the drafting of the Convention, it was said variously that "interests sufficiently important to be able to block major changes in the company" could amount to a "controlling interest" (Convention

History, Vol. 11, 447); that "control could in fact be acquired by persons holding only 25 percent of" a company's capital (id., 447-48); and even that "51% of the shares might not be controlling" while for some purposes "15% was sufficient" (id., 538).

210 The Respondent concludes that control is a "clearly defined chain, each link of which meets the applicable legal standard" and that the Claimants "have not demonstrated that continuous chain as there [sic] holdings and organograms are wilfully untraceable, probably for tax reasons." (see Rebutter, para. 223).

b) Claimants' Position

211 The Claimants submit that control requires consideration of all facts and circumstances, relying on *Vacuum Salt*⁴², and that indirect control may be control for the purpose of Article 25(2)(b) of the ICSID Convention (see Cl. Skel., para. 13; Cl. PHB, para. 14). The Claimants rely on *Société Ouest Africaine des Bétons Industriels (SOABI) v. Republic of Senegal* ("**SOABI**") (see 2 ICSID Reports 165, Decision on Jurisdiction, 1 August 1984, CLEX-393) and *Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela* ("**Mobil**") (see ICSID Case No. ARB/7/27, Decision on Jurisdiction, 10 June 2010, CLEX-410) in support of their latter point that indirect control is sufficient for the purpose of Article 25(2)(b) of the ICSID Convention. The following quote from *SOABI* is emphasized by the Claimants (see *SOABI*, paras. 35-37, CLEX-393):

The nationality of this company, which held in 1975 all of *SOABI*'s subscribed capital shares, could only be determinative of the nationality of the foreign interests if the Convention were concerned only with direct control of the company. However, the Tribunal cannot accept such an interpretation, which would be contrary to the purpose of Article 25(2)(b) in fine. This purpose, it is hardly necessary to observe, is to reconcile, on the one hand, the desire of States hosting foreign investments to see those investments managed by companies established under local law and, on the other hand, their desire to give those companies standing in ICSID proceedings.

SOABI is a perfect example of this, being a company established under Senegalese law to which the capacities of a national of another Contracting State have been granted.

It is obvious that, just as a host State may prefer that investments be channelled through a company incorporated under domestic law, investors may be led for reasons of their own to invest their funds through intermediary entities while retaining the same degree of control over the national company as they would have exercised as direct shareholders of the latter.

⁴² The Claimants refer to *Vacuum Salt*, para. 43, in support of this point. Specifically, the *Vacuum Salt* tribunal held that that the second limb of Article 25(2)(b) does not require or imply any particular percentage or share ownership, but noted that 100% ownership would almost certainly result in control whereas the total absence of any shareholding would virtually preclude the existence of control. The tribunal stated that the smaller the shareholding the "more one must look to other elements bearing on that issue", such as management.

212 The Claimants also point to the *Mobil* tribunal's discussion of Article 25(2)(b) as follows (see Surrejoinder, para. 127, quoting *Mobil*, paras. 153, 154 and 157, CLEX-410):

The Tribunal observes that Venezuela Holdings (Netherlands) owns 100 % of its US and Bahamian subsidiaries. Those subsidiaries are thus controlled directly or indirectly by a 'legal person constituted under the law' of the Netherlands. Accordingly they must be deemed to be Dutch nationals under article 1 (b) (iii) of the BIT.

The Respondent submits however, that this article is incompatible with Article 25 (2) (b) of the ICSID Convention which, according to Venezuela, excludes the use of the control test for the determination of a corporation's nationality.

...

However Article 25(2)(b)(i) does not impose any particular criteria of nationality (whether place of incorporation, siège social or control) in the case of juridical persons not having the nationality of the Host State. Thus the parties to the Dutch-Venezuela BIT were free to consider as nationals both the legal persons constituted under the law of one of the Parties and those constituted under another law, but controlled by such legal persons. The BIT is thus compatible with Article 25 of the ICSID Convention.

213 The Claimants distinguish *Amco Asia* on the basis that there was no agreement in that case concerning control as there is here in the form of Article 1(1)(c) of the Swiss BIT (see Cl. Skel., para. 13). The Claimants also submit that to the extent *Amco Asia* purports to limit the examination of control to the company immediately above the company incorporated in the host State, it was wrongly decided and has not been followed, as evidenced by the cases discussed above. Moreover there is nothing in the second limb of Article 25(2)(b) which indicates that such a restriction is required (see Surrejoinder, para. 120). The Claimants also point to the testimony of Mr. Moyo who admitted that, in Zimbabwe, property is often held through companies (see Cl. PHB, para. 15, referring to Tr. Day 6, p. 1618, lines 18-21).

214 Finally, the Claimants contend that the Respondent's reliance on *Autopista* to argue the opposite conclusion is misplaced, averring that the tribunal in that case did not decide that control could, as a general matter, only be by way of direct control (see Cl. Skel., para. 13).

c) The Tribunal's Analysis

215 The Tribunal is satisfied on its review of the evidence, and in particular that of Elisabeth and Heinrich, that the Border Claimants satisfy the criteria of Article 25(2)(b) on the basis of foreign control. The Tribunal rejects the Respondent's suggestion that the "chain of control" is broken in this case because of the presence of intermediary companies through which the von Pezolds' interest in the Border Claimants is held. The evidence clearly demonstrates that Elisabeth exercises overall control of the Border Companies and that Rüdiger, the Adult Children Claimants and Adam abide by Elisabeth's exercise of ultimate control over those companies. Accordingly,

the Tribunal finds that the requirements of Article 25(2)(b) of the ICSID Convention have been met and that it has jurisdiction *ratione personae* over the Border Claimants under the ICSID Convention.

(2) The BITs

(i) Respondent's Position

216 The Respondent disputes that the Border Claimants are "controlled" by any of the Swiss von Pezold Claimants, but it does so by reference to the meaning of "foreign control" in Article 25(2)(b) of the ICSID Convention, as opposed to "effective control" in Article 1(1)(c) of the Swiss BIT. The Respondent's submissions on "foreign control", for the purpose of establishing jurisdiction under Article 25 of the ICSID Convention, are dealt with in Section VI.C(1) above.

217 While not expressly connected with the Claimants' assertion of jurisdiction on the basis of Article 1(1)(c) of the Swiss BIT, the Respondent also submits that, as a result of an alleged failure to prove factual control as between the individual von Pezold Claimants, one of whom is German, the Claimants' claims under the Swiss BIT must be rejected. The Respondent does not distinguish, in this argument, as between the claims of the Swiss von Pezold Claimants and the claims of the Border Claimants. However, the Respondent's arguments appear to be relevant to the Tribunal's consideration of "effective control" for the purpose of determining its jurisdiction over the Border Claimants' claims. The Respondent's original submissions are set out in its Rejoinder, as follows (see Rejoinder, paras. 986-987):

To the extent that Claimants have hidden behind their nebulous, complex, obscure, holding structures, and abstained from proving the exact holder and amount of each stakeholder and given the fact that Rüdiger is among the key beneficiaries, trustees and ultimate decision-makers, the entirety of the von Pezold and Border Estate claims should be dismissed as no proof of each investment has been submitted and one of the Parent Claimants does not have any legal basis for his Claims and consequently there is no certain amount to be considered under the Swiss BIT.

In light of the above, not only must all Claimants' claims be dismissed under the German BIT but also under the Swiss BIT as Claimants have failed to prove the identity and holding that might otherwise benefit from consideration of hypothetical protection under the Swiss BIT.

218 The Respondent further stated the following in its Rebuttal (see Rebuttal, para. 116; Resp. PHB, para. 219):

As set out in Paragraph 986 of Respondent's Rejoinder, there is no determinable amount of claims to be considered under the Swiss BIT as Claimant Rüdiger is not Swiss and the intermingled holdings, control, beneficiaries (named and unnamed), trustee and ultimate decision-makers are not determinable, so Claimants' demands under the Swiss BIT must be rejected.

219 In its Post-Hearing Brief, the Respondent argued that while the Claimants had focused on the "theoretical grounds of 'control'", the Respondent had challenged the factual ground of who controlled what, and the Claimants have failed to prove their alleged ownership and control. The Respondent refers, by way of example, to the following statement in the Claimants' Memorial in support of its view that the Claimants have still not proven ownership (see Resp. PHB, paras. 171 and 222) :

The working capital of their investments may be a mix of their own money, finance from other investors, commercial banks and government owned development finance institutions that are mandated to invest in developing markets.

220 The Respondent appears to allege that: because Rüdiger has a "stake in the Claimants' holdings"; because that "stake is undefined"; because Rüdiger has a key role in the control of the "Claimants' assets"; and because German evidence "occupies a central role in the record", no damages can be assessed under the Swiss BIT because there is a lack of precision as to who owns and controls what (see Resp. PHB, para. 222).

(ii) Claimants' Position

221 The Border Claimants, although nationals of Zimbabwe, claim Swiss nationality pursuant to Article 1(1)(c) of the Swiss BIT by reason of having been effectively controlled by Swiss nationals and, in particular, by Elisabeth, a Swiss national (see Cl. PHB, para. 15). The Claimants contend that "effective control" of the Border Claimants existed by means of both factual and legal control, as follows (see Cl. PHB, para. 16; see also Cl. PHB, paras. 17-21):

... Factual control arose because Elisabeth is the source of the family's wealth, and because the family acknowledges that she is in overall control. Further, Heinrich (Swiss), since 1998, has managed the Border Company Claimants, subject to Elisabeth's overall control. Legal control arose because the Swiss Family members vote their 48.36% interest in Border as a block led by Elisabeth. This gives negative control as it permits the blocking of special resolutions, which require 75% of the vote. Further, Rüdiger (German) always voted his 38.13% in Border in the same manner as the Swiss Family Members. This gave the Swiss Family Members positive control with 86.49% of the issued share capital of Border. The legal control has existed since 1992, when Elisabeth and Rüdiger acquired 25.65% of Border. Mr Schofield confirmed that it was further supplemented in 2000 when the von Pezolds were granted joint management of Border by its then majority shareholder, which required their consent for all management decisions. The management agreement fell away in 2003, when the von Pezolds increased their shareholding to 86%. [citations omitted]

222 The Claimants submit that the term "effective control", although not defined in the Swiss BIT, means "real control, as opposed to the mere appearance of control; it encompasses direct and indirect control, so long as it is effective" (see Cl. PHB, para. 13).

223 The Claimants have interpreted the Respondent's arguments regarding direct and indirect claims as an independent ground of challenge to the jurisdiction of the Tribunal over the von Pezold Claimants' claims and the Border Claimants' claims (see below Section VI.D (1)(i)), as opposed to a challenge to the Border Claimants' standing to claim under Article 1(1)(c) of the Swiss BIT. It is noted, however, that the Claimants say they have established their beneficial ownership through the provision of title deeds, share certificates and family trust deeds, all of which are supported by organograms (see Cl. PHB, para. 33). The von Pezold Claimants also note that this same evidence states the percentage that each Claimant owns in the Zimbabwean Companies (including the Border Companies). The von Pezold Claimants affirm that, the investments are ultimately controlled by Elisabeth (see Cl. Skel., para. 33; Cl. PHB, para. 33), and that, although Elisabeth stated in her testimony that she did not understand the detail of the organograms she confirmed that she, together with her family, owns the Estates (see Tr. Day 2, p. 463, lines 11-15).

(iii) The Tribunal's Analysis

224 As discussed above in connection with the ICSID Convention nationality requirements, it is clear that the von Pezold Claimants are not Zimbabwean citizens and that they satisfy the nationality requirements of the relevant BITs in the case of each individual Claimant. The nationality point, in respect of the von Pezold Claimants, has not been argued strongly by the Respondent and therefore the Tribunal does not linger on it here. The Tribunal is satisfied that the documents filed with the Company House in Zimbabwe referring to Heinrich and Rüdiger as Zimbabwean citizens were filed in error. There is no evidence that either Claimant was ever a citizen of Zimbabwe.

225 Accordingly, the Tribunal finds that it has jurisdiction *ratione personae* over the von Pezold Claimants (save for Rüdiger) under the Swiss and German BITs and over Rüdiger under the German BIT.

226 With regard to the Border Claimants, which were incorporated in Zimbabwe, the Tribunal is satisfied that the Claimants have shown the Border Companies were "effectively controlled" by Swiss nationals and thereby satisfy the requirements of the Swiss BIT. Even if Rüdiger has an interest in the companies, the Tribunal is satisfied that the Companies are effectively controlled by Swiss nationals and, in particular, by Elisabeth. The day-to-day management of the Border Companies by Heinrich is further evidence that they satisfy the requirements of the Swiss BIT. On this basis, the Tribunal dismisses the Respondent's assertion that only theoretical control has been made out; effective control (both factual and legal) is supported by the evidence. Accordingly, the Tribunal finds that it has jurisdiction *ratione personae* over the Border Claimants under the Swiss BIT.

D. Jurisdiction *Ratione Materiae*

(1) The ICSID Convention

(i) Introduction

227 The Parent Claimants state that their investments include shares owned by them in the Zimbabwean Companies (the "**Zimbabwean Company Shares**"), the Zimbabwean Properties, the Residual Properties, other income-generating assets (i.e., moveable and immoveable property, including factories, saw mills, machinery and implements owned by the Zimbabwean Companies), the Water Permits attaching to the Forrester and Makandi Estates, 4,500 tonnes of maize owned by Forrester Estate (Private) Limited (the "**Seized Maize**"), foreign exchange and Zimbabwean dollar bank accounts, returns on investments, the exchange rate promise held in the name of Forrester Estate (Private) Limited by the Central Bank to transfer a certain sum of US Dollars to Forrester in exchange for the 2008 transfer by Forrester Estate of 25% of its Zimbabwean dollar holdings to the Central Bank (the "**Forrester Conversion Amount**"), the Makandi Acquisition Rights, the Forrester Water Rights and, with respect to Elisabeth alone, loans extended by her between 1994 and 1998 to the Zimbabwean Companies or otherwise to investments in Zimbabwe (the "**Forrester Loans**") (see Request for Arbitration, 10 June 2010, para. 119).

228 The Adult Children Claimants' investments are stated to include: the shares they own in Forrester Estate (Private) Limited, Border, Border International and Hangani; the Zimbabwean Companies owned through Forrester Estate (Private) Limited, Border and Hangani; the other assets associated with Forrester Estate (Private) Limited, Border, Border International and Hangani; the 4,500 tonnes of maize owned by Forrester Estate (Private) Limited; foreign exchange in Zimbabwean dollar deposits; returns on investments; the exchange rate promise of the Central Bank; and all other assets associated with those investments (see Request for Arbitration, 10 June 2010, para. 120). Because the Adult Children Claimants' investments do not include the Makandi Estate, all references below to the "Claimants" or "von Pezold Claimants" should be understood to exclude the Adult Children Claimants when the Tribunal addresses claims relating to the Makandi Estate.

229 Adam von Pezold's investments are stated to include the following: the shares he owned in Forrester Estate (Private) Limited; the Zimbabwean Properties owned through Forrester Estate (Private) Limited; the other assets associated with Forrester Estate (Private) Limited; the 4,500 tonnes of maize owned by Forrester Estate (Private) Limited; returns on investment; the exchange rate promise of the Central Bank; and all other assets associated with those investments (see Request for Arbitration, 10 June 2010, para. 121). Because Adam's investments do not include the Makandi or Border Estates, all references below to the "Claimants" or "von Pezold Claimants" should be understood to exclude Adam when the Tribunal addresses claims relating to the Makandi or Border Estates.

230 The Border Claimants' investments are stated to include: Border's shares in the other Border Claimants, the Zimbabwean and Residual Properties belonging to the Border Estate, the three Border sawmills, the two Border factories, the pole treatment plant, other income-generating assets belonging to the Border Estate, foreign exchange and Zimbabwean dollar bank deposits, returns on investments and all other assets associated with those investments (see Request for Arbitration, 3 December 2010, para. 103).

(ii) Respondent's Position

a) The *Salini* Test

231 The Respondent submits that ICSID tribunals, such as those in *Fedax N.V. v. Republic of Venezuela* ("**Fedax**") (see ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, CLEX-397), *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* ("**Salini**") (see ICSID Case No. ARB/02/13, Decision of the Tribunal on Jurisdiction, November 29, 2004, CLEX-438), *Joy Mining Machinery Limited v. Arab Republic of Egypt* ("**Joy Mining**") (see ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, CLEX-212), *Phoenix Action, Ltd. v. Czech Republic* ("**Phoenix Action**") (see ICSID Case No. ARB/06/5, Award, 15 April 2009, CLEX-240) and *Standard Chartered Bank v. United Republic of Tanzania* ("**Standard Chartered**") (see ICSID Case No. ARB/10/12, Award, 2 November 2012, RLEX-19), all agree on certain characteristics of investment and have, through their awards, clarified the definition of investment in the ICSID Convention (see Resp. Skel., para. 58).

232 The Respondent asserts that the Claimants' investments did not involve a risk, were of a commercial nature or a mere "holding", and offered no contribution or significance to the economic development of Zimbabwe (see Resp. Skel., paras. 58-68; Rejoinder, para. 949). In its Post-Hearing Brief, the Respondent identified additional criteria for an investment as developed in these cases and alleged that the Claimants have not satisfied any of them: duration, risk, not of a commercial nature or a mere holding, contribution or significance to the economic development of the host State, regularity of profit and return, investment made in good faith, and investment made in accordance with the law (see Resp. PHB, para. 155). Despite articulating these additional criteria, such as duration, regularity of profit and return and investment made in good faith, the Respondent has not made specific allegations in respect of these criteria as applied to the Claimants' investments.

233 The Respondent submits that the Claimants' investments are purely commercial in nature, involving commercial farming activities in which the host State is not involved. The Respondent encourages the Tribunal to take a course of conduct approach, such as the one adopted by the *LETCO* tribunal (see *Liberian Eastern Timber Corporation v. Republic of Liberia*, ("**LETCO**") 2 ICSID Reports 343,

Award, 31 March 1986, CLEX-167), to determine whether the Claimants' acquisitions were merely commercial (see Resp. PHB, para. 160, referring to *LETCO* quoting USC §1603(d))⁴³.

- 234 The Respondent also states that the Claimants took on no economic risk at the time of their investment, relying on the following passage from the Claimants' Memorial in support of this position (see Rejoinder, para. 954, quoting the Claimants' Memorial at paras. 72-73 and 173):

A central tenet of their business philosophy is to ensure that preservation of their investments for the next generation – as stated, they have lost investments to regime before and they did not wish it to happen again. Before investing they undertake due diligence. Their due diligence includes understanding the economy and local politics, and meeting with government officials in order to understand the host State's attitude to investors.

Therefore when the von Pezold Claimants have made investments – including in the Republic – they have always carried out significant due diligence in order to ensure that their wealth is protected;

...

However, they wished to ensure the preservation of their wealth.

- 235 The Respondent characterises the Claimants' invocation of the FPS provisions of the BITs as evidence of the Claimants' belief that no "legal or factual risk existed" because they were protected by "Rhodesian-style absolute full security and protection". (see Rejoinder, para. 956).

- 236 The Respondent relies on the evidence of Minister Mutasa in support of its position that the Claimants made no contribution to the development of Zimbabwe and, for this reason, do not qualify for protection under the ICSID Convention or the BITs (see Rejoinder, para. 946, quoting Minister Mutasa's Witness Statement, paras. 32, 33, 34 and 42, R-12):

32. Claimants never contributed anything to Zimbabwe. They drained our land of its resources to increase their family wealth which was already considerable

...

33. Claimants were here to reap profits for themselves only. They did not create anything useful for Zimbabwe. Their only concern was to maximise their individual family's financial gain. As they never contributed anything positive to our country, in that sense they did not make an investment which merits benefitting from the protections of a BIT in this arbitration ...

We told them 'you are no longer wanted here.'

... They have exploited us, contributing nothing to our country, and drained us of our country's wealth...

We do not like the greedy ones in any race or culture, those who are selfish, those who contribute nothing to our country but who only think of taking. We like good

⁴³ USC §1603(d) states: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose".

people, be they white or otherwise, all good people are accepted and all bad people are not.

237 The Respondent also points to the Claimants' own description of their choices during the alleged State of Emergency when food was short to feed the Zimbabwean population, whose staple food is maize (see Rejoinder, para. 961, quoting Mem. at para. 266):

Given that the Forrester Estate has less arable land available, it has given priority to the cultivation of tobacco over maize because it provides a better financial return.

238 The Respondent submits that its intention when entering into the BITs was to give incentives to "new" investments, not to perpetuate the "Rhodesian Way of Life" (see Resp. PHB, para. 156). By "new", the Respondent appears to mean a new influx of assets, which it contrasts to the holding of assets (see *ibid.*, n. 633). The Respondent also appears to advance an argument that "new" legal compliance was required at the time when the BITs entered into force in the event legal requirements for investments made prior to the entry into force of either BIT had not been satisfied (see *ibid.*).

239 The Respondent further argues that the Claimants have, in fact, drained off the riches of the Zimbabwean economy and, based on the dates of the Claimants' acquisition following the start of the Third Chimurenga⁴⁴, "bought the land of departing Europeans betting on their pan-European passports to benefit from a future BIT to cash in some day on their confidential investments." (see *ibid.*, para. 158).

b) Local Assets, Local Investment

240 The Respondent submits that the ICSID Convention is not applicable when an investment is not made by "foreigners into a host Country". In the present cases, the Respondent submits that all of the investments were conducted through local Zimbabwean Companies (some of which were originally Rhodesian companies) (see Rejoinder, para. 936) and that the properties in question were first acquired by a Zimbabwean Company, in some cases even before the Claimants indirectly purchased shares of the company owning the land, and since then new acquisitions were made by local companies using their assets such that no foreign investments are at stake (see *ibid.*, para. 942).

241 The Respondent relies on the *Tradex* case in support of this objection, and in particular the distinction made by the tribunal as between *Tradex* and the Albanian joint venture of which it was

⁴⁴ A "Chimurenga", as used by the Respondent, refers to a struggle for liberation or "uprising": see CM, paras. 10, 140. It appears that the "Third Chimurenga" refers to period of civil unrest beginning around the turn of the century: see Rejoinder, para. 623.

a part for the purpose of identifying a protected investment (see *ibid.*, para. 965, quoting *Tradex*, para. 103):

As Tradex is the (only) Claimant in this Case, only an investment by Tradex itself is relevant. It is undisputed between the Parties that the Joint Venture "Tradex Torovice" formed by the Agreement of 10 January 1992 (T1) is a separate legal entity under Albanian law (see Art. 1 paragraph 2 of the Agreement and Section 2 of the Authorization of 21 January 1992 = T2). Therefore, while a Tradex contribution is an investment covered by the 1993 Law, any investment by the Joint Venture itself is not a "foreign investment".

242 The Respondent also relies on the *Amco Asia* case in support of its position that the Claimants' investments are not foreign; it invokes the *Amco Asia* tribunal's discussion of indirect control where several companies had been interposed between the foreign investor claimant and the local entity⁴⁵.

c) Origin of Capital

243 The Respondent submits that, because funding for the alleged investments came from Zimbabwe and remained in Zimbabwe, no foreign investments are at stake (see *ibid.*, paras. 939, 941, 942 and 985). The Respondent adds that the Claimants' investments were "self sufficient", in particular after 2005, referring to the following statement in the Claimants' Memorial (see *ibid.*, para. 941, quoting Mem. at para. 83):

However, prior to their Zimbabwean businesses being affected by the Land Reform and Resettlement Programme, there was by and large enough cash generated by the businesses for them to be self-financing.

244 In its Rebutter, the Respondent asserted that the Claimants had failed to prove and indeed were "incapable of proving that any funds from outside Zimbabwe, from Germany or from Switzerland, ever trickled down to contribute to the Zimbabwean economy". The Respondent continued as follows:

... As a complex railroad switching station of the world's largest cities, many incoming tracks can be switched onto myriad outgoing tracks of financial flow. It is possible that any input Claimants were to prove having made at the top of this infernal machine never reached Zimbabwe.

245 The Respondent concludes that it cannot be considered to have consented to this.

⁴⁵ The issue of foreign control for the purpose of ICSID jurisdiction has been addressed above; see paras. 215, 226.

d) Claims by Shareholders

246 The Respondent submits that the von Pezold Claimants and the Border Claimants are invoking "indirect claims" (i.e., "claims in which a shareholder requests compensation for damages resulting from a measure that was directed exclusively against the rights of the company in which it holds shares") (see Resp. Skel., para. 69; Rejoinder, paras. 963-977) because the impugned measures were directed against the Zimbabwean Companies, not their shareholders, and, as such, the Claimants do not have standing under Article 25(1) of the ICSID Convention (see Rejoinder, paras. 207, 963-965, 967-971 and 977).

247 The Respondent's theory of "indirect claims" appears to be drawn from a discussion published by Professor Gabriel Bottini on treaty claims advanced by shareholders. The issue was defined by Professor Bottini as follows (see G. Bottini, "Indirect Claims under the ICSID Convention", (2008) 29 U. Pa. J. Int'l L., p. 565, R-55, RLEX-18):

Whenever the host state adopts measures that directly affect shareholders' rights, such as the right to receive any declared dividend or to participate in shareholders meetings, it is undisputed that under international law either the shareholder, if it has direct access to an international procedure, or its national state through diplomatic protection, will have standing to claim against the measures. The problem arises, however, when the contested measure affects only the rights of the company because, in any event, it will generally also affect the economic interests of its shareholders measures.

For the purposes of this Article, an indirect claim (or an indirect action) is defined as a claim in which a shareholder requests compensation for damages resulting from a measure that was directed exclusively against the rights of the company in which it holds shares. As will become readily apparent, however, one of the most difficult tasks in this domain is determining whose rights are the ones really affected, notwithstanding the allegation of the shareholder-claimant (who will always argue that it is invoking its own rights and not those of the company). [emphasis added]

248 The Respondent also argues, under the lens of its indirect claims objection, that owning shares through intermediary companies does not necessarily constitute an investment in Zimbabwe because an intermediary company "might not use the assets of its parent company to realize its own investment but rather possibly funds generated by itself" (see Rejoinder, para. 966).

e) Indirect Claims

249 The Respondent relies on the jurisprudence of the International Court of Justice ("ICJ"), and in particular *Barcelona Traction, Light and Power Co., Ltd. (Belgium/Spain)* ("**Barcelona Traction**") (see 5 February 1970, ICJ Reports 1970, CLEX-153) in support of its position on indirect claims. The Respondent refers to the following statement by the ICJ that, under international law, a company has a distinct personality from its shareholders and because of this separation a company

cannot be held responsible for the actions of its shareholders and *vice versa* (see Rejoinder, para. 969, quoting *Barcelona Traction*, para. 47, CLEX-153):

[A] wrong done to a company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation.... Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

250 The Respondent also refers to the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* ("*Diallo*") (see ICJ, Judgment on the Merits, 30 November 2010, CLEX-365) in which Guinea brought a claim on behalf of one of its nationals who had invested in Congo through two locally incorporated entities. The Respondent states that the ICJ also declined jurisdiction in that case on the basis that a distinction must be made between the companies and the shareholders for purposes of a claim (see Rejoinder, para. 970).

251 The Respondent invoked Article 25(2)(b) of the ICSID Convention for the proposition that shareholders are entitled to bring a claim before the Centre only in exceptional cases, such as when there is consent that a locally incorporated entity is treated as a national of another State for the purposes of Convention. The Respondent submitted that this is not the case here, as neither the German nor the Swiss BIT expressly allows shareholders to file claims on behalf of companies (see *ibid.*, para. 971).

f) Indirect Shareholdings

252 The Respondent takes the position that the Claimants are only "remotely connected" to the Zimbabwean Companies (see Rebutter, para. 215; Resp. PHB, para. 163).

253 The Respondent notes that, in *Enron*, the tribunal stated that "there is a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company" (see Rejoinder, para. 973 and Rebutter, para. 210, quoting *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic ("Enron")*) (see ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 14 January 2004, para. 52, CLEX-207). The Respondent takes the position that this is precisely the point here, that Zimbabwe's declarations of interest in "new" investments to develop the economy did not extend its consent to "an ill-defined, non-specific, nebulous maze of holdings ultimately owned or controlled by nobody knows whom or what 'dormant' off-shore company. Even if a 'smile' were proven, or suspected, it is neither an invitation – having occurred after the acquisition of the holding – or consent and these claims should be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting those holdings" (see Rejoinder, para. 974; Rebutter, para.

212). Thus, the Respondent frames the real issue here as the fact, in its view, that the Claimants only have the most remote connection to the affected companies (see Rebutter, para. 215; Resp. PHB, para. 163).

254 The Respondent refers to the conclusion reached by the tribunal in *Standard Chartered*, that "an indirect chain of ownership linking a British company to debt by a Tanzanian creditor does not in itself confer the status of investor under the UK-Tanzania BIT" (see Rebutter, para. 216, quoting *Standard Chartered*, para. 200, RLEX-19). The Respondent concludes that the Claimants have not proved their investment.

(iii) Claimants' Position

a) The *Salini* Test

255 In their Memorial, the Claimants took the position that, as there is no definition of "investment" in the ICSID Convention, the Tribunal is "primarily required to focus on what has been agreed by the Contracting Parties to the BITs" (see Mem., para. 1061). The Claimants acknowledged the "considerable body of case law which considers that in order for an investment to be an investment for the purpose of Article 25 of the ICSID Convention, it must also fulfill the criteria in the *Salini Test*" (see Mem., para. 1063), but cautioned that the "*Salini* criteria" are "mere yardsticks" to assist in determining whether there has been an investment for the purpose of Article 25 of the ICSID Convention and are not jurisdictional criteria (see Cl. Skel., para. 20; Cl. PHB, para. 24). The Claimants have referred to several ICSID cases in support of this proposition (see *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania ("Biwater")*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 312, 316-318, CLEX-233; *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 43, CLEX-245; *Ambiente Ufficio S.P.A. and others v. Argentine Republic ("Ambiente Ufficio")*, ICSID Case No. ARB/08/9, Decision on Jurisdiction & Admissibility, 8 February 2013, paras. 479 and 480, CLEX-415). In *Ambiente Ufficio*, where the tribunal stated (see *Ambiente Ufficio*, para. 479, CLEX-415):

... The preceding analysis has also made clear that the present tribunal endorses the view that the term "investment" in Art. 25(1) of the ICSID Convention should not be subjected to an unduly restrictive interpretation. Hence, the *Salini* criteria, if useful at all, must not be conceived of as expressing jurisdictional requirements *strictu sensu*.

256 The Claimants state that their contribution consisted of know-how, capital funding and management (see Cl. Skel., para. 21; Cl. PHB, para. 25), as borne out by the Claimants' testimony, summarized as follows (see Cl. PHB, para. 25):

... Elisabeth stated that forestry was the family's main business in Europe before they acquired the Border Estate. Rüdiger confirmed that his and Elisabeth's respective families had been involved in forestry and farming for many generations

before investing in Zimbabwe. This know-how came with the Claimants to Zimbabwe and it is self-evident that it was applied to the three Estates. Elisabeth and Rüdiger confirmed that the money to purchase the Forrester Estate came from Elisabeth, and Heinrich's written evidence is that Elisabeth provided the Loans. The Claimants' witnesses were not questioned in regard to the capital contributions to Border or Makandi, but Heinrich's and Rüdiger's written evidence is that capital contributions were made in regard to Border and Makandi. In addition, Rüdiger and Heinrich confirmed their prior evidence that they were deeply involved in the management of the three Estates. . . . [citations omitted]

257 They also submit that Zimbabwe has recognized their contribution to the economic development of Zimbabwe, referring to the following statements made by senior government officials (see Cl. Skel., para. 22, quoting C-477, C-496 and C-221; see also Surrejoinder, paras. 155, 156, 157; Cl. PHB, para. 26):

[T]he seizure of commercial land was contributing to the country's high inflation rate ... If you invade a coffee, tea, cocoa, wheat or a fruit farm what you are doing is to undermine the productive capacity of this economy, therefore causing inflation. [Governor of the Central Bank, Mr. Gideon Gono, October 2005]

It was remarkable to witness a good example of effective land utilization on your property. We would like to encourage you to continue this splendid task which is the basis of economic development of our country. [Senior Civil Servant of the Ministry of Lands, Mr. T.T.H. Muguti, November 1991]

The protection and preservation of indigenous forests, found in most parts of the country and especially in Matabeleland North and the Midlands Provinces, and the properly administered exploitation of the exotic timber plantations of Manicaland [location of Border], are matters of great national importance ... It employs some 16,000 people. The industry accounts for 3% of the GDP. [Zimbabwe land audit finding in relation to forestry]

258 In any event, the Claimants say that their contribution is self-evident from the number of people that the Claimants employ, the foreign exchange they earn from export sales, and in regard to Border the nature of the products they produce (e.g. sawn timber for construction). They also note that maize is grown for domestic consumption and that the only time they were unable to grow maize for the commercial market was during a period when the sale price was set at below the cost of production (see Cl. Skel., para. 22; Cl. PHB, para. 26; see also Heinrich-I, paras. 216-225).

259 The Claimants submit that Minister Mutasa has a predilection to view all foreign investment in unfavourable terms and harbours a deep prejudice against white people, as evidenced by his testimony, and that these factors rather than any actual knowledge rooted in fact form the basis for his views as to the Claimants' contribution to the economic development of Zimbabwe (see Cl. PHB, para. 27).

260 As regards the commerciality of the Claimants' investment, the Claimants submit that most investments have a commercial element to them and that under the full *Salini* test, regularity of profit and return is not only consistent with the concept of investment but is required (see

Surrejoinder, para. 161). The Claimants distinguish the case of *Joy Mining* from the present case, noting that *Joy Mining* involved a standard commercial (supply) contract (a one-off transaction) as opposed to the Claimants multi-year investments, which have included the building of lasting infrastructure such as dams, irrigation network, roads, curing sheds for tobacco, 95 tractors, combine harvesters, trucks and the Charter Estate sawmill (see Cl. Skel., para. 23; Surrejoinder, paras. 162-164; Cl. PHB, para. 28).

261 Finally, the Claimants submit that their success was not guaranteed, noting that variation in price and weather are risks that were faced by their investments in agriculture and timber production. The Claimants also reject the premise asserted by the Respondent that the Claimants faced no risk because they undertook due diligence before they invested in Zimbabwe and that they benefitted from "Rhodesian-style" absolute full security (see Surrejoinder, paras. 168-169; Cl. PHB, para. 29). The Claimants refer to the 2005 Constitutional Amendment as evidence of risk and the success or failure of the Forrester Estate as evidence of risk of non-repayment of the loans extended by Elisabeth (see Cl. Skel., para. 24).

b) Local Assets, Local Investment

262 The von Pezold Claimants affirm that they plead their claims on the basis that their investments include the shares that they directly and indirectly own in the Zimbabwean Companies, as well as the underlying assets and operations of those companies (see Surrejoinder, para. 71). Border also affirms that it claims on the basis that its investments include the shares in the other Border Claimants, as well as the underlying assets of those companies. Hanganı pleads its claim on the basis that its investments include the Border Properties that it directly owns. Border International pleads its claim on the basis that its investments include the stock that it directly owns (see Surrejoinder, para. 72).

263 In their Surrejoinder, the Claimants recalled the following background to their respective claims (see Surrejoinder, paras. 74-75):

74. In terms of the background facts to this issue, it will be recalled that the von Pezold Claimants (and ultimately Elisabeth), control the Zimbabwean Companies and the underlying assets through a combination of legal control and factual control. The legal control is through their indirect shareholdings in the Zimbabwean Companies. The factual control exists because through Heinrich they manage the businesses of the Zimbabwean Companies, and Heinrich, Elisabeth, and Rüdiger hold seats on the boards of the Zimbabwean Companies.

75. The von Pezold Claimants acquired their shareholdings in the Zimbabwean Companies for the purpose of acquiring the Zimbabwean Properties that make up the Forrester, Border and Makandi Estates and the business activities with which those companies are associated. In doing so, the von Pezold Claimants made investments into Zimbabwe. [footnotes omitted]

264 The Claimants note that the term "investment" is neither defined nor limited under Article 25(1) of the ICSID Convention. They further state that there is no restriction in Article 25(1) that would prevent the underlying assets of a company being classed as an investment of the shareholders. Turning to the BITs, the Claimants state that the definition of investment in each BIT is drafted in the widest possible terms, comprising assets of every kind, including moveable and immovable property, shares, claims to money and any performance having an economic value (or, in the case of the German BIT, any performance under a contract having economic value) (see Surrejoinder, paras. 79-80).

265 The Claimants note that there is a distinction between domestic corporate law (and concepts of veil piercing) and international law applicable to investment disputes, referring to *Total SA. v. Argentine Republic* ("*Total*") (see ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, CLEX-406), where an ICSID tribunal found, for the purpose of its jurisdiction, that it was immaterial that the assets and rights which were alleged to have been injured belonged to Argentine companies. Thus, the Claimants submit that the position under public international law is that if, as a matter of fact, a shareholder controls the company that owns the assets in issue, public international law will consider those underlying assets to be the investments of the shareholder⁴⁶. According to the Claimants, there is nothing in the Swiss or German BIT to contradict this position (see Surrejoinder, paras. 83-85).

266 The Claimants submit that the case of *Tradex* relied upon by the Respondent, does not in fact support the Respondent's position that the assets owned by the Zimbabwean Companies are not the von Pezolds' assets as the tribunal never addressed the situation where the claimant investor controls the company and the underlying assets, and uses that company as a vehicle through which to make or acquire assets (see Surrejoinder, para. 106; Cl. Skel., n. 16).

c) Origin of Capital

267 The Claimants state that they did use capital that originated from outside Zimbabwe when they purchased the share capital in the Zimbabwean Companies, and that subsequent investments into the Estates have been a combination of reinvesting profits and provision of some debt, including

⁴⁶ The Claimants discuss three awards in detail in support of their view: *Total*, CLEX-406; *Mr. Franz Sedelmayer v. Russian Federation*, SCC, Award, 7 July 1998, CLEX-398 (where the tribunal found the investments in question to be investments within the meaning of the BIT because they were controlled by the claimant); and *Waguilh Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* ("*Siag*"), ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, CLEX-407 (where the tribunal found the investment in question to be an investment within the meaning of the BIT based on indicia of control by the claimants).

the loans extended by Elisabeth from her own funds, held outside of Zimbabwe (see Surrejoinder, paras. 131-132).

268 In any event, the Claimants submit that nothing in Article 25(1) imposes an origin of capital requirement and that other ICSID tribunals have so held (see *Tokios Tokéles v. Ukraine* ("**Tokios Tokéles**"), ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 73, CLEX-401, para. 73; *Fedax*, paras. 29 and 41, CLEX-397).

269 As regards the BITs, the Claimants submit that such a requirement would be inconsistent with the object and purpose of the BITs, which they say is to encourage foreign investment in Zimbabwe, and that there is similarly no requirement in the BITs that, in order for investments to benefit from protection, the investments must have been acquired through the use of capital that originates from outside Zimbabwe. The Claimants refer again to the case of *Tokios Tokéles*, where the tribunal rejected Ukraine's arguments in connection with the origin of capital vis-à-vis Article 25(2) of the ICSID Convention and the Lithuania-Ukraine BIT, which contains a similarly broad definition of investments as the Swiss and German BITs. The Claimants insist that it is "the investment itself that must be in the territory of Zimbabwe, not the capital used to acquire it" (see Surrejoinder, para. 140).

270 The Claimants submit that *Tradex* does not support the Respondent's argument but rather contradicts it, as the *Tradex* tribunal held that so long as the capital was used for the benefit of the investment in Albania it did not need to flow into Albania (see Surrejoinder, para. 143, citing *Tradex*, paras. 118-119, RLEX-11). The Claimants also note that the *Tradex* tribunal was not required to decide the issue of capital that does not enter the host State but which is used to acquire shares in a company in the host State, but that this issue was considered by the tribunal in *Fedax*, which confirmed that such a transaction would not prevent the shares of the local company from being an investment covered by the BIT (see Surrejoinder, para. 147, citing *Fedax*, para. 41, CLEX-179).

d) Claims by Shareholders

271 The Claimants contend that the Respondent in fact raises two separate grounds for objection under its indirect claims objection: (i) indirect claims, being claims asserted by the Claimants on behalf of the Zimbabwean Companies; and (ii) claims asserted by the Claimants on the basis of indirect shareholdings in companies. The Tribunal agrees with the Claimants' observation in this regard and the Tribunal has therefore split the Respondent's objection(s) according to the Claimants' proposed approach.

272 Finally, although the Respondent appears to raise this objection (or these objections) in respect of both the von Pezold Claimants and the Border Claimants, the Claimants note that the point regarding indirect shareholdings does not appear to relate to the Border Claimants, as only one of

those companies (Border) holds shares in other companies (the other two Border Claimants) and those shares are held directly (see Surrejoinder, para. 223; C-56).

(i) Indirect Claims

273 The Claimants contend that the measures in question were directed at both the von Pezold Claimants and the Zimbabwean Companies and had the effect of directly expropriating: (i) the von Pezold Claimants' investments owned through the Zimbabwean Companies; and (ii) the Zimbabwean Companies' properties. Thus, the Claimants submit that they are asserting direct rights. The Claimants also contend that the measures had the effect of indirectly expropriating the von Pezold Claimants' shares in the Zimbabwean Companies, causing them loss (see Cl. Skel., para. 26; Surrejoinder, para. 175). The Claimants state that the foregoing applies *mutatis mutandis* to the Border Claimants (see Rebutter, para. 176; Cl. Skel., para. 26).

274 The Claimants reason that as the Claimants' investments included the underlying assets of the Zimbabwean Companies, the measures must have been directed at the Claimants and they therefore have standing. The Claimants also reason that even if the measures were only directed against the Zimbabwean Companies, the effect of those measures on the Claimants is such that they still have standing to pursue their claims (see Cl. Skel., para. 27; Surrejoinder, para. 179). The Claimants take the position, on the basis of *Total* (see *Total*, para. 80, CLEX-406), that the same measures may cause losses to both a company and to its shareholders.

275 The Claimants note that, while the Respondent advances its objection regarding indirect claims under Article 25(1) of the ICSID Convention, its arguments are primarily based on the jurisprudence of the ICJ. To the extent the Respondent advances its argument under Article 25(2)(b) of the Convention as well, the Claimants aver that the Respondent has misunderstood this provision and assert that it does not address the issue of shareholders bringing claims and does not restrict shareholders from bringing claims in regard to measures directed against their companies or them (see Surrejoinder, paras. 181-186).

276 The Claimants submit that the ICJ jurisprudence on which the Respondent relies is inapposite because it concerns the law of diplomatic protection of shareholders, not the protection of shareholders under investment protection treaties. The Claimants aver that investment treaty tribunals have consistently held that the law of diplomatic protection is inapplicable to claims pursuant to investment treaties, and that shareholders may bring claims for the losses they have suffered that arise from measures directed at their companies (see Cl. Skel., para. 28; Surrejoinder, paras. 187-213).

277 The Claimants refer (see Surrejoinder, para. 214) in particular to the following discussion of *Barcelona Traction in CMS Gas Transmission Company v. Argentine Republic* ("*CMS*") (see ICSID

Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, paras. 43, 44, 45 and 48, CLEX-203)⁴⁷:

However, Counsel for the Claimant are also right when affirming that this case was concerned only with the exercise of diplomatic protection in that particular triangular setting, and involved what the Court considered to be a relationship attached to municipal law, but it did not rule out the possibility of extending protection to shareholders in a corporation in different contexts. Specifically, the International Court of Justice was well aware of the new trends in respect of the protection of foreign investors under the 1965 Convention and the bilateral investment treaties related thereto.

Barcelona Traction is therefore not directly relevant to the present dispute, although it marks the beginning of a fundamental change of the applicable concepts under international law and State practice. In point of fact, the *Elettronica Sicula* decision evidences that the International Court of Justice itself accepted, some years later, the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State's legislation.

Diplomatic protection itself has been dwindling in current international law, as the State of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected. To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements recognizing the direct right of action by individuals. It is precisely this kind of arrangement that has come to prevail under international law, particularly in respect of foreign investments, the paramount example being that of the 1965 Convention.

....

The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach – a proposition that is open to debate - then that approach can be considered the exception.

278 As a final point, the Claimants submit that the Tribunal should bear in mind that the Zimbabwean Companies have no remedy under Zimbabwean law to recover compensation for the land that has been expropriated or to object to the expropriation itself. The Claimants state that this flows from the fact that the 2005 Constitutional Amendment removed the right of the former owners of land that had been expropriated to object to the expropriation in court. Thus, if successful, the

⁴⁷ The Claimants also refer to the decisions of the tribunals in *Siemens A.G. v. Argentine Republic ("Siemens")*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, CLEX-402; *Gami Investments, Inc. v. United Mexican States ("Gami")*, UNCITRAL, Final Award, 15 November 2004, CLEX-403; *Total*, CLEX-406; *BG Group Plc. v. Argentine Republic ("BG Group")*, UNCITRAL, Final Award, 24 December 2007, CLEX-231; and *RosInvest Co UK Ltd v. Russian Federation ("Rosinvest")*, SCC 079/2005, Final Award, 2010, CLEX-251. See Rebutter, paras. 215-219.

Respondent's arguments would have the effect of denying the shareholders any remedy whatsoever (see Surrejoinder, paras. 220-221).

(ii) Indirect Shareholdings

279 The Claimants note that this objection can only apply to the von Pezold Claimants and consider this to be an objection to the von Pezold Claimants bringing claims in relation to their shares in the Zimbabwean Companies in circumstances where there are companies interposed between them and the Zimbabwean Companies.

280 The Claimants submit that the term "investment" is neither defined nor limited in Article 25 of the ICSID Convention, but rather is defined in Article 1 of the BITs in the "widest possible terms". The Claimants argue that there is nothing in the BITs to prevent the indirect shareholdings in the Zimbabwean Companies from being classed as investments (see Surrejoinder, paras. 228-230).

281 The Claimants contend that ICSID jurisprudence supports the Claimants' conclusion, referring in particular to the cases of *Siemens, Ioannis Kardassopoulos v. Georgia ("Kardassopoulos")* (see ICSID Case No. ARB05/18, Decision on Jurisdiction, 6 July 2007, CLEX-227), and *Mobil* (see Surrejoinder, paras. 231-239). The Claimants quote the following language from the *Siemens* Decision on Jurisdiction (see *Siemens*, para. 137, CLEX-402):

The Tribunal has conducted a detailed analysis of the references in the Treaty to 'investment' and 'investor'. The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of 'investment' is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words 'not exclusively' before listing the categories of 'particularly' included investments. One of the categories consists of 'shares, rights of participation in companies and other types of participation in companies'. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.

282 The Claimants aver that *Enron* is not good authority for the Respondent's assertion that indirect shareholdings are not investments under Article 25 of the ICSID Convention, noting that the *Enron* tribunal permitted the claim of minority indirect shareholders. The Claimants set out their analysis of the *Enron* tribunal's conclusions as follows (see Surrejoinder, paras. 244-246):

244. The *Enron* tribunal disagreed and held that indirect shareholdings were not precluded from coverage under the bilateral investment treaty. In doing so, the *Enron* tribunal considered that the issue is whether or not the investor (shareholder) is too remote from the company which is the subject of the measures that have also caused losses to the shareholder. The *Enron* tribunal considered this to be a function of the extent of the host State's consent to arbitration, which

in turn it considered to be a function of whether or not the State had consented to the investment. In this regard the Enron tribunal said:

“If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.”

245. However, if Enron considered that consent to arbitration was the relevant test then it should have considered the dispute resolution provisions of the United States- Argentina bilateral investment treaty – it did not do this.

246. In any event, it is apparent that the Enron tribunal also considered that another matter was also of equal importance. That other matter was whether or not it could be said that as a matter of public international law, Enron and Pondersosa were the owners of the shares in TGS. In coming to this conclusion it is evident that the Enron tribunal did not consider ownership to be a question of domestic law (under Argentinian law, EPCA, CIESA and EDIDESCA were the owners of TGS, not Enron and Pondersosa – see the diagram in para 241 above). The relevant passage from the decision is as follows:

“The conclusion that follows is that in the present case the participation of the Claimants was specifically sought and that they are thus included within the consent to arbitration given by the Argentine Republic. The Claimants cannot be considered to be only remotely connected to the legal arrangements governing the privatization, they are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty-rights and not merely contractual rights related to some intermediary. The fact that the investment was made through CIESA and related companies does not in any way alter this conclusion.”

... [citations omitted]

283 Returning to the case at hand, the Claimants submit that the von Pezold Claimants’ investments in the Zimbabwean Companies are not “portfolio investments”, but rather investments which the von Pezold Claimants themselves manage and control, identifying the following indicia of management and control (see Surrejoinder, para. 247):

- legal control of the Zimbabwean Companies through their indirect shareholdings;
- factual control of the Zimbabwean Companies exercised through Heinrich von Pezold;
- Heinrich, Elisabeth and Rüdiger hold seats on the boards of the Zimbabwean Companies;
- All companies between the von Pezold Claimants and the Zimbabwean Companies are controlled by the same means;

- Respondent has acknowledged the von Pezold Claimants' ownership of the shares in the Zimbabwean Companies in its court orders, in its Land Audit Committee Reports and in the papers of its Executive sitting in Cabinet.

(iv) The Tribunal's Analysis

284 There is considerable jurisprudence to support the proposition that, although the primary task of an ICSID tribunal is to establish whether an investment exists in accordance with the specific words of the relevant treaty, there may nonetheless be certain inherent characteristics of an investment which assist a tribunal in this task. This is so whether under the ICSID Convention or otherwise.

285 Whatever the position may be on *Salini* as regards the elements to be satisfied, the Tribunal finds that it is rather less clear that the *Salini* test is the authoritative statement on those characteristics. Indeed, there seems to be a move away from *Salini* to a simpler test involving contribution, duration and risk. All of these characteristics are satisfied in the present case. Both the von Pezold Claimants and the Border Claimants have made a clear contribution both financially and in terms of expertise and time invested in managing the assets. The Respondent has not intimated that duration is an issue, but in any event this criterion is clearly satisfied. The Respondent's argument that, as a result of careful due diligence, there was no risk involved in the investments cannot be sustained and finds no support either on the evidence available in this specific case or the general jurisprudence, on this topic. It is evident that the present case does not involve a "commercial transaction" (such as a sale of goods) of the type that this "inherent characteristics" test is meant to distinguish. The Respondent's *Salini* argument is therefore dismissed.

286 The jurisprudence is uncertain as to whether a contribution to economic development of the State is required as part of the investment criteria. However, given the employment provided, contribution to the economy and know-how involved in the investment, it is clear that any such criterion would also be satisfied in the present case.

287 In relation to the Respondent's "local assets" argument, the Tribunal is satisfied that the fact that locally incorporated companies were used as part of the investment structure does not undermine the foreign nature of the investment in this case and there is no basis here for denying jurisdiction under the ICSID Convention.

288 There is no origin of capital requirement in the BITs or under the ICSID Convention; therefore this objection is also dismissed. In any case, it is clear that funding from outside Zimbabwe was invested by the Claimants and/or loaned to the Zimbabwean Companies, together with the reinvestment of locally-generated profit. The Tribunal is therefore satisfied that the von Pezold Claimants have established that qualifying investments were made in Zimbabwe. The Tribunal

discusses below the Parties' respective positions on claims by shareholders under the ICSID Convention and the BITs.

(2) The BITs

(i) Respondent's Position

289 The Respondent also challenges the Tribunal's jurisdiction *ratione materiae* over the disputes under the BITs on several grounds.

290 The Respondent asserts that the BITs require an investment to be "made" as opposed to just passively held (i.e., in a portfolio of holdings) (see Resp. Skel., paras. 46ff; Resp. PHB, para. 39), referring in particular to the language of Articles 2 and 9 of the German BIT, which refer to "investments made" in the context of the promotion and protection of "investments" and provide that the German BIT applies to all investments "made in accordance with the laws of" the host State, and Article 2 of the Swiss BIT, which provides that the Swiss BIT applies to all investments "made in accordance with the laws of" the host State (see Rebutter, paras. 87-88, 106-107).

291 The Respondent relies upon the ICSID case of *Standard Chartered* in support of its position that, in order to benefit from protection, investments must be actively made. The *Standard Chartered* tribunal held that the UK-Tanzania BIT required an investment to be made by, not simply held by, an investor, which meant that the investor had to have contributed actively to the investment (see *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/2, Award, 2 November 2012, para. 257, RLEX-19 ("*Standard Chartered*"). The *Standard Chartered* tribunal ultimately dismissed the case for lack of jurisdiction, having found that the putative investor had not made the investment in question:

230. Having considered the ordinary meaning of the BIT's provision for ICSID arbitration when a dispute arises between a Contracting State to the BIT and a national of the other Contracting State concerning an investment "of" the latter set out in Article 8(1) of the UK-Tanzania BIT, the context of that provision and the object and purpose of the BIT, the Tribunal interprets the BIT to require an active relationship between the investor and the investment. To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.

231. The Tribunal is not persuaded that an "investment of" a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.

232. Rather, for an investment to be "of" an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the

investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.

292 The Respondent argues that, like the UK-Tanzania BIT, the German and Swiss BITs also require a “new” or “active” investment that makes a contribution to the host State’s economy in order to benefit from their protection. The Respondent emphasizes that the German and Swiss BITs are bilateral, not one-way, and refers to the following reasoning of the *Standard Chartered* tribunal (see Rebutter, para. 63):

268. Could one imagine an executive in SCB Hong Kong deciding to purchase the IPTL loan with the expectation that it would get the protection of the BIT between the UK and Tanzania? Perhaps under that scenario, the UK-Tanzania BIT could be said to encourage the investment.

269. However, such encouragement works only in one direction. The UK-Tanzania BIT imposes no liability on Hong Kong or China to protect investors from Tanzania, by providing mutual benefits to Tanzanians investing in Hong Kong. Moreover, the decision in such a case would have been made by someone in Hong Kong, not in Britain, the Contracting State under the relevant BIT.

270. In the absence of text in the BIT expressing a contrary intent and on a record indicating no involvement or control of the UK national over the investment, it would be unreasonable to read the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities. The BIT preamble says “reciprocal protection” and “reciprocal” must have some meaning.

293 The Respondent concluded in its Post-Hearing Brief, on the basis of Mr. Nyaguse’s testimony, that the Claimants came to hold their investments in Zimbabwe in the *Standard Chartered* sense, constituting mere assets “held” and not protected investments “made” (see Resp. PHB, para. 149).

294 The Respondent also alleges that the von Pezold Claimants have not proven their beneficial ownership of the investments or the portion they each own of the Zimbabwean Companies⁴⁸ (see Resp. Skel., para. 143).

295 The particular legal basis for this objection is not entirely clear. The Claimants appear to consider this to be an independent ground for objection to jurisdiction although, as indicated above, it has some relevance to the Respondent’s position regarding the Border Claimants’ standing to claim under the Swiss BIT and the von Pezold Claimants’ claims over the assets of the Zimbabwean Companies. As an independent ground for objection to jurisdiction, the objection is encapsulated in the following paragraphs from the Rejoinder (see Rejoinder, paras. 986-987):

⁴⁸ Although the Respondent addresses this issue as a merits question relating to damages, as opposed to a question of jurisdiction, if successful, the effect of the Respondent’s objection would be to deprive the Tribunal of jurisdiction over the Claimants’ claims. Accordingly, it is addressed here.

To the extent that Claimants have hidden behind their nebulous, complex, obscure, holding structures, and abstained from proving the exact holder and amount of each stakeholder and given the fact that Rüdiger is among the key beneficiaries, trustees and ultimate decision-makers, the entirety of the von Pezold and Border Estate claims should be dismissed as no proof of each investment has been submitted and one of the Parent Claimants does not have any legal basis for his Claims and consequently there is no certain amount to be considered under the Swiss BIT.

In light of the above, not only must all Claimants' claims be dismissed under the German BIT but also under the Swiss BIT as Claimants have failed to prove the identity and holding that might otherwise benefit from consideration of hypothetical protection under the Swiss BIT.

296 The Respondent further stated the following in its Rebuttal (see Rebuttal, para. 116; Resp. PHB, para. 219):

As set out in Paragraph 986 of Respondent's Rejoinder, there is no determinable amount of claims to be considered under the Swiss BIT as Claimant Rüdiger is not Swiss and the intermingled holdings, control, beneficiaries (named and unnamed), trustee and ultimate decision-makers are not determinable, so Claimants' demands under the Swiss BIT must be rejected.

297 In its Post-Hearing Brief, the Respondent argued that while the Claimants have focused on the "theoretical grounds of 'control'", the Respondent has challenged the factual ground of who controls what, and the Claimants have failed to prove their alleged ownership and control. The Respondent referred, by way of example, to the following statement in the Claimants' Memorial in support of its view that the Claimants have still not proven ownership (see Resp. PHB, para. 171 and 222):

The working capital of their investments may be a mix of their own money, finance from other investors, commercial banks and government owned development finance institutions that are mandated to invest in developing markets.

298 The Respondent argues that the Forrester Water Rights are not investments because they are neither "rights *in rem*", pursuant to Article 1(a) of the German BIT, nor "business concessions under public law", pursuant to Article 1(e) of the German BIT (see Rejoinder, para. 232). The Respondent notes that Article 1(a) of the German BIT defines investment as "movable and immovable property as well as any other rights *in rem* such as mortgages, liens and pledges". The Respondent submits that the reference to *in rem* rights in this provision should be interpreted as follows (see Rejoinder, para. 232):

To understand the meaning given by the States to the phrase "in rem", one should use the example that follows such phrase in the definition "mortgages, liens and pledges which are all derivative legal concepts of items affecting or related to a property that are used as a guarantee based on such property with the aim to alter such property until complete fulfillment of the obligation that gave rise [sic] to such right. By comparison, a right to use water on a property is nothing similar to that concept and cannot be qualified as a right *in rem* per Article 1(a) of the BIT.

299 The Respondent also states that while, pursuant to Article 1(e) of the German BIT, a business concession may be comprised of rights to natural resources, this does not mean that all rights to natural resources constitute a business concession. Here, the Respondent argues that the Claimants cannot prove the existence of a business concession with respect to the use of water on the properties.

(ii) Claimants' Position

300 The Claimants submit that there is no requirement under the BITs for an investment to have been "made" and that a passive holding is sufficient to satisfy the definition of an investment under each BIT (see Cl. Skel., para. 10; Cl. PHB, para. 36).

301 The Claimants distinguish the facts in *Standard Chartered* by reasoning that the tribunal's findings turned on its interpretation of ambiguous wording in the dispute resolution clause in the UK-Tanzania BIT⁴⁹, the use of the word "made" in the BIT, including in its definition of "investment", and the fact that the claimant had expressly disavowed that it controlled the subsidiary that held the investment (see Cl. Skel., para. 39; Cl. PHB, paras. 37-38).

302 The Claimants note that, here, the von Pezold Claimants control the Zimbabwean Companies. The Claimants also note that there is no similar ambiguity in the language of the dispute resolution clause of the Swiss BIT as there was in the UK-Tanzania BIT, and the definition of "investment" in the Swiss BIT does not refer to investments being "made". Although the language of the German BIT dispute resolution clause is similar to that of the dispute resolution clause in the UK-Tanzania BIT which posed a problem for the claimants in the *Standard Chartered* case, the Claimants emphasize that the definition of "investment" in the German BIT does not refer to investments being "made". The Claimants argue that the use of the term "owned", in contradistinction to "controlled", in Article 3(1) of the German BIT, further implies that passive investment is covered⁵⁰.

⁴⁹ Articles 8(1) and 11 of the UK-Tanzania BIT read in relevant part as follows, the "ambiguity" in emphasis:

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as the "Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

....
If the provision of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreements.

⁵⁰ The Claimants note that the tribunal in *Standard Chartered* recognized that the word "own" connotes passive holding of investment. See Cl. Skel., n. 105; Cl. PHB, paras. 38-39; *Standard Chartered*, para. 223, RLEX-19.

303 The Claimants argue that, even if the analysis of the *Standard Chartered* tribunal is found to apply here, the Claimants have "made" investments and have satisfied the criteria for the making of an investment as set out by the tribunal in *Standard Chartered* (see Cl. Skel., p. 10; Cl. PHB, para. 40) in that they:

- Decided to make the investments (see Heinrich I, paras. 35 and 37; Heinrich and Rüdiger von Pezold's Joint Witness Statement, para. 4);
- Funded the investments (see Cl. Skel., n. 107; Heinrich's I, paras. 263-278, 419, and 452-457);
- Controlled the investments (see Elisabeth I, paras. 1 and 16; Rüdiger I, paras. 1, 2 and 11; Heinrich I, paras. 1, 3, 56, 58 and 488; Heinrich V, para. 65);
- Managed the investments (see Elisabeth I, paras. 1 and 16; Rüdiger I, paras. 1, 2 and 11; Heinrich I, paras. 1, 3, 56, 58 and 488; Heinrich V, para. 65); and
- Transferred something of value to acquire them.

304 The Claimants submit that nothing more than bare legal ownership is required by either BIT. They refer to the Interim Award on Jurisdiction and Admissibility in *Hulley Enterprises Limited (Cyprus) v. Russian Federation ("Hulley Enterprises")* (see UNCITRAL Arbitration Rules (Energy Charter Treaty), *Interim Award on Jurisdiction and Admissibility*, 30 November 2009, CLEX-362), in which the tribunal reviewed the plain text of the Energy Charter Treaty and found that it does not require more than simple legal ownership of shares for an investment to qualify as a protected investment. Following the approach to interpretation set out in Article 31 of the *Vienna Convention on the Law of Treaties ("Vienna Convention")*, the tribunal confirmed that there was "no indication whatsoever that the drafters of the Treaty intended to limit ownership to 'beneficial' ownership" (see *Hulley Enterprises*, para. 429). The Claimants apply the same principle to the present case.

305 In any event, the Claimants submit that they have established their beneficial ownership through the provision of title deeds, share certificates and family trust deeds, all of which are supported by organograms (see Heinrich I, Appendix 1, C-18; C-63, C-52 and C-64 (organograms); Cl. PHB, para. 33). The Claimants note that this same evidence also states the percentage that each Claimant owned in the Zimbabwean Companies. The Claimants admit that the investments are ultimately controlled by Elisabeth (see Cl. Skel., para. 33; Cl. PHB, para. 33), and that although Elisabeth stated in her testimony that she did not understand the details of the organograms, she confirmed that she, together with her family, own the Estates (see Tr. Day 2, p. 463, lines 11-15). The Claimants also note that Mr. Machaya admitted in his testimony that the Claimants owned the

investments at the time the pleaded causes of action accrued (see Tr. Day 5, p. 1461, Line 1 to p. 1462, line 1).

306 The Claimants argue that there is nothing to infer that the Contracting Parties to the German BIT intended to give the term "rights *in rem*" in Article 1(a) a special meaning limited to rights *in rem* that are akin to "mortgages, liens and pledges". The Claimants note that the ordinary meaning of rights *in rem* are rights that are exercisable against the whole world in relation to property. The von Pezold Claimants note that the Forrester Water Rights attached to the land to which they related and gave the holder the exclusive use of public water covered by the right. The Claimants reason that the Forrester Water Rights were *in rem* rights, and as such covered by Article 1(a) of the German BIT, as they could be asserted against the whole world in relation to the water that they covered (see Cl. Skel., para. 35).

307 The von Pezold Claimants also argue that the Forrester Water Rights are business concessions under public law within the meaning of Article 1(e) because water is a natural resource and a Water Right gave the holder the right to extract and exploit water for business purposes (see Cl. Skel., para. 36). The Claimants note that a public law element of the concession is that it was granted pursuant to legislation, namely the Water Act 1976 (see Surrejoinder, para. 266).

308 Finally, the von Pezold Claimants submit that the Forrester Water Rights are "every kind of asset" within the meaning of Article 1 of the German BIT, as they constitute compensable property under Zimbabwean law. The Claimants refer to s. 16(1)(c) of the Constitution, which required that the owner of "property" be compensated if his property was expropriated, and to the Water Act 1976, which required that the holder of a Water Right be compensated if the right was expropriated (see Cl. Skel., para. 37).

(iii) The Tribunal's Analysis

309 Article 11 of the German BIT provides that only disputes "concerning an investment of [a] national or company [of a Contracting Party] in the territory of the [other] Contracting Party" are protected. Similarly, Article 10 of the Swiss BIT provides that only disputes "with respect to investments between a Contracting Party and an investor of the other Contract Party" are protected. The issue here is whether the Claimants' investments satisfy the definition of "investment" in each respective BIT.

310 The Swiss and German BITs each define "investment" as follows:

Swiss BIT

Article 1

Definitions

For the purpose of this Agreement:

...

(2) The term "investments" shall include every kind of assets and particularly:

- (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
- (b) shares, parts or any other kinds of participation in companies;
- (c) claims to money or to any performance having an economic value;
- (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
- (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

A change in the form in which assets are invested does not affect their character as investments.

....

German BIT

Article 1

Interpretation

For the purpose of this Agreement:

1 the term "investments" comprises every kind of asset, in particular:

- a) movable and immovable property as well as any other rights in rem such as mortgages, liens and pledges;
- b) shares in companies and other kinds of interests in companies;
- c) claims to money or to any performance under contract having an economic value;
- d) intellectual property rights such as copyrights, patents, utility models, industrial designs, trade marks, trade names, trade and business secrets, technical processes, know-how, and goodwill;
- e) business concessions under public law, including rights to search for, extract and exploit natural resources;

and any alteration of the form in which assets are invested shall not affect their classification as investments;

....

311 Ad Article 1(a) of the German Protocol further states that "returns from the investment, and, in the event of their reinvestment, the returns therefrom], shall enjoy the same protection as the investment" (CLEX-3).

312 The first ground of challenge under this heading is that the investments were not "made" by the Claimants, but were passively held. To the extent there is any requirement of an active role in the investment – of which the Tribunal is not convinced, given the definition of "investment" under the Swiss and German BITs – the Tribunal considers that it is satisfied in the present case. It is evident that the Claimants actively control the investments and are not simply passive offshore shareholders, with no role in the business. The acquisition of the relevant shares was also actively pursued and would itself satisfy any requirement that the investment be "made".

313 Having reviewed *Standard Chartered* in the light of the BITs and factual matrix in issue in this case, the Tribunal agrees with the Claimants' assessment that the *Standard Chartered* case is distinguishable both on the facts and the wording of the specific BITs, and therefore does not provide a reliable authority for this Tribunal. The Tribunal refers to the detailed comparative assessment of this case and the *Standard Chartered* case provided by the Claimants, summarized earlier in this Award (see above paras. 301-308).

314 The next ground of challenge is that the von Pezold Claimants have not proved beneficial ownership. The Tribunal can find no requirement that beneficial ownership be proven in either the Swiss or German BITs, and sees no basis on which such a requirement should be read into the BITs. In the present case, the Tribunal finds that the Claimants have provided *prima facie* evidence of legal ownership which has not been rebutted and this is sufficient to establish jurisdiction.

315 Finally, in relation to the Forrester Water Rights, these rights constitute part of the investment, as an asset held by the von Pezold Claimants, as both a right *in rem* and a business concession under public law. The Tribunal notes, in this regard, that the very nature of the von Pezold Claimants' investments in Zimbabwe to which their water rights are connected, being large scale agricultural operations, require access to water for irrigation purposes. Indeed, it is inconceivable that such operations could exist, let alone succeed, without reliable access to water.

316 Accordingly, the Tribunal finds that it has jurisdiction *ratione materiae* under the BITs.

(3) The von Pezold Claims: One Last Issue

317 One final issue remains for discussion: namely, to whom these investments belonged. This question arises because the von Pezold Claimants have brought their claims primarily in relation to loss suffered to investments held not by them personally, but by the locally-incorporated Zimbabwean Companies – an approach challenged by the Respondent. The only investments owned directly by the von Pezold Claimants are, strictly speaking, the shares they hold in the companies directly below them in their corporate organograms⁵¹. This issue becomes particularly significant in the context of the Tribunal's remedial jurisdiction, because the von Pezold Claimants claim not only for the indirect expropriation of the value of their shares, but seek restitution of (or, in the alternative, compensation for) the Zimbabwean Properties – assets that they themselves have never directly held. Moreover, in seeking for the Tribunal to restore the *status quo ante* through an award of restitution, the von Pezold Claimants ask that these assets be returned not to their possession, but to the possession of the Zimbabwean Companies which directly held them

⁵¹ The only other exception is the Forrester Loans, which monies were loaned directly by Elisabeth von Pezold to the Forrester Companies. As direct creditor in respect of those loans, Elisabeth von Pezold has a direct personal claim for their return.

prior to 2005. It is important to bear in mind that neither the Forrester Companies (see above, para. 120) nor the Makandi Companies (see above, para. 136) have brought claims in their own name; only the Border Claimants (see above, para. 12) have brought a claim in their own name.

318 The Respondent argues that claims by foreign shareholders cannot encompass measures directed against a locally-incorporated company, nor loss incurred by that company. It submits that "[N]either the German BIT nor the Swiss BIT expressly allows shareholders to file claims on behalf of companies. [...] [N]othing in the BIT states that such investment allows an investor to claim on behalf of a third party like a company" (see Rejoinder, para. 971). The Respondent's submission amounts, in effect, to a claim that the von Pezold Claimants lack *ius standi* to bring their claims before this Tribunal. The von Pezold Claimants, in response, have made clear that they do not seek to bring a claim on behalf of the Zimbabwean Companies (see Cl. Observations, paras. 71, 82, 175). Rather, they submit they are entitled to bring a claim for their own losses in respect of what are, as a result of their "control" of the Zimbabwean Companies, their own investments: "[i]f, as a matter of fact, a shareholder controls the company that owns the assets in issue, public international law will consider those underlying assets to be the investments of the shareholder" (see Cl. Observations, para. 85; see also Cl. Observations, para. 179: "The Claimants claim for their own losses. The parties have already agreed that the same measure by a State may cause a loss to the company and also a separate (but equivalent) loss to the shareholders").

319 It is true that, as the Respondent submits, international law traditionally tended to look unfavourably on shareholders bringing claims for damage to investments which they did not directly own. The well-known decision of the ICJ in *Barcelona Traction*, cited frequently by the Respondent, represents the high-water mark of this perspective (*Case Concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)*, 5 February 1970, CLEX-153). In that case, Belgium sought to bring a diplomatic protection claim on behalf of its nationals, who owned an 88% shareholding in the Canadian company Barcelona Traction, which in turn owned a number of Spanish subsidiaries allegedly mistreated by the Spanish government. The Court found that Belgium had no standing to bring a claim on behalf of the Belgian shareholders; the proper plaintiff was, rather, the Canadian company, whose rights had been more directly affected.

320 The *Barcelona Traction* case, however, was decided in the particular context of diplomatic protection: see *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, para. 78, CLEX-406. Indeed, the ICJ noted in its decision that a different approach might well apply through the "considerable development" of bilateral and multilateral treaties providing for the direct protection of foreign investors (para. 90) (see also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections Judgment, ICJ, 24 May 2007, para. 91, RLEX-13). As the von Pezold

Claimants observe, that proposition was tested before the ICJ in a subsequent case, *Elettronica Sicula Spa (ELSI)* – a case whose facts are somewhat similar to those of the present case (*Case concerning Elettronica Sicula Spa (ELSI); USA v. Italy (Judgment of 20 July 1989)*, CLEX-172). *ELSI* concerned a claim by the United States for diplomatic protection of two American corporate shareholders, Raytheon and Machlett, investors in an Italian company whose property had been requisitioned by the Italian government. Italy argued that the United States' claim (on behalf of Raytheon and Machlett) should be limited to the loss of its nationals' shareholding, not the loss of underlying assets owned by the local Italian company. The Court, however, rejected that contention, finding that (para. 132):

The Chamber however has some sympathy with the contention of the United States, as being more in accord with the general purpose of the FCN [Friendship, Commerce and Navigation] Treaty. The United States' argument is further that Raytheon and Machlett, being the owners of all the shares, were in practice the persons who alone could decide (before the bankruptcy), whether to dispose of the immovable property of the company; accordingly, if the requisition did, by triggering the bankruptcy, deprive ELSI of the possibility of disposing of its immovable property, it was really Raytheon and Machlett who were deprived; and allegedly in violation of Article VII.

321 The key to the *ELSI* decision is that Raytheon and Machlett were, in the Court's description, "in practice the persons who alone could decide" the disposition of the company's assets. This principle – that where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former – has, as the von Pezold Claimants submit, since gained currency in investment treaty arbitration. An early instance was the decision of the tribunal in *Sedelmayer v. Russian Federation, SCC*, Award, 7 July 1998, CLEX-398, cited by the von Pezold Claimants. In that case, the tribunal was required to consider "whether Mr. Sedelmayer might be regarded as an investor under the Treaty with respect to investments which were – at least formally – not made by him but by different companies". Noting "growing support" for what it labelled the "control theory" in international law, the tribunal recognised that, provided it was not inconsistent with the text of the relevant Treaty, "an individual who makes his investments through a company might be regarded as an investor – a de facto investor" (p. 57). Relevant to the tribunal's decision in *Sedelmayer* was a recognition that in practice "it is not unusual that an individual, who wants to make an investment abroad, uses a company as a tool" (p. 57). One might pause to interpolate that the practice is not only "not unusual", in the words of the *Sedelmayer* tribunal, but widespread. Indeed, in many instances investment through a local company is actively required by States as a prerequisite to investment⁵². Subsequent cases cited by the von Pezold Claimants have applied this same principle to permit

⁵² Mr. Moyo recognised at the hearing that in Zimbabwe property is often held through companies (see Tr. Day 6, p. 1618, lines 18-21).

claims by a shareholder in respect of a State's conduct towards the underlying assets of their investment: see *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, CLEX-190; *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, CLEX-208; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, CLEX-407; *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, CLEX-219 (Award subsequently upheld on annulment challenge on jurisdictional grounds).

322 Ultimately, for every tribunal it must be a matter of interpretation of the relevant BITs – and, in this case, the ICSID Convention – which determines who may bring proceedings for an alleged violation of the BIT in respect of a protected investment. As the von Pezold Claimants submit, there is nothing in the text of the Swiss or German BITs to preclude a finding that the von Pezold Claimants can bring a claim in respect of the underlying assets of the Zimbabwean Companies. The fact that the BITs do not expressly anticipate such a claim does not suggest that such claims should be excluded (see *Sedelmayer*, p. 57: “the mere fact that the Treaty is silent on the point now discussed should not be interpreted so that Mr. Sedelmayer cannot be regarded as a de facto investor”). The definition of “investment” contained in Art 1 of the Swiss and German BITs contains no requirement that the investment be directly held or controlled. Indeed, the definition is framed in the broadest terms in both BITs: “every kind of asset[s]” (see Swiss BIT, Art 1(2), CLEX-5, and German BIT, Art 1(1), CLEX-3). Moreover, the definition of “investment” in each BIT further includes “movable and immovable property as well as any other rights in rem”, as well as “shares” or other kinds of interests or participation in companies, as well as any “claims to money or to any performance” under contract having an economic value (see Swiss BIT, Art 1(2)(a)–(c), CLEX-5, and German BIT, Art 1(1)(a)–(c), CLEX-3).

323 Article 25 of the ICSID Convention places no restriction on the type of investment which can give rise to an investment dispute. Article 25(2)(b) provides for the possibility that a locally-incorporated company may bring a claim relying on control by a foreign shareholder, but, as the von Pezold Claimants observe, the inclusion of that provision does not derogate from any right that shareholders in the company might otherwise have to bring proceedings in their own name (see Cl. Observations, para. 186; see also Swiss BIT, Art 1(1)(c), CLEX-5). One must also be conscious of the express purpose of the ICSID regime generally, and that of the Swiss and German BITs particularly: that the “encouragement and legal protection of [...] investments [is] apt to stimulate private business initiative and to increase the prosperity of both nations” (see German BIT, Preamble, CLEX-3). The need to provide broad legal protection to foreign investors such as the von Pezold Claimants is one of the primary reasons that investment protection treaties, including the Swiss and German BITs, have been adopted. It is clear that the Respondent was well aware of

the von Pezold Claimants' foreign nationality at the time they made their investments, and not only consented to but welcomed those investments (see below para. 354).

324 The von Pezold Claimants have submitted extensive evidence to demonstrate their legal and factual control of the Zimbabwean Companies. The Tribunal has already accepted that the von Pezold Claimants have established ownership of the Zimbabwean Companies through the respective chains of corporate ownership, with Elisabeth controlling those investments on behalf of the von Pezold family (see above paras. 125, 134, 139). In respect of the Forrester Companies, the von Pezold Claimants exercise legal control of 100% of the companies' shareholding (see above para. 120). In the case of the Border Companies, the von Pezold Claimants exercise legal control of 86.49% of the shares – a clear controlling majority (see above paras. 127, 215, 226). Finally, as regards the Makandi Companies, the von Pezold Claimants possess only a 50% participation in these companies (and only 44.4% in the Rusitu Valley Development Company (Private) Ltd) (see above para. 136). However, the von Pezold Claimants have also adduced evidence showing that Heinrich, on behalf of the von Pezold family, exercised factual control over the Makandi joint venture (comprising the Makandi Companies) pursuant to a management agreement signed between representatives of the von Pezold interests and the other 50% interest held by the Høegh family (see Heinrich First Witness Statement, paras. 56–58, 478–487; Management Agreement, CC-962). The Tribunal accepts the von Pezold Claimants' submission that this agreement gave Heinrich, acting on behalf of the von Pezold Claimants, *de facto* control over the Makandi Companies. Control of a company may be factual or effective ("*de facto*") as well as legal (see *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 106).

325 In light of the above facts, the Tribunal finds that in this case it would be artificial and unjust to limit the von Pezold Claimants to a claim for the indirect expropriation of their shareholdings. The Zimbabwean Companies, controlled by the von Pezold Claimants, are simply the subsidiary vehicles through which the von Pezold Claimants have made their investment. Any conduct by the Respondent targeted towards the Zimbabwean Companies thus was also conduct targeted towards the von Pezold Claimants (indeed, the fact that the measures taken by the Respondent tended to be directed at farms perceived to be held by "foreigners" provides further support for the proposition that the measures were really directed against the von Pezold Claimants⁵³).

326 In the circumstances of the present case, the Tribunal upholds the von Pezold Claimants' submission that they have a right to bring claims in respect of the underlying assets held by the Zimbabwean Companies. The von Pezold Claimants' ownership and control of the Zimbabwean

⁵³ The Tribunal finds below that the evidence supports a conclusion that the Claimants were targeted as a result of their skin colour: see below para. 501.

Properties (and related assets) through an indirect corporate holding structure presents no bar to their claims for restitution and/or compensation for the loss suffered to those investments. The Respondent's objection that the von Pezold Claimants lack standing to bring claims relating to the protected investments is therefore dismissed.

327 Based on the foregoing, the Tribunal finds that it has jurisdiction *ratione materiae* under the ICSID Convention, and the relevant BIT's, over both the von Pezold Claimants' investments and the Border Claimants' investments, as defined above.

E. Jurisdiction *Ratione Temporis* under the German BIT

(i) Respondent's Position.

328 The Respondent argues that no agreement existed for the provisional application of the German BIT before it entered into force (see Rejoinder, paras. 237-238) and, as the measures complained of in respect of the Forrester Water Rights occurred prior to the entry into force of the German BIT (i.e., in January 2000), the Respondent reasons that any claim in connection with such measures is not covered by the German BIT (see *ibid.*, para. 237)⁵⁴.

329 The Respondent explains its position on the provisional application of the German BIT as follows (see *ibid.*, para. 238; Resp. PHB, para. 37):

The note to the German Ambassador by the then Respondent's Minister of Finance, Mr Herbert Murerwa, was a unilateral expression of the intention to which there was no corresponding agreement from the German authorities which constitutes the condition for provisional application of the BIT. Considered on its own, the note cannot found the basis of an agreement such as is contemplated under Article 25 of the Vienna Convention. The note, in the absence of corresponding acceptance of that act by the Federal Republic of Germany, does not meet even the broad standards required of an agreement under that article. It shall be noted that note verbale insists on the fact that "this declaration is made in the expectation that the Federal Republic of Germany is considering the issue of guarantees for German investments in Zimbabwe already prior to the entry into force of the Agreement." A declaration is not an undertaking. Moreover, even if accepted by the Federal Republic of Germany, the entry into force of the BIT on a preliminary basis would only cover the investments guaranteed by the Federal Republic of Germany. This is obviously not the case here. Accordingly the note by the then Zimbabwean Minister of Finance establishes no agreement for the provisional application of the BIT and as such the Claimants cannot establish any claim in relation to water rights prior to the date on which the BIT entered into force.

330 The Respondent draws an analogy (see Resp. PHB, para. 37) to the case in *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar ("Yaung")* (see ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, RLEX-21), a dispute under the 1987 ASEAN Agreement between a

⁵⁴ The Tribunal observes that, whilst the Respondent appears to extend its pleading to the Swiss BIT, the Claimants have only brought their Forrester Water Rights claims under the German BIT, having expressly acknowledged that the Swiss BIT had not yet entered into force during the relevant period and there was no agreement for its provisional application. See Reply, para. 434.

Singaporean company and the Government of the Union of Myanmar relating to a joint venture in Myanmar. The Government of Myanmar disputed the jurisdiction of the tribunal on the ground that the investment had not been specifically approved as required by the terms of the ASEAN Agreement. Article II(1) of the Agreement provided that the investment must be "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement" to benefit from the investment protections of the Agreement. However, Article II(3) further provided that an investment made prior to the entry into force of the Agreement for the host State would only be covered if it was "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purpose of this Agreement subsequent in its entry into force." The claimant argued that Article II was satisfied since the investment was already approved in writing by the FIC, an organ of Myanmar, and there was no indication in the Agreement that a special procedure for registration was required. The respondent argued that the provision required approval specifically "for the purpose of this Agreement" and that the investment had not received such approval. The claimant admitted that, in order to benefit from protection under the 1987 Agreement, its investment had to satisfy the requirements of Article II(3). It argued that, as no specific procedure had been identified in Article II nor had Myanmar made any specific requirements in regard to that provision, the prior acts of approval should be seen as having satisfied Article II(3). The *Yaung* tribunal concluded that the claimant's investment did not qualify for protection having failed to satisfy the requirements of Article II(3), reasoning as follows:

58. The Tribunal notes that under Article II of the 1987 ASEAN Agreement, there is an express requirement of approval in writing and registration of a foreign investment if it is to be covered by the Agreement. Such a requirement is not universal in investment protection agreements: it does not apply, for example, under the 1998 Framework Agreement. In this respect Article II goes beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State. The Tribunal noted that a requirement of specific approval and registration already existed under the legislation of certain parties to the 1987 Agreement, especially those with centrally-managed economies. This was, and remains, the situation in Myanmar where no foreign investment can be made without specific approval of the Government of Myanmar acting through the FIC. Under the Foreign Investment Law this approval is given in writing after a thorough process. In the Tribunal's view, this process is in substance that described in Article II(1) of the 1987 ASEAN Agreement. In its Procedural Order no. 2, the Tribunal indicated that on the information currently available as to the practice of the various parties to the 1987 ASEAN Agreement, including the Respondent, it was not inclined to interpret the Agreement as requiring a special procedure for registration for the purposes of Article II. The Tribunal is reinforced in this view by the further information provided. It appears that no party to the Agreement which has a general legal requirement for the approval of foreign investment has felt it necessary to set up, in addition, a special procedure for the purposes of Article II. It is true that there is such a procedure in Singapore. But even there it was not specifically designed exclusively for the purposes of the 1987 ASEAN Agreement. Moreover the situation in Singapore is different because foreign investments can be made freely there without any requirement of approval or registration.

59. No doubt a Party to the 1987 ASEAN Agreement could establish a separate register of protected investments for the purposes of that Agreement, in addition to or in lieu of approval under its internal law. But if Myanmar had wished to draw a distinction between approval for the purposes of the 1987 ASEAN Agreement and approval for the purposes of its internal law, it should have made it clear to potential investors that both procedures co-exist and, further, how an application for treaty protection could be made. At the least it would be appropriate to notify the ASEAN Secretariat of any special procedure. None of these things was done. In the Tribunal's view, if a State Party to the 1987 ASEAN Agreement unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to be registered and approved also for the purposes of the Agreement. In other words, when a foreign investment, brought into Myanmar by a national or a company of a Party to the 1987 ASEAN Agreement, has been approved and registered in writing as such by the relevant authorities under the laws of Myanmar after the entry into force of the Agreement for Myanmar, this investment should be deemed specifically approved in writing and registered for the purposes of Article II(3), and it is entitled to treaty protection.

60. It follows from this interpretation of Article II that - had the 1987 ASEAN Agreement been in force for Myanmar in 1993 when the Joint Venture Agreement was signed - the Claimant's investment would have been protected. But, under Article II(3), a further test has to be met. In the present case the investment was approved and most of it had been effectively made before 23 July 1997, when the 1987 ASEAN Agreement entered into force for Myanmar. It follows from the actual language of Article II(3) that investments made before that date are not automatically covered, even if they were approved in writing and registered under the law of the host State when they were made. It is not uncommon for investment protection treaties to apply to pre-existing investments, but the extent to which the 1987 ASEAN Agreement does so is expressly stated in Article II(3). It is true that the procedure for giving approval under Article II(3) is not spelled out, and there appear to be no indications to be drawn from ASEAN practice on this point. But effect must be given to the actual language of Article II(3), which requires an express subsequent act amounting at least to a written approval and eventually to registration of the investment. The mere fact that an approval and registration earlier given by the host State continued to be operative after the entry into force of the 1987 ASEAN Agreement for that State is not sufficient.

331 The Respondent argues in the alternative that, should the Tribunal find the German BIT to apply provisionally prior to its entry into force, then Article 9(b) of the BIT applies and, as no specific approval was given by the competent authorities of the Forrester Water Rights investment, the investment is not covered by the BIT (see Rejoinder, para. 238).

332 Finally, the Respondent argues as regards the Makandi Water Permits that such permits do not constitute an "investment" in terms of the German BIT, as these permits are given to the occupier of agricultural land to use water for agricultural purposes and expire after 20 years. As a result, the Respondent insists that no value can attach to them so as to warrant compensation (see Rejoinder, para. 239).

(ii) Claimants' Position

333 As noted above, the German BIT was signed on 29 September 1995 and entered into force on 14 April 2000. However, the Claimants assert that, by agreement of the Governments of Germany

and Zimbabwe, the BIT provisionally applied as from 18 September 1996. The timing of the treaty's application is relevant to the Claimants' establishment of certain alleged breaches.

334 Specifically, the Claimants submit, on the basis of Article 25(1)(b) of the *Vienna Convention*, that an agreement for the provisional application of a treaty may be implicit, through acquiescence, by way of separate agreement or by way of conduct. The Claimants insist that the provisional application of the German BIT is evidenced from the following:

- The Zimbabwean Minister of Finance sent a Note to the German Ambassador, dated 18 September 1996 (the "**Zimbabwean Note**"), stating that:

The Republic of Zimbabwe, after having taken note of the fact that the competent authorities of the Federal Republic of Germany may grant measures for the encouragement of German investments in Zimbabwe already prior to the entry into force of the Agreement, will apply the Agreement on a preliminary basis, as from the date of this Note, pending the Agreement's formal entry into force in accordance with its terms. The Federal Republic of Germany will take the necessary steps to conclude the ratification process currently under way as soon as possible. This declaration is made in the expectation that the Federal Republic of Germany is considering the issue of guarantees for German investments in Zimbabwe already prior to the entry into force of the Agreement" (see CLEX-3);

- Germany assisted in the drafting of the Zimbabwean Note (see Letter from Minister Murerwa (the Minister of Finance) to Graf Leutrum regarding BIT Zimbabwe – Germany ratified, 18 September, 1996, C-497);
- The German Ambassador immediately responded to the Zimbabwean Note, confirming receipt (see Letter from Ambassador Norwin Graf Leutrum to Minister H Murerwa, 18 September 1996, C-782);
- On 19 September 1996, the German Ambassador informed the German Ministry of Foreign Affairs that the "Exchange of notes to Provisional Application of the [German BIT] was completed on 18.09.1996", in time for the Hamburg investment conference (see Letter from Ambassador Norwin Graf Leutrum to Minister H Murerwa, 18 September 1996, C-783);
- President Mugabe attended the investment conference in Hamburg at the end of September 1996 (see Cl. Skel., para. 43; see also Reply, paras. 515-527).

335 The Claimants rely on *Kardassopoulos* in support of their position that the effect of the foregoing agreement for provisional application is that the German BIT applied from 18 September 1996, as if it was already in force (see *Kardassopoulos*, paras. 219 and 250, CLEX-227). The Claimants aver that Zimbabwe did not limit provisional application of the BIT to investments that had been guaranteed by Germany, but that it had merely stated it was agreeing to provisional application

because Germany had stated it was “considering” the issue of guarantees of German investments (see Cl. Skel., para. 44).

336 The Claimants further note that Mr. Nyaguse admitted during his testimony that the German BIT applied provisionally from 18 September 1996 (see Cl. PHB, para. 41; Tr. D5, p. 1517, lines 5-16, p. 1518, lines 9-10). Mr. Nyaguse testified as follows:

Q. Do you remember being involved in the process whereby the German Bilateral Investment Treaty was actually to apply from the date you were in the – at the conference onwards, which I was September—if I remember, it’s about 18 September, 1996?

A. Yes. I recall because I was part of the team that negotiated the BIT with Germany.

Q. So was it important for you that when you got to Germany, you could say to the German investors, ‘Look, we’ve got this Treaty which applies and, therefore, your investments are going to have all the benefits of the German Treaty’?

A. Yes.

Q. Can you recall when Zimbabwe signed its first Bilateral Investment Treaty? I have an idea, but I’d like to hear your opinion.

A. I think the first agreement was 1995, if I’m not mistaken.

Q. Okay. Do you think it might have been 1994, but around that time?

A. Signing or ratifying? Because those are two different processes.

Q. Yes, it enters into force when its ratified.

(iii) The Tribunal’s Analysis

337 As discussed above, the issue of jurisdiction *ratione temporis* relates solely to the alleged breach of the German BIT in relation to the Forrester Water Rights.

338 The Tribunal considers that whether the German BIT provisionally came into force from 18 September 1996 turns on the exchange of Notes that occurred between Zimbabwe and Germany. Having reviewed the underlying documentation, the Tribunal finds that there is sufficient evidence on the record of the provisional entry into force of the German BIT.

339 Provisional application of a treaty is governed by Article 25(1) of the *Vienna Convention*, which provides that a treaty may be applied provisionally (pending its entry into force) if: (a) the treaty itself so provides; or (b) the parties have “in some other manner” so agreed. In this case, it is (b) that applies.

340 The Tribunal considers that the Zimbabwean Note represents a clear expression of Zimbabwe's intention that the German BIT would apply from 18 September 1996. In particular, the Tribunal notes the following factors:

- The declaration was made in the context of both parties seeking to "intensify economic cooperation" between them by creating "favourable conditions for investments" (as stated in the preamble of the German BIT). Giving the treaty provisional effect is consistent with these objectives.
- The Zimbabwean Note was signed by Zimbabwe's Minister of Finance, who is a person "representing the State" in connection with his portfolio. The Respondent has not argued that the Finance Minister was not authorised to bind the Republic of Zimbabwe.
- The Zimbabwean Note expressly states that the Republic of Zimbabwe would apply the Agreement on a preliminary basis, from the date of the Note. There is no ambiguity in the language used.

341 Under Article 25 of the *Vienna Convention*, there is no particular form which the agreement of the German Government should take. A United Nations ("UN") Report on the provisional application of treaties makes it clear that the determinative factor here is the intention of the parties. It is clear from Germany's response, the fact that it assisted in drafting the original note, and from its subsequent conduct, that agreement was provided. An example of such conduct is the letter from the German Ambassador to the German Ministry of Affairs on 19 September 1996 to advise that the "exchange of notes" regarding provisional application of the German BIT had been completed. This is strong evidence that Germany considered that the German BIT was to come into effect prior to the date of ratification.

342 Finally, the Tribunal rejects the Respondent's argument that even if the German BIT applied provisionally from 18 September 1996, it "would only cover the investments guaranteed by the Federal Republic of Germany". The language used in the Note does not support the imposition of such a condition, and is, at most, equivocal. The words "is made in the expectation" are not strong enough to create a binding condition limiting the provisional application to investments that had been guaranteed by Germany. This conclusion is reflected by the similarly weak language – "considering the issue" – used to describe the purported condition.

343 Accordingly, the Tribunal finds that it has jurisdiction *ratione temporis* under the German BIT in respect of the Forrester Water Rights.

F. Admissibility of the Claimants' Claims

(1) Introduction

344 In its Post-Hearing Brief, the Respondent acknowledged that it has presented its objections regarding the legality of the Claimants' alleged investments and their approval as admissibility objections as opposed to jurisdictional objections (see Resp. PHB, para. 180), and continued to allege in its Post-Hearing Brief that, based on a similar analysis to that carried out by the tribunal in *Enron*, the Claimants' claims are inadmissible (see Resp. PHB, paras. 183-184). The Respondent nevertheless submitted that jurisdiction and admissibility are often considered together (see Resp. PHB, para. 182), referring to the following assessment by the tribunal in *Ioan Micula, Viorel Micula and others v. Romania ("Ioan Micula")* (see Resp. PHB, n. 681, citing ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, paras. 63-64, CLEX-237)⁵⁵:

The Tribunal is of the opinion that when an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection. If such a requirement is not satisfied, the Tribunal may not examine the case at all for lack of jurisdiction. By contrast, an objection relating to admissibility will not necessarily bar the Tribunal from examining the case if the reasons for the inadmissibility of the claim are capable of being removed and are indeed removed at a subsequent stage. In other words, consent is a prerequisite for the jurisdiction of the Tribunal. In this proceeding, as it will be shown in the course of the Tribunal's analysis, the vast majority of Respondent's objections are actually objections to jurisdiction.

345 The Claimants state, importantly, that the availability of their MFN defence to these objections turns on their characterisation as admissibility objections as opposed to jurisdictional objections (see Cl. PHB, para. 75):

The MFN clause can be relied upon to avoid the approval requirement under the German BIT (if it exists) because it is an issue of admissibility, not jurisdiction. The distinction between these two concepts can be summarised as follows: at the jurisdictional stage the question is whether an investment qualifies for protection under the BIT, while at the admissibility stage the question is whether such protection is limited or revoked by the terms of the BIT. Where there is a qualifying "investment" within the terms of the relevant treaty, the State has consented to granting the investor the substantive protections of the treaty and jurisdiction is established. Where "investment" is not explicitly defined in terms of approval (as is the case with the German BIT – see Article 1(1)), approval is irrelevant to assessing the tribunal's jurisdiction – any contrary interpretation would fail to give effect to the State parties' decision to separate the two concepts.

346 The Tribunal has determined to treat the Respondent's Approval and Illegality Objections in this Award as admissibility objections, consistent with how they have been presented by the Respondent in the majority of its pleadings. The Tribunal notes, however, that the characterization

⁵⁵ It is noted that, in *Ioan Micula*, the respondent raised objections on grounds of nationality, definition of investment (whether it included "incentives"), absence of a showing of harm, temporal application of the BIT and nature of remedy sought (restitution).

of these arguments as either jurisdictional or relating to admissibility, in these cases, is immaterial save as to whether the Claimants are entitled to raise their MFN defence. As shall be seen, however, it is not necessary for the Tribunal to consider this defence and this too, therefore, has no effect on the treatment of these objections as either jurisdictional or relating to admissibility.

(2) The Respondent's Request to Re-Open PO No. 9

347 In its Post-Hearing Brief, the Respondent made a number of allegations of procedural abuse and violation of its right to be heard in connection with, in particular, PO No. 9. Specifically, the Respondent stated, at paragraphs 83-84, the following:

... Respondent considers that Claimants obtained PO No. 9 as the direct result of Claimant's own tardy submission of C-858, their only written BIT – access – condition "approval" from the "time of admission" of their acquisitions. The Claimant should have submitted that document key to these arbitrations with their Surrejoinder on 1 March 2013. Had Claimants played by the procedural rules of the game that they demand of others, at the risk of becoming the "footmen" of the "rules and regulations of these Arbitral Tribunals" [sic], Respondent would have been in a position to respond to c-585 [sic], submitting R-087 and r-082 (Mr. Masiwa's comments on C-858) with its Rebutter. Similarly, Claimants are even more tardy in testifying for the first time during oral proceedings that both Forrester and Border required Reserve Bank Exchange Control approvals as described in para 134 of this Post-Hearing Brief, these key elements of information, wilfully tardily submitted by Claimants, permit Respondent and these Arbitral Tribunals to "connect the dots" proving illegality. It is not possible, under these circumstances for these Arbitral Tribunals to exclude Claimants' tardy proof of the illegality of their acquisitions. Once proof of the legal acts is known, it is not possible to "ignore it" for sterile "procedural" reasons, particularly when that proof is submitted by the Party it incriminates. Further, as Claimants are responsible for that tardy submission and as these proceedings are now at end, no further exhibits should be submitted by either party.

It is on the basis of these manipulations and misrepresentations that Claimants led the Arbitral Tribunals to issue PO No. 9 preventing Respondent from presenting key legal arguments having a direct impact on the case without Respondent having had the benefit of *le contradictoire*. Therefore, Respondent considers that the Arbitral Tribunals cannot maintain PO No. 9 as it regards exchange control regulations (C-858/R-087) and consequently should consider fully Mr. Masiwa's Third Witness Statement, the full text of Respondent's 26 September 2013 Reply on Approval/Illegality and all related Oral Argument and witness testimony redacted from the hearing transcripts. Additionally, the Arbitral Tribunals should consider the fact that Respondent's right to be heard was silenced during the last phase of these proceedings and consequently has prevented Respondent from presenting the fullness of its arguments on illegality in its Skeleton Argument, during Oral Proceedings and generally after PO 9.

348 In view of the serious nature of the Respondent's allegations and its request that PO No. 9 be reconsidered, the Tribunal sets out below a detailed review of the procedural history leading up to issuance of PO No. 9, as well as a summary of the admissibility issues surrounding certain of the Respondent's defences and allegations raised both before and after the Hearing.

349 It is recalled that during the Joint First Session of the Tribunal with the Parties, held on 7 February 2011, the Respondent stated that it did not intend to file any objections to jurisdiction (see Minutes

of the Joint First Session, Arts. 13.1 and 16.1). However, the Respondent did raise objections to the Tribunal's jurisdiction in its Rejoinder, which was to have been the final written pleading served in this arbitration.

350 On 14 December 2012, the Respondent filed its Rejoinder in which it raised the following objections for the first time:

- The Claimants' investments are not "foreign" as required by Article 25 of the ICSID Convention;
- No "investment" was made by the Claimants within the meaning of Article 25 of the ICSID Convention, as this term has been interpreted through ICSID jurisprudence;
- The Claimants' claims constitute impermissible "indirect claims" under Article 25 of the ICSID Convention;
- No specific approval was obtained by the competent authorities at the time of admission of the investments⁵⁶ pursuant to Article 9(b) of the German BIT, therefore the German BIT does not apply (the "**Approval Objection**");
- The Claimants have not proved beneficial ownership of the investments;
- The Forrester Water Rights do not constitute an investment under the German BIT; and
- The German BIT does not apply provisionally to any events occurring prior to its entry into force, such as the conversion of the Forrester Water Rights to Water Permits.

351 The Claimants sought an order from the Tribunal that the jurisdictional objections pleaded in the Rejoinder, insofar as they related to the Claimants' cases as pleaded in the Memorial, are inadmissible or, alternatively, an order directing that the jurisdictional objections be joined to the merits, that a new round of briefing on those objections be directed, and that new hearing dates be set.

352 In PO No. 3, the Tribunal found as follows:

44. The Arbitral Tribunals consider that the jurisdictional challenges contained in the Rejoinder, in so far as they relate to the Claimants' ancillary claims pleaded with its Reply, are timely raised. However, in so far as the challenges relate to the Claimants' case as pleaded in the

⁵⁶ The Respondent did not identify at this stage what form of approval was required or by whom. The Respondent also did not argue at this stage whether any subsequent approval might satisfy the requirements of Article 9(b) of the German BIT.

Memorial, those challenges should have been brought at an earlier stage of the proceedings, consistent with Rule 41(1) of the Arbitration Rules. The consequences of these findings shall be dealt with below.

...

49. The Arbitral Tribunals therefore find that the Respondent has raised certain jurisdictional challenges and new defences after the time limits set for doing so in these cases and under the Arbitration Rules. The question remains whether "special circumstances" exist, within the meaning of Rule 26(3), so as to engage the Tribunals' discretion to admit these challenges and defences after the time when they ought to have been pleaded.

50. The fact of external counsel having been retained at a late date is not, in the Arbitral Tribunals' consideration, sufficient in itself, in the circumstances of these cases, to justify a finding of "special circumstances" within the meaning of Rule 26(3). The Tribunals do not find the analogy to default proceedings to be apposite for the same reasons articulated by the Claimants. That is, the issue is not the Respondent's right to be heard, but rather the Parties' equal right to due process and a fair proceeding, which includes respect for the time limits fixed by the Tribunals for each step in the proceedings.

51. The Arbitral Tribunals note the additional factors identified by the Respondent in its December 28th Letter, namely the submission of new, ancillary claims by the Claimants almost one year after the date on which they submitted their Memorial, the absence of "new" facts or documents contained or referred to in the Rejoinder, and the Respondent's offer to agree a further limited round of pleading to ensure that both Parties have the opportunity to fully plead their case. In relation to the Respondent's first point, the Tribunals agree that the delay in which the Claimants' ancillary claims were brought is, practically speaking, partly the cause of the present difficulty of managing the Respondent's late-raised jurisdictional challenges and defences in such close proximity to the Hearing.

52. On a related point, the Tribunals observe that were they to disregard the jurisdictional objections as they relate to the Claimants' case as pleaded in the Memorial, simply as being out of time, but admit, as they must, the jurisdictional objections as they relate to the ancillary claims pleaded by the Claimants with their Reply, a paradoxical situation would result. The absence of any new facts underpinning the jurisdictional objections and defences raised in the Rejoinder, such that no undue evidentiary burden would be placed on the Claimants at this stage of the proceedings, strengthens the case that the late-raised jurisdictional challenges and defences ought to be admitted and heard together with those timely raised jurisdictional challenges and defences.

53. Finally, the Tribunals note the Claimants' own concern regarding the enforceability of any future award rendered in these cases in the event the Respondent is not "fully heard" on its jurisdictional objections and defences, and their proposal, echoing that of the Respondent, to establish further written and oral procedures in order to ensure that each Party has an adequate opportunity to respond to the other Party's case.

54. The Arbitral Tribunals find that the above factors, cumulatively, constitute special circumstances compelling it to exercise its discretion pursuant to Rule 26(3) to admit the late-raised jurisdictional challenges and the new defences and to fix new time limits for the remaining steps in the proceedings.

353 Accordingly, the Tribunal ordered a new briefing scheduling, directing the Claimants to file their observations on the Rejoinder by 1 March 2013 (i.e., the "**Surrejoinder**") and the Respondent to file its response to the Claimants' observations by 19 April 2013 (i.e., the "**Rebutter**"). The February 2013 hearing dates were vacated and new hearing dates were set for 10-14 June 2013 (i.e., the June 2013 Hearing dates).

354 In their Surrejoinder, the Claimants raised the following arguments in defence to the Approval Objection:

- Ad Article 2 of the German Protocol alters the interpretation of Article 9(b) by contradicting, and indeed removing, the requirement under Article 9(b) of the German BIT that German investments must be specifically approved at the time of admission;
- Subsequent practice, evident through the exchange of *Notes Verbales*, the Witness Statement of the former German Ambassador to Zimbabwe (see Conze I, para. 7) and Zimbabwean Government practice (see Surrejoinder, paras. 291-315), supports the above interpretation;
- Alternatively, any approval requirement has been satisfied (see Surrejoinder, para. 316). In connection with this last argument, the Claimants offered the following interpretation:

Given that there was no formal approval process articulated in the German BIT, (and in any event) the reasonable conclusion is that the effect of Ad Article 2 of the German Protocol is to grant advance specific approval in relation to all German investments. This interpretation chimes with the words in Ad Article 2:

"Investments made in accordance with the laws [of Zimbabwe] ... shall enjoy the full protection of the Agreement."

- In the further alternative, the Claimants argued that, in the absence of a specific mechanism by which investments were to have been specifically approved, informal approval sufficed to meet requirement. The Claimants pointed to the following examples of approvals in connection with each Estate:
 - Forrester Estate (see Surrejoinder, paras. 322-328):

- encouragement from senior Government officials, informally and in formal correspondence;
 - approval of the conversion of leasehold title to freehold title on four of the ten properties on the Forrester Estate;
 - From 1988 onwards, the Reserve Bank of Zimbabwe granted the von Pezold Claimants permission to purchase “blocked funds” in order to build a dam on the Forrester Estate, and they also issued them with Special Dividend Import Licences;
 - From 1994 to 1998, the Reserve Bank approved all of the Loans made by Elisabeth; and
 - In 1997, Forrester was granted an Export Promotion Zone Licence by the Zimbabwean Investment Centre for Forrester Estate’s agricultural operations. This Licence granted the holder special incentives.
- Border Estate (see Surrejoinder, paras. 329-332):
 - encouragement from senior Government officials, informally and in formal correspondence;
 - Around 2004 when Border wanted to export Border’s products to South Africa, it applied to the Central Bank for approval as to the margin that it could agree with its South African agent. Border was granted this approval; and
 - Border has been granted all of the necessary licences to operate the sawmills and factories and was granted an Export Processing Zone Licence in April 1997. This Licence granted the holder special incentives.
 - Makandi Estate (see Surrejoinder, para. 333):
 - In addition to various licences held by Makandi Estate, they also pay various annual fees to the Environmental Management Agency, for pulp waste, coffee effluent and industrial effluent. The Makandi Estate has also been issued with various fire-arms certificates by the Firearms Controller, for the protection of crops and livestock on Makandi Estate.
- Additionally, or in the alternative, the Claimants argued that the Respondent was estopped from denying that the German BIT applies to the Claimants’ investments and/or estopped

from denying that they have received any requisite approvals (see Surrejoinder, paras. 335-357).

355 In its Rebutter, the Respondent responded to the afore-mentioned submissions on approvals, noting that Zimbabwe had "Foreign Investment Authorisation Procedures" in place before the von Pezold Claimants began acquiring their holdings and that they continue to have such procedures in place today. The Respondent stated that, during the 1980s and through 1993, such investment approvals were issued by the Zimbabwe Foreign Investment Committee ("FIC"), which was subsumed into the Zimbabwe Investment Authority ("ZIA" or "ZIC") (see Rebutter, para. 21). The Respondent further pleaded as follows (see Rebutter, paras. 337-341):

337. Claimants' failure to submit in this arbitration such approval or written confirmation that the German BIT or the Swiss BIT is applicable for their investments and specifically their principal investment in 1988 establishes that such investment is not subject to any protection under the German BIT under its explicit terms.

338. Claimants neither applied for, obtained nor submitted in this arbitration any "specific approval," particularly at the time of purchase of their holdings, yet they have the audacity to post a heading in their 1 March 2013 Observations that "(iv) If approval is required, it has been given by the Respondent."

339. However, upon careful review of materials submitted, the Arbitral Tribunal will note that Claimants do not affirm that they made any "specific" request for approval nor do they submit any document giving any such "specific approval at the time of" their 1988 project founding purchase.

What Claimants do is to assert their will in a princely manner:

- (i) "informal approval must suffice." That will no longer make law.
- (ii) "Anonymous approval must suffice";
- (iii) "Attending parliament must suffice";
- (iv) "No name discretion is elegant and must suffice";
- (v) "these---people---wanted---and---indeed---encouraged" sounds like an anachronistic view of rape where the women must have wanted---and---indeed---encouraged to lose her sovereignty over her own body – Zimbabwe. must have wanted---and---indeed---encouraged Claimants to take sovereignty over 78 275 hectares (which converts to 193 421.74 acres) of rich farmland ----- a rich farmland area greater than that available in a number of nations ----- with no preliminary "formalities" required!
- (vi) "they also pay various annual fees to the Environmental Management Agency, for pulp waste, coffee effluent and industrial effluent. The Makandi Estate has also been issued with various fire---

arms certificates by the Firearms Controller, for the protection of crops and livestock on Makandi Estate”

340. None of these even remotely resembles the Article 9 b) standard:

“b) specifically approved by the competent authorities of the latter Contracting Party at the time of their admission.”

341. Certainly such evidence does not remotely resemble a foreign investment made “in accordance with the laws of the Host State”, which have at all relevant times required ZFIC / ZIA approval. [footnotes omitted]

356 The Respondent again raised new objections, alleging that the Claimants' investments were not “actively made”, as required under the BITs, and that they were not made in accordance with the laws of the host State as required by Article 9(a) of the German BIT and Article 2 of the Swiss BIT (the “**Illegality Objection**”).

357 The Respondent framed its Illegality Objection as follows (see Rebutter, para. 68):

So it is that Claimants seek to base on the German BIT itself and / or the Swiss BIT itself the jurisdiction of the Centre to hear its disputes with Zimbabwe. However, for the reasons indicated in the Inceysa Award quoted above, Claimants cannot benefit from the rights granted in the German or in the Swiss BIT, including access to the jurisdiction of the Centre, because its investment does not meet the conditions set forth in Article 9 of the German BIT and in Article 2 of the Swiss BIT necessary for Claimants' assets to be included within the scope of that investment protection.

358 The Respondent pleaded its Illegality Objection in the following terms (see Rebutter, paras. 90-93, 110-117):

90. The laws of Zimbabwe in 1988, when Claimants allegedly acquired their fundamental holdings included the obligation for foreign investments to receive the approval of the Zimbabwe FIC; and for investments made after 19 November 1993 such approval was issued by the ZIA.

91. As set out in Section 21 above, Mr Nyaguse establishes in his witness statement that the laws of Zimbabwe have since well before Claimants' confidential acquisition of holdings and to this day, included foreign investment approval ----- via the FIC through 19 November 1993 and the ZIA thereafter ----- pursuant to written applications resulting in written approvals. In this regard, in line with the meaning of “specific,” any written approval or consent had to be “peculiar or proper to somebody or something.”

92. It is clear from Claimants' file that they did not comply with Zimbabwe Law as they neither applied for nor received “at the time of their admission” or at any time thereafter, the required approval from the Zimbabwe FIC, thus failing to meet the “made in compliance with laws” requirement and the “specific approval” requirement of the German BIT.

93. As such, their confidentially acquired holdings are in violation of national law and, via the terms of Article 9 a) of the German BIT international law which incorporates national law for purposes of ICSID consent. The BITs, public international law and the law of Zimbabwe are thus each relevant.

...

110. It is clear from Claimants' file that they did not comply with Zimbabwe Law as they neither applied nor received the required approval from the Zimbabwe FIC.

111. As such, such confidentially acquired holdings being in violation of national law, they fail to be "made" [sic] "accordance with the laws" "of the latter Contracting Party."

359 The Respondent tendered into evidence a Witness Statement from Mr. Grasio Nyaguse in support of both its Approval Objection and its Illegality Objection.

360 On 18 July 2013, the Claimants brought an application relating to the Illegality Objection and to the new evidence filed in support thereof and in support of the Approval Objection (e.g., Mr. Nyaguse's Witness Statement, R-56). The Claimants amended their application on 1 August 2013, withdrawing their objection to the new evidence in support of the Approval Objection and seeking a further written procedure to respond to the evidence.

361 In PO No. 7, the Tribunal began its analysis by noting that the hearing had already been postponed in these cases three times and that in such circumstances, the matters raised in the application could not lead to a further postponement of the hearing. The Tribunal made the following findings, among others:

45. It is clear to the Tribunals that the Respondent, in pleading the Illegality Objection, has not adhered strictly to the above provisions of the Arbitration Rules or Summary Minutes, nor to the directions in PO No. 3 relating to new submissions. The Tribunals are nevertheless loathe to declare inadmissible a jurisdictional objection raised (imprecisely) by a sovereign state unless to do so would jeopardize the Tribunal's starting premise articulated in paragraph 31 above, that is to result in a postponement of the Hearing of these cases.

46. Article 26(1) of the Arbitration Rules requires that the Tribunals disregard any steps taken after the time for doing so unless "special circumstances" exist. As the Tribunals noted in PO No. 3, the fact of external counsel having been retained at a late date is not, in itself, sufficient to justify a finding of special circumstances (see PO No. 3, para. 50), although it is relevant to the exercise of retrospectively reviewing the pleadings for the point at which certain defences have been pleaded and why defences may not have been timely raised.

47. While not stated expressly in PO No. 3, the Tribunals also consider the jurisdictional nature of the defences the subject of the Application to be a

factor in determining whether special circumstances exist. The Tribunals recall the concern expressed by the Claimants regarding the enforceability of any future award in the event the Tribunals had exercised their discretion to exclude the Respondent's late-raised jurisdictional objections in PO No. 3 (see PO No. 3, paras. 20 and 53). The Tribunals consider that, while not raised as a concern by the Claimants in the present Application, failure to admit the jurisdictional defences, could ultimately jeopardize the enforceability of any award these Tribunals may render.

48. Finally, based on the review the Tribunals have conducted for the purpose of deciding the Application, the so-called Illegality Objection appears to be sufficiently limited in scope that a supplemental written procedure may be accommodated within the remaining timetable without jeopardizing the Hearing dates.

49. It is therefore not without some hesitation that the Tribunals have decided to dismiss the Claimants' request that the Illegality Objection be ordered inadmissible and disregarded, and grant the Respondent's petition, subject strictly to the directions set out in Section V below.

362 The Tribunal further sought to address an issue raised by the Respondent regarding what it considered to be a "procedural reality" of these cases:

56. Finally, the Tribunals note with some concern the following paragraph from the Respondent's Reply (see Respondent's Reply, para. 191):

"Claimants seem to want to ignore one key procedural reality: the proceedings are not closed and Respondent has every right during the oral phase of proceedings, during both cross-examination and oral argument, to draw the arbitrators' or the witnesses' attention to any document on the record and to draw any conclusion and make any suggested characterisation is [sic] wishes to make with respect to any issue related to the file."

57. Whilst it is correct that the proceedings are not closed and that both Parties are entitled to a full and fair hearing of the case, fairness requires that each party know with a reasonable degree of certainty the other party's case in order to respond to it in writing and during the oral procedure. The time limits fixed by the Tribunals in these proceedings and the procedural rules agreed by the Parties are not merely formalities but also serve the important purpose of ensuring the equality of the Parties and a fair procedure. Accordingly, any "characterisation" that a Party wishes to make with respect to "an issue related to the file" must nonetheless remain within the bounds of what has been pleaded to be in issue. Similarly, no new argument nor any new evidence may be introduced during the oral procedure without the Tribunal's prior consent.

58. The Tribunals reiterate the imperative stated at the beginning of this Procedural Order, that the Hearing scheduled to commence on 28 October 2013 must proceed as planned, and urge the Parties to direct their energies to preparing, as the Members of the Tribunals must also do, for the Hearing.

363 The Tribunal directed a further written procedure, affording the Respondent an opportunity to submit "a concise statement of its jurisdictional objection on the basis of Article 9(a) of the German BIT and Article 2 of the Swiss BIT, limited to the law and evidence already on the record" by 16 August 2013 (i.e., the Re-Rebutter). The Claimants were also afforded an opportunity to respond to the Approval Objection, as pleaded in the Rebutter, with any responding evidence (i.e., the Claimants' 9 September Response). Finally, the Respondent was given a right of reply with reply evidence, due by 23 September 2013, which was eventually filed on 26 September 2013 (i.e., the Respondent's 26 September Reply).

364 In its Re-Rebutter, the Respondent pleaded that Article 9(a) of the German BIT, Article 2 of the Swiss BIT and ICSID case law require compliance with local law "Rules of the Game", which the Respondent contended include (see Re-Rebutter, § 1.1.4, 1.1.5 and 1.1.6):

- the FIC procedure and subsequently the ZIA procedure described by Mr. Nyaguse, as well as Article 13 of the 2006 Zimbabwe Investment Authority Act (CLEX-59);
- The ZSE Rules free float rule, requiring that 30% of a listed company's shares be part of the free float (R-83/CLEX-435); and
- The Zimbabwe Exchange Control Regulations 1996, and their predecessor Exchange Control Regulations 1977 (R-86/CLEX-428).

365 Based on the foregoing, the Respondent alleged as follows in connection with approvals by the FIC or the ZIA (see Re-Rebutter, para. 19):

Claimants' self-declared standard is best recorded in Claimants Rudiger's affirmation that 'there appeared to be a realisation that foreign investment was needed in the Republic, and the government appeared to want it.' Claimants thus neither applied for nor received the required approval from the ZFIC or ZIA. What is not on the record is as important as what is on the record. Claimants have submitted no relevant approval, neither having obtained 'foreign investment' status at the time of acquisition of their holdings nor at the entry into force of the German BIT on 14 April 2000 or at entry into force of the Swiss BIT on 9 February 2001.

366 Regarding the ZSE Rules, the Respondent alleged on the basis of Mr. Kanyekanye's evidence⁵⁷ that the shareholding in Border was not allowed under the ZSE Rules and that the Claimants had

⁵⁷ First Witness Statement of Joseph Kanyekanye, R-04, para. 48 (in regard to the valuation of Border: "... It is important to note that the shareholding shown is not allowed under ZSE rules and in any case it was apparently done as a way of ring fencing the asset ahead of the Indigenization and Empowerment Act promulgated on 7 March 2008 plus fighting land reform where the State compensates for land covered by BIPPAS ..."), and Fourth Witness Statement of Joseph Kanyekanye, R-13, para. 33 (Mr. Kanyekanye queries whether the 1992 further acquisition of shares in Border was "corrupt" as a transaction between a son-in-law and his in-laws).

themselves admitted that the ZSE Rules applied to their acquisition of Border but they had disregarded the rules. The Respondent referred to the fourth Witness Statement of Heinrich von Pezold (C-682)⁵⁸ and to the Claimants' Reply⁵⁹.

367 Regarding the Exchange Control Regulations, the Respondent referred to its 4 July and 29 July letters where it had alleged that the ZSE Rules are inter-related with the Exchange Control Regulations, and in particular that s. 17 of the Exchange Control Regulations 1996 (CLEX-38), which provides that "[s]ubject to such terms and conditions as may be prescribed, a listed security may be issued or transferred to a foreign resident or his nominee" (Respondent's emphasis), refers to the ZSE Rules (see Re-Rebutter, para. 25). The Respondent alleged on the basis of Heinrich's evidence that Reserve Bank exchange control approval had been denied in connection with the "acquisition of Border" and referred to its earlier allegations in the Rebutter that the exchange control approval had similarly not been obtained or had been evaded in respect of the Loans extended to Forrester Estate (see Re-Rebutter, paras. 25-27).

368 In conclusion, the Respondent argued that:

⁵⁸ Heinrich stated as follows at para. 79 of his fourth Witness Statement:

Mr Kanyekanye states that the shareholding set out in Mr Levitt's First Report "is not allowed under the ZSE rules". I agree that Border does not comply with the ZSE rule that requires that 30% of a listed company's shares are part of the free float (the "free float"). Given that Border does not have a free float of 30%, in 2004 it attempted to take the company private and de-list it from the ZSE. However, the Reserve Bank denied exchange control approval for the transaction, and it was therefore not possible to complete the transaction and request de-listing from the ZSE.

⁵⁹ In their Reply, at paras. 347 and 354, the Claimants wrote as follows:

Mr Kanyekanye's report grossly undervalues the Border Estate. Based on the market capitalisation of Border on the Zimbabwe Stock Exchange (ZSE), Mr Kanyekanye opines that the Border Estate has an "as is" value of US\$6,763,443 as at 2012.694 Mr Kanyekanye has provided very minimal information as to how he arrived at his valuation of the Border Estate. Therefore there is very little to analyse, and the Claimants' response as a consequence can only be general in nature. A more detailed response, if possible, will be in Mr Levitt's second expert report.

...

The market capitalisation of Border is a wholly inappropriate tool to establish the fair market value of the Border Estate. The reason for this is that Border was 86.49% owned by one family (namely the von Pezold Claimants – two families since the Second Joint Venture). Therefore the balance of 13.51% (the "free float") in the hands of minority shareholders means that it is a very illiquid (thinly traded) stock, i.e. market trades have very little, if any, influence on the price of Border's shares. Moreover, Border has not paid any dividends for a number of years. Therefore with no appreciation in share price (because the shares are thinly traded), and no payment of dividends, Border naturally has a market capitalisation which is a fraction of its underlying assets.

- The Claimants' acquisition of Border does not qualify as a protected investment because no approval for the acquisition was obtained from the FIC or ZIC, was "corrupt"⁶⁰, was in violation of the Exchange Control Regulations and the ZSE Rules;
- The Claimants' acquisition of Forrester does not qualify as a protected investment because no approval for the acquisition was obtained from the FIC or ZIC;
- Elisabeth's Loans to the Forrester Estate do not qualify as a protected investment (no specific law or approval mechanism was invoked, although it is suggested the Forrester Loans are not protected because they are not "investments" on the *Salini* criteria and in the Rebutter it had been alleged in connection with the Approval Objection that exchange control approval had not been obtained); and
- The Claimants' acquisition of Makandi does not qualify as a protected investment because no approval for the acquisition was obtained from the FIC or ZIC.

369 In their response (the "**Re-Rebutter**"), the Claimants argued that the Approval Objection is an admissibility objection, not a jurisdictional objection, and invoked the MFN provisions of the Swiss BIT and the Danish-Zimbabwe BIT, which do not contain any approval procedure such as the one set out in Article 9(b) of the German BIT⁶¹. The Claimants also submitted the following in response to the evidence of Mr. Nyaguse (see Claimants 9 September Response, paras. 4-12):

The Foreign Investment Committee (FIC): The FIC was an informal grouping that had no statutory basis to it, and its decisions did not have the force of law. In any event, on Mr Nyaguse's own evidence, the FIC's purported remit only extended to "new projects". All of the investments made by the Claimants were into existing projects, albeit improve them;

The Zimbabwe Investment Centre Act 1993: The 1993 Act created the Zimbabwe Investment Centre and the Investment Committee. Under the 1993 Act, local and foreign investors could submit "project proposals" for approval in order to obtain perceived advantages from the Government. This was not compulsory, but merely a condition of receiving such incentives;

The Exchange Control Review Committee: The Exchange Control Review Committee was created by statutory regulation to hear appeals on exchange control matters. The Exchange Control Review Committee did

⁶⁰ This appears to be an allegation that the 1992 further acquisition of Border shares was not arm's length.

⁶¹ Although not pleaded in the Rebutter or Re-Rebutter, in the first Witness Statement of Mr. Masiwa (R-5), filed with the Respondent's Counter-Memorial, Mr. Masiwa stated that: as of 1996, the accessing of off-shore loans was subject to the 1996 Exchange Control Regulations which required prior exchange control approval. Mr. Masiwa also referred to Directive RE-277, dated 3 August 2003, which purportedly directed all Authorised Dealers to declare to Exchange Control all active foreign currency loans that were approved by or registered with the External Loans Coordinating Committee or Exchange Control, failing which any loans not declared would not be recognized by Exchange Control and would be deemed to be non-existent. A copy of Directive RE-277 has never been produced onto the record of these proceedings.

not have any remit under the laws of Zimbabwe to approve foreign investment. In any event, the Claimants' investments have never diluted local control of an enterprise. Therefore on Mr Nyaguse's own evidence, the Claimants did not require the approval of the Exchange Control Review Committee;

The Reserve Bank and the Exchange Control Regulations: In regard to the Reserve Bank, it did have a role in regard to approving foreign investment, in so far as the investment engaged what will be referred to hereafter as the "the Exchange Control Regulations". The Exchange Control Regulations consist of the Exchange Control Regulations, 1977 ("the 1977 Regulations"), and their successor from 5 July 1996, the Exchange Control Regulations 1996 ("the 1996 Regulations"). The Exchange Control Regulations are explained by Mr Paul in his witness statement.

Under the Exchange Control Regulations, issuers and transferors of shares were required, in certain circumstances, to obtain approval from the exchange control authority, which was the Reserve Bank (see para 10 below). In particular, in regard to an "issue" of shares in a Zimbabwean company, if the issuee was not Zimbabwean resident, approval from the Reserve Bank was needed (s9, 1977 Regulations; s12, 1996 Regulations). In regard to a "transfer" of shares in a Zimbabwean company, where either the transferor or the transferee (or their "nominees", if any) was not Zimbabwean resident, approval from the Reserve Bank was needed (s10, 1977 Regulations; s13, 1996 Regulations).

Under the 1996 Regulations, exchange control approval was not needed for transfers of shares in listed companies to foreign residents or their nominees so long as certain conditions existed. These are discussed in paras 72 to 79 below in the context of the Respondent's allegation that the Claimants breached s17 of the 1996 Regulations.

The Reserve Bank's role as the exchange control authority for the purpose of the Exchange Control Regulations is established under Zimbabwean law. In particular, in regard to the 1977 Regulations, the responsible Minister for the 1977 Regulations (the Minister of Finance) was the exchange control authority. However, pursuant to s32 of the 1977 Regulations, the Minister delegated his powers to the Reserve Bank. In regard to the 1996 Regulations, the "exchange control authority" is defined in s2 of the 1996 Regulations as "the Minister", and the Reserve Bank to the extent the Minister delegates to the Reserve Bank. In 1997, the Minister delegated his powers under the 1996 Regulations to the Reserve Bank, other than in relation to appeals.

Therefore to the extent that a foreign investment was obtained through the issue or transfer of shares and it came within the ambit of the Exchange Control Regulations, the issue or transfer of shares had to be approved by the Reserve Bank. The Claimants' evidence is that only one of their transactions was within the ambit of the Exchange Control Regulations and therefore required approval by the Reserve Bank (which was granted). The transaction is discussed in para 16 below;

Zimbabwe Investment Authority Act 2006: In addition to relying on the Nyaguse Procedure, the Respondent also relies in its Re-Rebuttal on

CLEX-59. CLEX-59 is the Zimbabwe Investment Authority Act 2006 ("the 2006 Act"). Its purpose is similar to the 1993 Act. In any event, the 2006 Act did not enter into force until September 2006, after the Claimants' investments in the Estates had been expropriated, and long after the investments had been made. Therefore the 2006 Act is not relevant to the Approval Objection or indeed the Illegality Objection. [footnotes omitted]

370 The Claimants also introduced additional evidence in connection with Exchange Control approval for the 1992 investment in Border (see Claimants' Re-Rebutter Response, paras. 16-17):

Only one of the transactions that resulted in the Claimants obtaining an interest in the Estates fell within the ambit of the Exchange Control Regulations and therefore required approval by the Reserve Bank. The transaction in question was the 25.65% indirect interest that the Parent Claimants acquired in the Border Estate in December 1992. Pursuant to that transaction, a Belgian Bank's subsidiary transferred the issued share capital of the Zimbabwean company, Franconian Zimbabwe Investments (Pvt) Ltd ("Franconian") to the Jersey company, Saxonian Estate Ltd ("Saxonian"). Franconian was formerly known as "Tanganyika Investments (Pvt) Limited", and was a shareholder in Border Timbers Ltd ("Border"). Approval for this transfer was granted by the Reserve Bank in November 1992. The approval is evidenced by a letter dated 12 November 1992 from Merchant Bank of Central Africa Limited to Tanks Groups Services Limited (which was a member of the Belgian bank's group). The Merchant Bank of Central Africa Limited was an "authorised dealer" pursuant to the 1977 Regulations, and was responsible for liaising between the Reserve Bank and the parties to the transfer.

Therefore when the laws of Zimbabwe required formal approval under the Exchange Control Regulations, the Claimants obtained it. However, the Respondent in its Re-Rebutter alleges that two further transactions required approval under the Exchange Control Regulations – it is incorrect. The first is the Loans to the Forrester Estate (see paras 60 to 61 below). The second is the acquisitions that took the von Pezolds' interest in Border beyond 70% (see paras 70 to 79 below).

371 As regards the Illegality Objection, the Claimants also argued that the issue is one of admissibility, not jurisdiction (see Claimants' Re-Rebutter Response, para. 31) and extended their estoppel argument pleaded in connection with the Approval Objection in their Surrejoinder to apply also to the Illegality Objection (see Claimants' Re-Rebutter Response, para. 80).

372 The Claimants also responded to the Respondent's allegation that the Claimants' investment in Border violated the ZSE Rules free float rule (see Claimants' Re-Rebutter Response, paras. 45-52).

373 The Claimants further responded to the Respondent's arguments that the Claimants' investments in Border and the Forrester Estate, and the Loans made by Elisabeth in connection with Forrester Estate, failed to comply with the 1996 Exchange Control Regulations and Directive RE-277 (see Claimants' Re-Rebutter Response, paras. 60-69).

374 As regards the Border Estate, the Claimants submitted (see Claimants' Re-Rebutter Response, paras. 79):

79. In summary, the prescribed terms and conditions referred to in s17 of the 1996 Regulations are contained in the 1996 Order not the ZSE Rules. Therefore the Respondent's allegation that the Claimants breached the ZSE free float rule cannot be the basis of an allegation of a breach of s17 of the 1996 Regulations. Further, the Respondent does not allege that the 1996 Order was breached, and indeed it was not. In the circumstances, the allegation that the Claimants have breached the Legality Articles in regard to Border by reason of not complying with the ZSE free float rule and in turn s17 of the 1996 Regulations is unsubstantiated and indeed is incorrect. In any event, a breach of s17 is not a breach of a fundamental legal principle of the host State's laws (see para 33 above). In particular, there is no suggestion that a failure to comply with s17 is tantamount to "fraudulent misrepresentation or the dissimulation of true ownership" (see Desert Lines, para 22 above).

375 On 26 September 2013, the Respondent filed its reply submission ("**Re-Rebutter Reply**"), its application for additional pages to address allegedly new arguments raised by the Claimants in their Re-Rebutter Response having been denied by the Tribunal in PO No. 8.

376 The Respondent's Re-Rebutter Reply was accompanied by a second Witness Statement from Mr. Nyaguse (R-85)⁶² and a third Witness Statement from Mr. Masiwa (R-82), in which Mr. Masiwa purported to give evidence in connection with the compliance of the Border investment with the ZSE Rules. That evidence, and the pleadings which rely on it, were eventually ruled inadmissible in PO No. 9⁶³. The Respondent argued as follows in connection the FIC/ZIA approval issue:

19. Claimants' characterisation of the FIC as « the Nyaguse Procedure » shows their lack of respect for local Rules. Claimants have no difficulty seeing the waste effluent controller as representative of the State, yet they consider the FIC / ZIA to be of no use although the FIC / ZIC, as an inter-ministerial Committee, is a governmental unit of the State of Zimbabwe.

Claimants's characterisation of FIC is incorrect. Mr. Nyaguse's 2nd Witness Statement (R-85) and Zimbabwe's "Foreign Investment, Policy, Guidelines and Procedures, Government of the Republic of Zimbabwe, September. 1982, Cmd. R.Z.) 1982.], Printed by the Government Printer, Harare"(R-91) irrefutably prove Respondent's position: FIC is not a mere "informal procedure," but published government Policy, Guidelines and Procedures.

20. Claimants (¶5 CR 9/9/2013) recognise FIC /ZIC procedures to be "a condition of receiving ... incentives" (cf. list of "incentives ¶7, R-85: "incentives which the government extended to officially recognised foreign investors, like remittability of dividends, remittances on disinvestment, tax

⁶² The Parties agreed, in advance of the issuance of PO No. 9, that the entirety of Mr. Nyaguse's second Witness Statement was admissible and might remain unredacted on the record.

⁶³ See PO No. 9, para. 56.

breaks..."). Mr Nyaguse's ¶12 (R-85) responds to Claimants, explaining the relevance of FIC / ZIC and consequences on this case:

"12. Any acquisitions not approved by FIC or ZIC were not therefore considered to have been approved in the sense of being admitted after presentation and examination of a given project by the State of Zimbabwe. Such acquisitions, while lawful and valid, were not approved in the sense of protected foreign investments notwithstanding that the general public treated such foreigners as owners so long as ... pursued lawful activity."

377 On 22 September 2013, the Respondent brought an application in connection with its Re-Rebutter Reply, which was originally scheduled to be filed on 23 September 2013, seeking permission to address in pages beyond the page limit set for its reply three "new" items, namely:

- The Claimants' invocation of the Swiss and Danish MFN clauses in connection with Article 9(b) of the German BIT;
- The treatment of the Approval and Illegality Objections as objections to admissibility as opposed to jurisdiction; and
- The extension of the Claimants' estoppel argument pleaded in their Surrejoinder to Article 9(a) of the German BIT.

378 The Respondent argued that, if its application was not granted, it would consider that its right to be heard had not been respected.

379 In PO No. 8, the Tribunal dismissed the Respondent's application, reasoning as follows:

13. The Tribunals do not consider the Claimants' 9 September Response to be inconsistent with or contrary to the directions issued to the Parties in Procedural Order No. 7 such that the Tribunal's directions must be re-considered or amended. The arguments in question are clearly responsive to the Respondent's new jurisdictional objections, admitted by the Tribunals in Procedural Order No. 7 and pleaded fully for the first time in the Respondent's Re-Rebutter. The Claimants are entitled to defend those jurisdictional objections, even if this means raising a defence or defences that have not previously been pleaded. This is a consequence of raising new jurisdictional objections at this stage of the proceedings.

14. The Respondent has been afforded ample opportunity to present its case and to defend the Claimants' claims. In Procedural Order No. 3, the Respondent's challenges to jurisdiction, as pleaded for the first time in the Rejoinder, were admitted. In Procedural Order No. 7, the Respondent was permitted to raise additional jurisdictional objections at an even later stage of the proceedings, was given an opportunity to present those objections cogently in a supplemental pleading to its Rebutter, and was given a right of reply to the Claimants' 9 September Response. The Respondent now seeks additional pages for this last submission to expand on how, in its

view, certain cases cited in its Reply in response to the arguments raised by the Claimants in their 9 September 2013 Response "enlighten the debate" between the Parties in respect of the Respondent's jurisdictional objections.

15. The Tribunals are not persuaded that it is necessary or appropriate at this stage to re-open the directions set out in Procedural Order No. 7 so as to afford the Respondent additional pages to plead its reply to the Claimants' 9 September Response. The Respondent's Procedural Request is therefore denied.

16. The Tribunals are of the view that in so denying the Procedural Request, the Respondent's right to be heard is not in any way impinged. In addition to the multiple opportunities afforded to the Respondent to plead its jurisdictional objections in relation to Article 9(a) and 9(b) of the German BIT and Article 2 of the Swiss BIT in writing, the Respondent is also entitled to make submissions on both law and evidence on the record in respect of these objections during the oral hearing, scheduled to commence on 28 October 2013, and in any post-hearing procedures that may be agreed by the Parties and the Tribunals or decided by the Tribunals.

380 It is important to note that, in a letter dated 26 September 2013, the Respondent confirmed, by reference to para. 16 of PO No. 8, reproduced above, that it was "satisfied by these means to be heard" and confirmed that the Respondent did not intend to make any application to exclude the Claimants' arguments.

381 On 15 May 2013, the Claimants' *quantum* expert, Mr. Levitt, filed corrections to his Second Report (CE-7), which led to the Claimants filing, also on 15 May 2013, a Corrected Request for Relief ("**CI. Corrected Request for Relief**") reflecting consequential amendments to Heads of Loss 9, 10 and 13.

382 In a letter dated 22 July 2013, the Parties recorded their agreement that the Respondent should have a right to respond to Mr. Levitt's corrections and the consequential changes made by the Claimants, as well as a right to correct any errors in its own damages calculations, by 9 September 2013. The Parties also agreed that the Claimants should have a right to comment on such written response by 23 September 2013 (eventually agreed to be 26 September 2013, in parallel to the shift in filing deadline for the Respondent's Re-Rebutter Reply) (the "**Parties' July 22 Agreement**").

383 The Claimants reserved their right to challenge the admissibility of the Respondent's response, should the Respondent's response go beyond responding to Mr. Levitt's corrections and the consequential changes made, or go beyond correcting errors on its own damages calculations, or to respond to any material that is not responsive.

384 In a letter to the Parties on behalf of the Tribunal, dated 6 September 2013, the Tribunal's Secretary confirmed the Parties' July 22 Agreement, including the Parties' agreed briefing schedule. The

Tribunal also directed that the Parties file skeleton arguments, pursuant to PO No. 3 and the Parties' July 22 Agreement, by 14 October 2013.

385 On 9 September 2013, the Respondent submitted its response, as foreseen by the Parties' July 22 Agreement, being comprised primarily of a third Witness Statement from Mr. Moyo and a fourth Witness Statement from Mr. Kanye Kanye (the "**Respondent's 9 September Quantum Reply**").

386 On 26 September 2013, the Claimants filed their comments on the Respondent's 9 September Response (the "**Claimants 26 September Quantum Reply**"). In this submission, the Claimants stated that, apart from those specific parts of the Respondent's 9 September *Quantum Reply* which they agreed were in conformance with the Parties' agreement concerning submissions in response to Mr. Levitt's corrected damages report, the Respondent's materials should be disregarded for failure to accord with the terms of PO Nos. 3 and 7.

387 On 2 October 2013, the Respondent brought an application in connection with its Re-Rebutter Reply as well as its 9 September *Quantum Reply*, seeking confirmation that each of these submissions and their supporting evidence are fully on the record (the "**2 October Application**"). The Respondent also sought leave to submit a legal opinion relating to its jurisdictional and "BIT access" objections and Zimbabwean legislation relating to these objections.

388 The Respondent brought a further application on 12 October 2013, seeking an order fixing a date for the Claimants to submit any further "approval/illegality exhibits they may have 'overlooked' through 10 December 2013 with an unlimited number of pages of accompanying lawyer's pleadings", along with a similar right of reply for the Respondent by 20 December 2013 (the "**12 October Application**").

389 Further to the Tribunal's invitation, the Parties agreed to the admission of certain materials filed with the Respondent's 9 September Response and 26 September *Quantum Response*, and each provided written submissions in connection with the remainder of the materials and pleadings in question.

390 The President of the Tribunal held a telephonic conference with the Parties on 11 October 2013, during which the Parties were invited to, and did, make extensive oral representations in respect of each of the requests contained in the Respondent's 2 October Application. The Respondent's second application was submitted a day following the date of the telephonic conference.

391 PO No. 9 records the Parties' main submissions in connection with the Respondent's 2 October and 12 October Applications.

392 During the telephonic conference held on 11 October with the President of the Tribunal, both Parties agreed that there was no reason to postpone the oral hearing of the two cases scheduled to commence on 28 October 2013. The main issue, as the Respondent saw it, was the impact of the Exchange Control Regulations on the "approval/illegality debate". The Respondent alleged that the Claimants were attempting to persuade the Tribunal to "muzzle the Respondent on Exchange Control Regulations and the legal consequence of the absence of relevant approvals on the outcome of this arbitration". The Claimants, for their part, dismissed the Respondent's suggestion that the wide-ranging allegations of breach of the Exchange Control Regulations that the Respondent now raised had been raised any earlier by the Respondent, averring that such allegations had been raised only for the first time in the Respondent's 26 September 2013 Re-Butter Reply. The Claimants therefore framed the fundamental issue as that being the fact that the Respondent never pleaded in its pleadings or in its witness statements before 26 September 2013 the "wide jurisdictional challenge regarding the alleged breach of the Exchange Control Regulations and how it may affect the approval and illegality objections". The Claimants further stated that, while they had agreed to post-hearing submissions, they did not agree to a further round of pleadings after the oral hearing.

393 The Parties' exchange in respect of their respective positions is reproduced in summary form at paragraphs 21-22 of PO No. 9. They read as follows:

21. The Respondent stated, in the context of ensuring the Claimants' right to be heard, that there remains a single issue to be decided: the impact of the Exchange Control Regulations on the approval/illegality debate. In this regard, the Respondent cautioned the Tribunals as follows:

"9) The Arbitral Tribunals must not forget that the question of approvals has given rise to at least eight (8) written submissions by Claimants: (i) Urgent Application of 20 December 2013, (ii) 31 December 2012 letter, (iii) 301 pages of 1 March 2013 Surrejoinder, (iv) Mr Coleman's remark "for the record" at the close of the 21 May 2013 telephonic conference, (v) 18 July 2013 Application ... Illegality and Approval Evidence, (vi) 9 September 2013 Response ... approval and Illegality, (vii) Mr Paul's witness statement, C--879 and (viii) C--585 [sic], among the most recent and the most important, on which Claimants' found their case both as to approval and legality. Claimants have thus written about "approv" at least 284 times, since Respondent's 14 December 2013 Rejoinder, yet they find it inappropriate for Respondent's expert on this question, Mr Masiwa, to disagree with their conclusion that "only one of their transactions was within the ambit of the Exchange Control Regulations." Disagreement in a contradictory debate is not unusual; what is extraordinary here is that Claimants are attempting to persuade the Arbitral Tribunals to muzzle the Respondent on Exchange Control Regulations and the legal consequence of the absence of relevant "approvals" on the outcome of this arbitration. It must also be recalled that Respondent has "invited" or even "challenged" Claimants to submit any approvals they may have "overlooked", such as in Section 5.4 of Respondent 29 July 2013 letter, R-079." [footnotes omitted]

22. The Tribunals invited the Claimants to respond to the Respondent's October 12 Application. On 13 October 2013, the Claimants wrote to the Tribunals

characterising the Respondent's October 12 Application as "abusive" and seeking its dismissal. As regards the Respondent's reliance on a 29 July 2013 letter, the Claimants averred that such letter does not raise the wide jurisdictional challenges regarding the alleged breach of the Exchange Control Regulations raised in the Respondent's September 26 Reply, insisting that such challenges were only made for the first time in the Respondent's 26 September Reply (the "Claimants' October 13 Letter"). Specifically, the Claimants stated as follows (see Claimants' October 13 Letter, paras. 4-6):

"4. In paras 146 and 147 of Section 6.2 of R-79, the Respondent merely makes limited allegations regarding s17 of the 1996 Regulations and its alleged relationship to the ZSE Rules, i.e. the same limited allegations that it made in its Re-Rebutter. Therefore the Respondent is simply wrong when it states in para 4 of its 12 October letter that it is now only requesting through its 26 September 2013 pleading and evidence that there is "only one question left for the Arbitral Tribunals to decide [, which is 1 that stated in Section 6.2 of R-079". It is unacceptable for the Respondent to continue to engage in obfuscation as to what it has done in the past and what it intends to do in the future.

5. In any event, after R-79 was filed, the Respondent was granted, by way of P.O. No. 7, one further opportunity to file a pleading by 16 August 2013 (the Re-Rebutter) in order to state its final case regarding Illegality. It now admits that it failed to do so. Moreover, its Approval Objection was to remain confined to that as pleaded in the Rebutter, which did not raise the wide ranging objection concerning exchange control.

6. The Respondent in its 12 October letter ignores the fundamental issue, which is that the Respondent never pleaded in its pleadings (or indeed stated in its witness statements) before 26 September 2013, the wide jurisdictional challenge regarding the alleged breach of the Exchange Control Regulations and how it may affect the Approval and Illegality Objections. Once again the Respondent seeks a further opportunity to do so by essentially requesting that Mr Masiwa's Third Statement (filed on 26 September 2013) is read as a pleading, and that the Claimants plead to it after the oral hearing, with the Respondent putting in a further round of pleading in response. Although the parties agreed to post-hearing submissions in para 7.1 of their letter of 8 October 2013 (which has been provided to the Tribunals), they did not agree to a further round of pleadings after the oral hearing. It simply will not do for the Respondent to continue to flout the agreements it enters into with the Claimants and the Procedural Orders of the Tribunals. It is obvious to the Claimants that the Respondent will not comply with the new procedural timetable it suggests and which the Claimants oppose."

394 In PO No. 9, the Tribunal ruled on the admissibility of the various documents the subject of the Respondent's application. As regards to the Respondent's Approval/Illegality Objections pleaded in its Re-Rebutter Reply, the Tribunal found that the Respondent had expanded its objections in breach of the Tribunal's procedural orders and in particular para. 55(i) of PO No. 3 and para. 62 of PO No. 7, as well as in breach of Arbitration Rules 31(3) and 41(1). The Tribunal did not find "special circumstances" to exist under Arbitration Rule 26(3) to warrant the admission of such an expanded defence at such a late stage of the proceedings. The Tribunal reached this decision in part on the basis of the Claimants' detailed chronology of the Respondent's pleadings, provided orally during the teleconference and reproduced at para. 50 of PO No. 9:

50. The Claimants further explained as follows during the October 11 telephone conference in response to the Respondent's position that the question of approvals has been "on the table" for nine months, since 14 December 2012, when it was raised in the Respondent's Rejoinder (see Tr. Uncorrected, pp. 23-26):

"Mr. Fortier: Okay. Mr. Coleman, would you please reply to what Mr. Kimbrough's main submission is, that this information has, in fact, been in your hands since December, 2012.

Matthew Coleman: Yes, certainly. Well December 2012 is the date that the rejoinder is filed. And with the rejoinder comes from the first allegation that approval is needed. No approval procedure is set out.

And secondly, there is no allegation regarding illegality. So that point we're not answering anything in illegality. We then get the rebutter, which says that the approval procedure is that as set out by Mr. [sounds like: Nigussi], which is appearing before the foreign investment committee and [U] the investment committee formed under the 1993 act. And then he also says that you may need to get permission from the reserve bank if you engage the exchange control regulations and you may also need to appear before the review committee. And then in that pleading in the rebutter, there is an allegation regarding illegality. But the allegation regarding illegality is simply that the failure to appear before the foreign investment committee or its successor, the investment committee, makes the investment illegal.

The next point is a very important point. There is no allegation in the rebutter that the exchange control regulations have been breached. In particular, there is no allegation that each and every purchase into the 3 estates is a breach of either the 1977 and 1996 exchange control regulations. We then get the re-rebutter, which, of course, is the result of procedural order number 7 where the respondent is asked to give a concise statement as to illegality. And it does so, and it does so in the following terms. And I'll set out what [U] in relation to each of the 3 estates, Forester, Border and McCandy.

First, in relation to Forester, it says the investment is illegal because no permission was obtained from the foreign investment committee. It also says that the loans are illegal because they breach some unidentified provision of the 1996 regulations and a further provision which we've never been provided, which is RE277, which we believe may be a directive of the reserve bank. But there is certainly no allegation that the purchases of shares in regard to Forester breach the exchange control regulations.

Moving on to the Border estate, they say that the illegality arises because we failed to appear before the foreign investment committee or the investment committee. And then there is a very limited allegation in regard to the 1996 exchange control regulations. And the allegation of breach in regard to those regulations is they say that in 2003 when we made a further investment, we breached the 1996 exchange control regulations because we did not follow the free float rule as set by the Zimbabwe stock exchange. There's absolutely no other allegation regarding breaches of the exchange control regulations in relation to Border for any of the purchases that were made from 1992 up to 2007.

Moving on to the last estate, the McCandy estate, the only allegation there is that the illegality has been caused by a failure to get permission under the 1993 act; in other words, the investment committee. No allegation saying that the purchase of shares breached the 1996 regulations.

We then move on the latest pleading, which was filed pursuant to procedural order number 7, which is the 23 September 2013 pleading, in fact, filed on 26; 2013 with the agreement of the parties. And this is where the case is greatly expanded and

one that's never been made before. And the expansion is that they now say that each and every purchase in all 3 of the estates over a period covering 1988 through to 2007 now breaches the 1977 and 1996 regulations.

There is no specific allegation identifying which specific purchases may have breached and for what reason, it is simply a global challenge. And that greatly expands the case. It's one we've never been asked to answer before, and to do so, we would need to go through each and every share purchase over a 25 year period. We would need to consider the regulations, which are somewhat complex, and then form a position on it. We haven't done so because we haven't been asked to do so.

So when Mr. Kimbrough says it's always been on the table, it simply hasn't been on the table in terms of the pleadings. In terms of our objection, while the basis of the objection is rule 313, it's a non-responsive pleading, 263, it's out of time and because it's a jurisdiction challenge, it's also out of time under 411. [U simultaneous conversation] my submission on that particular point."

395 The Tribunal also noted the Claimants' view as to the likely effect of allowing the Respondent's arguments and evidence in connection with the Approval and Illegality Objections pleaded in the Respondent's Re-Rebutter Reply onto the record. Specifically, as set out in para. 49 of PO No. 9, the Claimants submitted as follows:

The objections are made on the basis that the Respondent raises new challenges to jurisdiction/admissibility... In particular, it alleges that none of the Claimants' investments in the three Estates comply with the 1977 or the 1996 Exchange Control Regulations ("the Exchange Control Regulations"), i.e. it extensively expands the Illegality and Approval Objections. In particular, in the Re-Rebutter the Respondent only alleged that the 2003 investment into Border breached the 1996 Regulations by reason of the ZSE free float rule being breached, and that the Forrester Loans breached an unidentified regulation of the 1996 Regulations, and directive RE277... The Rebutter did not allege any breach of the Exchange Control Regulations in support of the Approval Objection. The expansion of the Respondent's argument is extensive, because in effect it covers each and every share purchase, between the period 1988 and 2005 that the von Pezold's made in the Zimbabwean Companies that make up the three Estates. In addition, it greatly expands upon those parts of the Exchange Control Regulations which it alleges are breached (previously it limited itself to s17 of the 1996 Regulations, which it mistakenly considers to refer to the ZSE free float rules). It would take several months to analyse each of those purchases and collate the necessary evidence to respond. If it had been raised in the Re-Rebutter of 15 August 2013, the Claimants would have responded to it, but would have required an extension. [Tribunal's emphasis in PO No. 9]

396 In dismissing this aspect of the Respondent's application, the Tribunal also recalled para. 14 of PO No. 8, which stated that:

The Respondent has been afforded ample opportunity to present its case and to defend the Claimants' claims. In Procedural Order No. 3, the Respondent's challenges to jurisdiction, as pleaded for the first time in the Rejoinder, were admitted. In Procedural Order No. 7, the Respondent was permitted to raise additional jurisdictional objections at an even later stage of the proceedings, was given an opportunity to present those objections cogently in a supplemental pleading to its Rebutter, and was given a right of reply to the Claimants' 9 September Response".

The Tribunals considered the Respondent's invocation of Arbitration Rule 38 (2), which provides that, exceptionally, the Tribunal may, before the Award has been rendered, reopen a proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor or that there is a vital need for clarification on certain specific points. At paragraph 54 of PO No. 9, however, the Tribunals stated that Rule 38 (2) relates to the emergence of "new evidence" after the closure of a proceeding on the basis of which the Tribunals would be justified in reopening the proceeding after having declared it closed. The Tribunals stated that this is not the case with respect to the Respondent's expanded illegality arguments. Specifically, the Tribunals found that "these arguments do not spring from evidence that has recently come to light such that the Respondent could not, at an earlier stage of the proceedings, have raised and pleaded its objections within the time required according to the arbitration rules and the Tribunals procedural orders.

397 On 16 October 2013, the President of the Tribunal held a pre-hearing telephonic conference with the Parties during which the Parties each made oral submissions in respect of various hearing organizational matters. Among those matters addressed, the Parties made extensive submissions in connection with the allocation of time during the Hearing to address certain matters admitted into the record by PO No. 9. The Parties' agreement was recorded in a letter from the Tribunal's Secretary to the Parties, dated 17 October 2013 (the "**October 17 Letter**"), as follows:

V. Allocation of Additional Time to the Claimants Pursuant to Procedural Order No. 9

18. In its Procedural Order No. 9, the Tribunals decided that the Claimants would be allocated additional time to address with Mr. Levitt on direct examination certain matters arising from (i) Mr. Moyo's third witness statement and (ii) Mr. Kanyekanye's fourth witness statement (see PO No. 9, paras 29 and 33). As envisioned by Procedural Order No. 9, this matter was addressed during the October 16, 2013 telephone conference, and each party was given the opportunity to state its position as to how much additional time was to be allocated to the Claimants, and the manner in which this time was to be used.

19. In this regard, the Claimants requested that the additional time afforded to them pursuant to Procedural Order No. 9 be used not only for the direct examination of Mr. Levitt, but also for the direct examination of Messrs. Bottger and van der Lingen. Specifically, the Claimants requested an additional allocation of 75 minutes, to be allocated as follows (i) 20 additional minutes to address with Mr. Levitt Mr. Moyo's third witness statement; (ii) 25 additional minutes to address with Mr. Levitt Mr. Kanyekanye's fourth witness statement; (iii) 15 additional minutes to address with Mr. Bottger Mr. Kanyekanye's fourth witness statement, and (iv) 15 additional minutes to address with Mr. van der Lingen Mr. Kanyekanye's fourth witness statement.

20. The Respondent objected to the allocation of 75 additional minutes, submitting that an additional 45 minutes for direct examination would, in its view, be sufficient for the Claimants to address Mr. Moyo's third witness statement and Mr. Kanyekanye's fourth witness statement.

21. The Tribunals, having considered the parties' respective positions, have decided to allocate 60 additional minutes to the Claimants to address Mr. Moyo's third witness statement and Mr. Kanyekanye's fourth witness statement. These 60 additional minutes shall be apportioned as follows:

- a. 20 additional minutes to address with Mr. Levitt Mr. Moyo's third witness statement;
- b. 20 additional minutes to address with Mr. Levitt Mr. Kanyekanye's fourth witness statement;
- c. 10 additional minutes to address with Mr. Bottger Mr. Kanyekanye's fourth witness statement, and
- d. 10 additional minutes to address with Mr. van der Lingen Mr. Kanyekanye's fourth witness statement.

22. For the avoidance of doubt, the Claimants will be allocated 60 minutes in addition to the hearing time allocated to the Claimants pursuant to the parties' agreement. Assuming a 34-hour total hearing time, as envisioned by the parties, the Claimants will therefore have 18 hours and the Respondent 17 hours.

398 A further procedure was also implemented, and recorded in the October 17 Letter, governing the handling of written and oral pleadings and written and oral evidence on matters ruled to be inadmissible in PO No. 9. This procedure was set out as follows:

IX. Compliance of the Parties' Written and Oral Submissions with Procedural Order No. 9

30. During the October 16, 2013 telephone conference, an issue was raised pertaining to the compliance of the parties' written and oral submissions and written and oral witness testimony with the Tribunals' decisions as reflected in Procedural Order No. 9.

31. Further to Procedural Order No. 9, and for the sake of good order as to the content of the record of these arbitrations, the Respondent is directed to review and to identify with specificity the paragraphs or portions of paragraphs in (i) Mr. Masiwa's second witness statement, (ii) Mr. Kanyekanye's fourth witness statement, (iii) Mr. Kanyekanye's fifth witness statement, and (iv) the Respondent's Skeleton Argument which contain evidence that has been declared inadmissible pursuant to Procedural Order No. 9. The Respondent shall provide the Tribunals and the Claimants, by no later than Monday, October 21, 2013 at 12:00p.m. (noon) Washington, D.C. time, with corrected versions of Mr. Masiwa's second witness statement, Mr. Kanyekanye's fourth and fifth witness statements and the Respondent's Skeleton Argument with all material determined to be inadmissible pursuant to Procedural Order No. 9 blacked out. The Claimants will then have 24h to provide the Tribunals and the Respondent with their observations on the corrected versions. Any remaining dispute, if any, will be resolved by the Tribunals.

32. The parties are further directed to provide on the first day of the hearing updated, consolidated hyperlinked indices containing these corrected versions.

33. The Tribunals will address the procedure which is to be followed in the event a party objects to oral arguments and/or witness/expert examination or testimony on matters that have been declared to be inadmissible at the outset of the forthcoming hearing.

399 On 28 October 2013, the first day of the Hearing, the President of the Tribunal recorded the following during his opening remarks, also disposing of an application brought by the Respondent on the eve of the Hearing to re-open PO No. 9. This quote, while lengthy, is relevant to the

Respondent's further and more recent request in its Post-Hearing Brief to re-open PO No. 9 (see Tr. Day 1, pp. 10-27):

It's a matter of public record that there have been a multitude of procedural applications in these cases, particularly since the beginning of this year and, more pointedly, since December of 2012. And, as Chairman, I benefited greatly from the assistance of the Tribunals' Assistant, Alison Fitzgerald, and the Tribunals' Secretary, Ms. Nitschke, and we, in consultation with my co-Arbitrators, have done our utmost to deal fairly and as expeditiously as possible with all the many Applications which we have received. And I note that as late as yesterday evening, there were Applications which were submitted to the Tribunal by both Parties.

Much has been said about the due-process rights of the Claimants--of the Respondent in particular; and the fact that we, as a Tribunal, has in effect dealt over backwards in order to accommodate the many requests of the Respondent, demonstrates that we are conscious--very conscious--about due process, fundamental Rules of Procedure, and I refer in particular to Paragraph 50--that's five-zero--of Procedural Order Number 3. I refer to Paragraph 57 of Procedural Order Number 7. I refer also to Paragraphs 14 and 15 of the Procedural Order Number 8.

It may be appropriate at this point to reiterate what we wrote in Paragraphs 14 and 15 of Procedural Order Number 8, and I quote: "The Respondent has been afforded ample opportunity to present its case and to defend the Claimants' claims.

In Procedural Order Number 3, all of the Respondent's challenges to jurisdiction, as pleaded for the first time in the Rejoinder, were admitted.

In Procedural Order Number 7, the Respondent was permitted to raise additional jurisdictional objections at an even later stage of the proceedings, was given an opportunity to present those objections cogently in a supplemental pleading to its Rebuttal, and was given a right of Reply to the Claimants' 9 September response.

The Respondent now seeks additional pages for this last submission to expand on how, in its view, certain cases cited in its Reply in response to the arguments raised by the Claimants in their 9 September 2013 response enlighten the debate between the Parties in respect of the Respondent's jurisdictional objections.

And we concluded: "The Tribunals are not persuaded that it is necessary or appropriate at this stage to reopen the directions set out in Procedural Order Number 7 so as to afford the Respondent additional pages to plead its Reply to the Claimants' 9 September response."

And we concluded: "The Respondent's procedural request is, therefore, denied."

And we added in Paragraph 16: "The Tribunals are of the view that in so denying the procedural request, the Respondent's right to be heard is not in any way impinged."

And we said: "In addition to the multiple opportunities afforded to the Respondent to plead its jurisdictional objections in relation to Article 9(a) and 9(b) of the German BIT and Article 2 of the Swiss BIT in writing, the Respondent is also entitled to make submissions on both law and evidence on the record in respect of these objections during the Oral Hearing scheduled to commence on 28 October 2013 and in any post-hearing procedures that may be agreed by the Parties and the Tribunals, or decided by the Tribunal."

So, I thought it was important to recall those very clear statements which the Tribunals inserted in the many Procedural Orders that have been issued.

On the 15th of October of 2013, after having been briefed extensively by the Parties, we considered yet another application by the Respondent, and I chaired a hearing, telephonic hearing, with the Parties on the 11th of October 2013 during which the Parties were invited to and did make extensive oral representations in respect of each of the requests contained in the application.

As the Parties know, this telephone conference was recorded and transcribed, and the audio recording and the transcript were provided to the Parties and the Tribunals. I recall that this telephonic hearing lasted a little over three hours.

On the day following the telephonic conference, the Respondent submitted a further application, and the Claimants were invited to respond to the Respondent's October 12 application, which they did on 13 October--I recall that this was during a weekend--and, eventually, the Tribunal in Procedural Order Number 9, unanimously decided that certain requests of the Respondent should be granted and others should be dismissed. And I reiterate again that Procedural Order Number 9 runs to some 27 pages.

And it was issued on 15 October, a few hours before we held--I chaired the Pre-Hearing Telephonic Conference on the 16th of October 2013, and this Pre-Hearing Telephonic Conference lasted nearly two hours.

...

In Procedural Order Number 9, the Tribunal had decided that the Claimants would be allocated additional time to address with Mr. Levitt on direct to the compliance of the Parties' Witness Statements, the Parties' Skeletons, with the Tribunals' decisions as reflected in Procedural Order Number 9.

So for the sake of good order, the Respondent was directed to review and to identify with specificity the paragraphs or portions of paragraphs in, firstly, Mr. Masiwa's Second Witness Statement; secondly, Mr. Kanyekanye's Fourth Witness Statement; and Mr. Kanyekanye's Fifth Witness Statement, as well as the Respondent's Skeleton Argument, which contains evidence which has been declared inadmissible pursuant to Procedural Order Number 9. And the Respondent was invited to provide the Tribunals and the Claimants by no later than Monday, October 21, 2013, with corrected versions of Mr. Masiwa's Second Witness Statement, Mr. Kanyekanye's Fourth and Fifth Witness Statements, and the Respondent's Skeleton Argument, with all material determined to be inadmissible, pursuant to Procedural Order Number 9, blacked out. This was done, and I thank the Respondent for having complied with the Tribunals' order.

The Claimants, the Tribunals stated, would have 24 hours to provide the Tribunals and the Respondent with their observations on the corrected versions. Again, this was done, and I thank the Claimants, and we said any remaining dispute will be resolved by the Tribunals. In fact, we have reviewed during the weekend Exhibit R-81--Witness Statement R-81, which is Mr. Kanyekanye's Fourth Witness Statement, and Witness Statement R-82, which is Mr. Masiwa's--have I got this right?--Mr. Masiwa's Witness Statement.

Having reviewed the corrections proposed the by the Respondent and the corrections proposed by the Claimant, the Tribunal has made a few more corrections, and those Witness Statements have now been filed in the record. They were sent to the Parties in the hour earlier this afternoon.

I note for the record that Mr. Kanyekanye's Fifth Witness Statement--that's Exhibit R-93--the revisions agreed by the Parties were confirmed by the Tribunal.

I now come to the Skeleton. Again, the Skeleton submitted by the Respondent did not--could not--take into account the decisions of the Tribunal recorded in Procedural Order Number 9, and the Respondent made a valiant effort to redact

from the Skeleton those sentences, those passages, which, because of Procedural Order Number 9, should be declared as inadmissible.

The Tribunals' Assistant and the Tribunals' Secretary, aided and abetted by your Chairman, also made a no less valiant effort to perform that exercise during the weekend. We came to the conclusion—and this conclusion has been endorsed by my two co-Arbitrators—that this was going to be an impossible task to be performed thoroughly and in a fulsome way prior to 2:15 this afternoon.

In the circumstance, we have decided that the Parties' Skeleton Submissions would be admitted into the record; and, in the fullness of time, the Tribunal, informed by the clear terms of Procedural Order Number 9, will determine, during its deliberations, what needs to be redacted, what should be redacted, and what should remain as being admissible. This is a situation where the Parties are invited to trust the Tribunal, to trust the arbitrators to act in accordance with their conscience. We will do our conscious best to rule out any passages in the Respondent's Skeleton, which, because of the terms of Procedural Order Number 9, should be inadmissible and what should be admissible.

So, both Skeletons are admitted into the record provisionally; subject to what I have explained.

Now, I mentioned in the course of the telephonic conference on the 16th—that's right, on the 16th of October—that we, the Tribunal, were concerned about the procedure which should be followed in the event that a Party objects to oral arguments or Witness or Expert examinations or testimony on matters that have been declared to be inadmissible pursuant to Procedural Order Number 9. What we have decided, gentlemen, ladies, what we have decided is the following:

In order to disrupt as little as possible the proceedings—for example, the Opening Statement by one counsel or another—we don't want opposing counsel standing up like a Jack-in-the-Box every second minute or every five minutes and objecting to a statement or, indeed, part of a statement in his friend's statement or his friend's question or a witness's answer. What we have decided is the following:

After the Hearing is concluded on Saturday, each side will be given an opportunity to review the transcripts and point out, in a submission to the Tribunal, point out simultaneously those passages in the record which it opines it views as being contrary to the clear terms of Procedural Order Number 9.

We will afford the Parties a second round to comment on its friends' first submission, and aided and abetted by these submissions, again the Tribunal will do its conscious best to proceed to its deliberations on the basis that the record has been redacted of all that, in the final analysis, it considers to be inadmissible statements or inadmissible evidence, and this will lead us to the issuance of an award/decision in due course.

Now, following these two rounds of exchanges with respect to what in the record each Party views as being admissible or inadmissible, we will then issue a timeline for the submission of Post-Hearing Briefs, and this will lead us to a date certain, probably, realistically in early 2014, when we will commence our deliberations on the basis of a record which is not replete with inadmissible statements or inadmissible evidence.

Now, I have to deal, as Chairman, with the Applications which we received yesterday evening. I refer firstly to the Claimants' application which, as a result of the Respondent's reply submitted on time this morning and for which I thank the Respondent, it is obvious to us that the Claimants' application has become moot, and I so declare. Yes, Mr. Coleman.

MR. COLEMAN: Yes, I confirm that's correct.

PRESIDENT FORTIER: Thank you very much. Now, with respect to the Respondent's application, again it has been considered by Members of the Tribunal very carefully, both yesterday evening and this morning, we have also considered the Claimants' Reply received earlier today and bearing today's date, and we have deliberated, and we have decided unanimously that Procedural Order Number 9 should stand as it is, that it should not be revisited, that it should not be modified. Simply put: Procedural Order Number 9 is part of the law of these cases.

It is not irrelevant in that context to recall the terms of what was, in 1976, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration. Parties will recall that it said that--it provided that the Parties should be treated with equality, and each Party shall be given full opportunity of presenting its case. When the UNCITRAL Rules were amended, revised in 2013, the word "full" was replaced with the word "reasonable": "The Parties shall be treated with equality and each Party shall be given reasonable opportunity of presenting his case. Now, there is no doubt that a reference to Rule 50(3)(b) of the ICSID Arbitration Rules is appropriate in this connection.

As is well-known to the Parties, that provision reads that annulment, if in accordance with Article 52 of the Convention, if it is not can be granted if there has been a serious departure from a fundamental Rule of Procedure," and we are of the view that the Respondent has been granted every reasonable opportunity of presenting its case and that there is no need to revisit Procedural Order Number 9.

The opportunity which the Respondent—that the Tribunal considers that it has discharged its duty to the full to provide a reasonable opportunity to the Respondent to present its case throughout these proceeding, and that is the reason why we have decided that the Respondent's request of yesterday's date, Respondent's application should be denied and that PO Number 9 should stand. [emphasis added]

400 The Tribunal recalls that on the final day of the Hearing, the Respondent confirmed its satisfaction that it had been treated fairly and had had its "day in court" (see Tr. Day 6, pp. 1875-1878):

PRESIDENT FORTIER: Mr. Kimbrough, I ask you the same question: Are you satisfied with the way the hearing has been conducted and comfortable that your clients have had their day in court before these two Tribunals?

MR. KIMBROUGH: Sir, the conditions here in the ICSID facility have been excellent. All of the parties, Ms. Nitschke, has been very cooperative, and photocopies, and we have, absolutely no complaint.

If I have any reservation, it is simply to reiterate the--I think it--was it psychological or philosophical discomfort of Minister--

MR. MOREAU: Spiritual.

MR. KIMBROUGH: Spiritual--the spiritual discomfort of Minister Mutasa. We sincerely regret that external circumstances that we view with a certain criticism for hypocrisy to--not to say the visa was refused on the part of the American authorities and then to hand it to him as he went into a situation which was both humiliating and hostile. I'm not here to give testimony but I've worked with him several times and in totally reasonable man theory. And I saw him--the French have an expression "bont de femme" (phonetic). I've seen him as a "bont font de femme" (phonetic). He was under great stress. I had--because I knew all of the past of this Tribunal, I had a very uncomfortable situation of not having spoken with him one minute before and having--with 40 spectators to tell him that I gave him advice to go on. I think that a portion of his tone and excitement were directly linked

to those circumstances, and so he has made his reservation on the record. I reiterate that, and I simply ask the Arbitral Tribunal to take into full consideration those extremely unusual circumstances and to consider that in their view of the overall situation.

PRESIDENT FORTIER: Absolutely. And I think you will recognize that we were also, the Tribunals, through me, was also uncomfortable with the way this matter arose and, of course, you recognize this. This is a matter over which the Tribunals had no control whatsoever.

MR. KIMBROUGH: We do understand that. The comment is not toward the Tribunals. It is to underline the external force that we think was extremely unpleasant for the Minister and allowed the Respondent to present its materials to these Tribunals with a relatively severe handicap.

PRESIDENT FORTIER: But at the end of the day as the Minister said himself, he thought he was treated with respect and given a full opportunity to answer all the questions that were put to him.

MR. KIMBROUGH: Ms. Berry did serve him tea as well.

(Laughter.)

PRESIDENT FORTIER: So insofar as this matter is concerned, that you have explained and, over which, as you acknowledged, the Tribunals had no control, are you satisfied on behalf of your clients that Zimbabwe has had its day in court and it has been treated fairly?

MR. KIMBROUGH: Yes, sir.

401 On 24 February 2014, the Tribunal issued PO No. 10, which settled the remaining disputes between the Parties in connection with the transcript correction exercise directed by the Tribunal at the end of the Hearing and admitted onto the record the supplemental documents provided by the Respondent in connection with Land Audits and the German BIT *travaux préparatoires*. The Tribunal also rejected, in PO No. 10, the Respondent's request that its Skeleton Argument be re-circulated with the final redactions approved by the Tribunal in order that it "know" what "interpretation" the Tribunal gives to PO No. 9. In so doing, the Tribunal noted the following in regard to PO No. 9:

38. The Tribunals understand the Respondent to suggest at page 2 of its 19 February Letter that by circulating a redacted version of the Respondent's Skeleton Argument in advance of the Post-Hearing Submissions, the Parties will then – and only then - know exactly what interpretation of Procedural Order No. 9 the Tribunals deem acceptable. The Tribunals disagree. Procedural Order No. 9, which runs 27 pages in length and decides matters that were extensively briefed in written and oral submissions, is both detailed and clear. Counsel for the Respondent confirmed during the Pre-Hearing Telephone Conference held on 16 October 2013 that Procedural Order No. 9 was "very clear" (see Pre-Hearing Telephone Conference of 16 October 2013, audio recording, at 1:48:33).

39. Accordingly, the parties are directed to abide by the terms of Procedural Order No. 9 in preparing their Post-Hearing Submissions. No further or additional interpretation of Procedural Order No. 9 shall be given to the parties through redactions to the Respondent's Skeleton Argument. [emphasis added]

402 The foregoing summary is lengthy, but the Tribunal considers that it is vital for its unanimous determination that PO No. 9 should be reconfirmed again, and it so decides. Accordingly, the Respondent's request in its Post-Hearing Brief that the Tribunal's PO No. 9 be reconsidered is denied.

403 The Respondent's admissibility objections will be decided on the basis of those findings and that evidence which has been ruled admissible by the Tribunal in its Procedural Orders and other directions.

(3) The Tribunal's Analysis

(i) The Approval Objection

404 The Respondent's Approval Objection is based on Article 9(b) of the German BIT⁶⁴ which states that the BIT shall apply to investments that have been "specifically approved by the competent authorities of the latter Contracting Party at the time of their admission". The Claimants argue that Ad Article 2 of the German Protocol amends Article 9(b) or, alternatively, grants the required approval.

405 Ad Article 2 states:

Investments made in accordance with the laws [of Zimbabwe] ... shall enjoy the full protection of the Agreement. The preamble to the German Protocol notes that Contracting Parties have agreed on the following provisions, which shall be regarded as an integral part of [the BIT].

406 The Tribunal notes that this objection is only relevant to the German BIT – not to the Swiss BIT. Only one Claimant – Rüdiger – relies exclusively on the German BIT, with all other Claimants bringing claims under both BITs.

407 On its face, there is an apparent conflict between Article 9(b) of the German BIT and Ad Article 2 of the German Protocol. In the light of this ambiguity, it is helpful to refer to Article 31(3)(b) of the *Vienna Convention*, which notes that, together with the context, the decision maker shall take into

⁶⁴ The Tribunal notes that the Approval Objection, as such, applies only to the von Pezold Claimants' claims and not to the Border Claimants' claims, which are advanced solely under the Swiss BIT.

account "any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation".

408 The Claimants argue that there are numerous examples of subsequent conduct by Zimbabwe (and Germany) which evidence the Parties' agreement that the von Pezold investments were protected by the German BIT.

409 The Tribunal is of the opinion that the Protocol does operate to override the approval requirement in Article 9(b) and therefore no specific approval is required. Although the Parties' intentions are not clear from the wording of the German BIT and the German Protocol, as neither document expressly overrides the other in the event of conflict, the Protocol was obviously written after the main BIT and was expressly intended to be regarded as an "integral" part of the treaty. The Tribunal therefore considers it reasonable to infer that the parties intended the Protocol to modify or add to the provisions of the BIT. Ad Article 2(a) would be rendered redundant if its effect was not to modify Article 9 of the German BIT.

410 Having reviewed the Parties' submissions, including the Claimants' evidence of Zimbabwe's subsequent conduct, the Tribunal is persuaded that Zimbabwe and Germany intended for Ad Article 2(a) to remove the specific approval requirement that had originally been a pre-condition to protection under the German BIT.

411 Even if this were not the case, the Tribunal considers that the Respondent is estopped from denying that it approved the Claimants' investments. Apart from the many informal statements of approval given by the Respondent and its organs (see para. 354 above), it is unclear on the evidence what the process would have been to obtain further approval. The Tribunal is not persuaded by the argument that approval from the FIC (or later the ZIC) was necessary. The FIC was not a statutory body and the Tribunal can find no evidence that suggests that FIC approval was required for BIT protection. The fact that the procedure was published in a document entitled "Policy, Guidelines and Procedures" rather than established through any formal act of parliament corroborates the Claimants' submission that it was a non-mandatory process. The Tribunal also notes Mr. Nyaguse's evidence that the purpose of this body was to consider "new projects", as opposed to investment in existing projects as occurred here. Similarly, ZIC approval appears to be required in order to obtain certain specific advantages (e.g. tax breaks). However, these advantages do not include BIT protection – if this were truly the required procedure under the BIT (as submitted by the Respondent), surely some evidence would exist to corroborate this submission. The Respondent has not produced any such evidence.

412 The Tribunal also does not consider that Reserve Bank approval was required to create a qualifying investment. In any case, the Tribunal accepts the Claimants' evidence that Reserve Bank approval

was only required for one transaction, and that it was obtained for the purposes of that transaction. The Claimants have sufficiently explained why their acquisition of Border shares did not meet the approval threshold. Overall, the Tribunal considers that the Reserve Bank arguments are more pertinent to the Illegality Objection than to the Approval Objection.

413 With regard to the Forester Loans, the fact that they were registered with the Reserve Bank would satisfy any requirement for approval. However, once again, the Tribunal cannot see any basis on which to find that Reserve Bank approval was required under Article 9(b).

414 With respect to the Border Estate and the allegation that a breach of the free float rule is relevant to the approval requirement, the Tribunal again considers that this is really an illegality issue. However, the Tribunal agrees with the position that the ZSE Rules were not part of the "laws of Zimbabwe" at the relevant time and therefore the "illegality" argument fails as well. Accordingly, the Tribunal considers that neither ZSE nor Reserve Bank approval for any non-compliance with the free float rule affects its admissibility ruling. In any case, the Tribunal is persuaded that the ZSE was fully aware of any non-compliance with the 30% free float threshold and clearly took no action to sanction it. The Tribunal does not consider there is any basis on which to rule the Border claims inadmissible on the basis of the free float rule.

415 Accordingly, the Respondent's Approval Objection is dismissed.

(ii) The Illegality Objection

416 With regard to the Illegality Objection, the Tribunal is not convinced that the Claimants breached any of Zimbabwe's laws, but even if they did, the Tribunal is of the opinion that the Respondent is estopped from now denying that BIT protection exists.

417 As noted above, it is clear that no illegality argument can be sustained in relation to FIC or ZIC approval, as such approval was not mandatory and cannot be said to form part of the laws of Zimbabwe (let alone any "fundamental legal principle").

418 Article 13 of the *ZIA Act 2006* (which entered into force in September 2006) cannot be relevant to determining whether investments existed in the current case. The investments took place well before this date (primarily in the 1980s and 1990s) and the alleged expropriation occurred in September 2005. The *ZIA Act 2006* is therefore irrelevant.

419 The Tribunal is persuaded by the Claimants' arguments as to compliance with Section 17 of the 1996 Regulations (and the 1996 Order). Therefore, any allegation of a breach of the ZSE "free float" rule based on a breach of Section 17 cannot be sustained. The Tribunal does not consider the ZSE Rules to have formed part of the laws of Zimbabwe at the relevant time, and therefore any

breach thereof would not be a sufficient basis on which to deny treaty protection. The Tribunal also considers that it would be inappropriate to deny treaty protection based on the fact that Border appears not to have had a 30% free float from well before the Claimants made their investment. Further, it is evident that any breach of the free float rule should have been dealt with by the ZSE itself, which had the power to invoke certain sanctions if it considered that the free float rule had not been complied with. Finally, there is clearly no support for any "corruption" allegation in relation to the free float rule.

420 With respect to the Forrester Loans, the Tribunal can see no basis for concluding that they did not comply with relevant rules and regulations. The Forrester Loans were registered with the Reserve Bank and appear to comply with its requirements. The Tribunal also agrees with the Claimants that, for the purpose of the legality requirement, when determining whether an investment exists it is compliance with the laws at the time the investment is made that is pertinent. Any subsequent alleged breach of law would not affect whether the investment qualifies for protection under the BIT.

421 Again, the Tribunal cannot find any basis for denying protection to the investments on the basis of a breach of Directive RE 277. The Tribunal recalls that this Directive has never been formally published and was not produced by the Respondent in these proceedings. The Tribunal is not satisfied that this Directive genuinely existed, but non-compliance cannot be a basis for withholding protection if the Directive was never made public and, in any case, as the Claimants pointed out, it imposed no obligation on the Claimants, and therefore could not have been breached by them.

422 Accordingly, the Respondent's Illegality Objection is also dismissed.

(4) Respondent's July 2 Request

423 The Tribunal has considered the Respondent's submission of 2 July 2014 and the Claimants' Response of 9 July 2014. Two of the Respondent's "procedural requests" raised in its 2 July submission remain to be decided. Procedural requests (vi) and (vii), which were held in reserve by the Tribunal until the rendering of the final Award, state as follows:

- (vi) Declare that Claimants' assertions discussed herein constitute "emergence of new evidence";
- (vii) Declare that, under [ICISD Arbitration Rule] 26(3), "special circumstances" exist.

424 The new evidence identified by the Respondent relates to the oral testimony during the Hearing of Rüdiger that the investments made by himself and Elisabeth in the Forrester Estate in 1988 and

Border in 1992 required approval from the Reserve Bank (and, in the case of Forrester, that they obtained such approval).

425 Resolution of this issue turns on whether there is "new evidence", and whether that new evidence is significant enough to warrant exercise of the Tribunal's power under ICSID Arbitration Rule 26(3).

426 Having reviewed the portion of the Hearing transcript where this "new evidence" was allegedly advanced, the Tribunal finds the Respondent's characterization of this evidence to be inconsistent with the surrounding context of the cross-examination (which concerned the family motives for making the Forrester investment) and that Rüdiger was not discussing whether approval was needed to make the investment itself. This line of questioning was separate from questions about whether Rüdiger knew there was a procedure for specific approval (which questions were put to Rüdiger in the cross-examination a few minutes later). Although it is not specifically stated, the Tribunal is nonetheless satisfied that the approval referred to by Rüdiger during his cross-examination was the approval granted for the conversion of leasehold into freehold title.

427 In regard to the Border Estate, the issue is whether the transaction Rüdiger referred to was one between the von Pezolds and the Reserve Bank, or, as the Claimants submit, between the previous owners and the Reserve Bank. Rüdiger testified on cross-examination that (see Tr. Day 3, p. 691, lines 9-18):

Q. ...

I turn you to this exhibit marked C-52. You have the tab open, the organogram of Border. What date did you acquire Saxonian Estate Limited?

A. Saxonian Estate as we acquired from the Société de General-I call them the vendors. They had various company boxes, but the beneficiary owner was Société de Generale in Brussels, and they had put the Zimbabwean Tank Assets [i.e. Franconian] into Saxonian Limited with approval of Reserve Bank, and afterwards, Saxonian Estate Shares were acquired by us.

428 The Claimants have explained that Rüdiger had mistakenly interpreted a letter from the Reserve Bank as referring to his own investment, when in fact the letter was addressed to the previous owners of the estate (and was dated prior to Rüdiger's investment). The letter itself is dated 12 November 1992 and clearly does not relate to Rüdiger's investment (see C-858). The Tribunal finds that Rüdiger simply misconstrued the letter, as stated by the Claimants.

429 The Tribunal concludes that there is no new evidence that would warrant allowing the Respondent to enter pleadings out of time. The Tribunal also notes that the Respondent has been granted numerous opportunities to amend its pleadings during the course of this arbitration. As the Claimants note, there is a degree of unfairness to allowing Respondent to submit a new pleading when the Claimants will not be able to address this at a hearing.

430 The Respondent's requests (vi) and (vii) are therefore dismissed.

G. Attribution

(1) Claimants' Position

431 The Claimants assert that, pursuant to Article 4 of the International Law Commission's Articles on State Responsibility ("ILC Articles"), the conduct of the following State organs is attributable to the Respondent (see Mem., para. 1123): the President, Vice President, Ministers of State, Provincial Governors, Provincial and District Administrators, the Legislature, the Courts, the Central Bank, the Defences Forces (including the Army), the CIO, the Police, the Lands Committee (including Provincial Lands Committees), the District Development Fund, the Grain Marketing Board, and Agritex.

432 The Claimants also assert that the acts of the Settlers/War Veterans are attributable to the State pursuant to Article 8 or, alternatively, Article 11 of the ILC Articles. The Claimants submit that it is not necessary, for the purpose of showing breaches of any treaty standard, to establish that the acts of the Settlers/War Veterans are attributable to the Respondent. The Claimants take the position that the placement of the Settlers/War Veterans on the Claimants' properties by the Respondent was a breach of the BITs and the fact that the acts of the Settlers/War Veterans once on the properties are attributable to the Respondent simply makes the treaty breaches "more egregious" (see Cl. PHB, para. 110).

433 As regards Article 8 of the ILC Articles, the Claimants submit that "direction" and "control" are synonymous, whereas "instruction" is distinct. The Claimants further submit that it is sufficient to establish either one of these. Referring to the ICJ's reasoning in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (*Bosnian and Herzegovina v Serbia and Montenegro*) (see CLEX-224), the Claimants acknowledge that they must show that "effective control" was exercised over the persons who performed the acts which are alleged to give rise to wrongful conduct, or that the State's instructions were given in respect of each operation (i.e., the Invasions) in which the alleged violations occurred (see Cl. PHB, para. 111).

434 The Claimants refer to the following evidence in support of their position that the State exercised effective control over the Settlers/War Veterans and/or that the Settlers/War Veterans acted on the State's instructions (see Cl. PHB, paras. 112-115; Cl. Skel., paras. 88-89):

- Minister Mutasa's admission that the Government had transported Settlers/War Veterans onto the farms, provided them with food and allocated them with units of land (see Tr. Day 5, p. 1415);

- Minister Mutasa testified as follows (see Tr. Day 5., pp. 1415-1416):

Q. Mr. Mutasa, it's Mr. Coleman for the Claimants. I just have some questions.

Mr. Kimbrough started off talking about events that happened in Zimbabwe around 2000, and I appreciate you said you very much wanted to help your own people.

When people moved onto the farms, can you just please give us a brief - brief account of as to how you helped the people move onto the farms?

A. Me, personally?

Q. You and your Government, please.

A. Are you asking about me, personally?

Q. Sorry, your Government.

A. When we—we helped them to settle down, to give them where the limits of their land goes and also give them food during their initial stay, that was what I was referring to. We gave them seed and fertilizer in the initial stages of their work.

Even now, we're still giving people seed and fertilizer to help them to settle down and make productive work on their farm.

Q. And have you also helped them with transport to get onto the farms, or—or any other assistance?

A. Yes, indeed we would.

- Professor Chan's evidence that, once the Invasions began, the Government mobilised quickly to provide material support to the Settlers/War Veterans, thereby expanding the Invasions beyond Masvingo Province (see Tr. Day 3, pp. 938-939, 949 and 969; Chan I, paras. 15, 32, 34 and 36, C-37);
- Mr. Theron's evidence that vehicles with Government markings were used to transport Settlers/War Veterans onto farms (see Tr. Day 3, pp. 657-659);
- Ms. Tsvakwi's admission that the Government issued Offer Letters to Settlers/War Veterans instructing them to take up possession of the plots of land identified in the Offer Letter (see Tr. Day 4, p. 1246; CLEX-83);
- Ms. Tsvakwi testified as follows:

Q. ... Do you accept that the Government sent people onto the property through Offer Letters? I'm talking about the Offer Letter Process of Offer Letters being given out to people to go onto the three Estates? Do you accept that happened?

A. Yes, people were given Offer Letters⁶⁵.

The Claimants note in connection with Ms. Tsvakwi's testimony that many of the Offer Letters were issued after September and November 2002, when the local courts had ruled that Section 5 Notices identifying land for expropriation were invalid, and before the properties were expropriated pursuant to the 2005 Constitutional Amendment.

- Ms. Tsvakwi also testified as follows in response to Tribunal questioning (see Tr. Day 4, pp. 1257-1258):

ARBITRATOR HWANG: So, if these people went onto—the Invaders, if I may call them that—were on property which had not yet been expropriated legally, why would they be holding valid Offer Letters?

THE WITNESS: No, the Offer Letters they were given later after the property had been acquired.

ARBITRATOR HWANG: But at the time of the Invasion, they didn't have—they could not have held Offer Letters or did they actually have Offer Letters?

THE WITNESS: No. At the time of Invasions, properties had not yet been acquired. No letter was valid.

ARBITRATOR HWANG: There were no Offer Letters.

THE WITNESS: There were no Offer Letters. Offer Letters were only made after the property was acquired.

...

ARBITRATOR HWANG: So, what I'm getting at is to ask you whether the Government ever had a policy of issuing Offer Letters before the expropriation had been completed. Before the acquisition [sic] been completed, did the Government issue Offer Letters?

THE WITNESS: Before listing the property, we didn't issue Offer Letters.

- Heinrich's evidence as to the Government's effective control over the Settlers/War Veterans and instructions to them (see Heinrich I, paras. 575-583, 627; C-18); and
- The findings of the Zimbabwean High Court in *CFU v. Minister of Lands & Ors* (2000) (see CLEX-76). For example, the Court stated the following at pp. 282-283:

... Save perhaps for those farms whose owners have agreed to the takeover of their properties, the settling of people on farms has been entirely haphazard and unlawful. It has not been done in terms of a programme of land reform or in terms of the Act. A network of organisations, operating with complete disregard for the law, has been allowed to take over from Government. War veterans, villagers and

⁶⁵ Offer letters were documents from the Government which assigned parcels of land to War Veterans.

unemployed townspeople have simply moved into farms. They have been supported, encouraged, transported and financed by party officials, public servants, the CIO and the Army. It has undoubtedly been an outpouring of reaction to years of frustration and economic hardship. Who is to blame for that frustration and economic hardship is another matter, and not for the courts to determine.

435 Alternatively, the Claimants contend that conduct may also be attributable to a State pursuant to Article 11 of the ILC Articles if the State acknowledges and adopts it as its own. The Claimants contend that the Respondent admitted, in its Counter-Memorial, that it acknowledged and adopted the Settlers/War Veterans' conduct during the Invasions, referring to para. 156 of the Counter-Memorial (see Reply, para. 184; quoting CM, para. 156):

To arrest the situation Respondent reacted by putting in place legal instruments to enable the acquisition of more land for redistribution.

436 The Claimants note that "putting in place legal instruments" is a reference to "Phase II" (FTLRP) which began in July 2000, whereby Section 5 Notices were issued in respect of occupied and as yet unoccupied properties. The Claimants also note that regular statements were made by the President and other senior officials which acknowledged and adopted the Settlers/War Veterans' conduct (see Cl. PHB, para. 117; Cl. Skel., para. 93; Reply, para. 185; C-460; C-449).

437 As regards the Respondent's reliance on *Tradex*, the Claimants aver that the award in *Tradex* contains no analysis as to what constitutes the actions of a State and its officials, nor any analysis as to the liability of a State for the acts of its officials that are *ultra vires*. On the Claimants' interpretation of the award, it stands for the proposition that there will only be a finding of wrongful conduct if the act or omission is attributable to the State (see Surrejoinder, para. 400).

(2) Respondent's Position

438 The Respondent does not appear to dispute the Claimants' assertion that the organs identified at para. 1123 of the Claimants' Memorial are State organs. However, the Respondent takes the position that the Settlers/War Veterans are not organs of the State and there is nothing to show that the Settlers/War Veterans were acting as instruments of the State in complete dependence on the State, or that they were acting on the instructions or under the direction or control of the State (see CM, paras. 118-122).

439 The Respondent denies that its witnesses corroborated the Claimants' theory as to the Government's role in the Invasions. The Respondent avers that Minister Mutasa's testimony regarding the transportation of "African Zimbabweans" referred to new farmers settling down after land reform had been legislated. Similarly, the Respondent states that Ms. Tsvakwi's testimony regarding Government Offer Letters to Settlers/War Veterans confirmed that Offer Letters were

only given to "African Zimbabweans" after acquisition of their land from its previous owners (see Resp. PHB, para. 257).

440 The Respondent has also asserted that "what matters is only the official acts by the State's officials" (see Rejoinder, para. 1083). The Respondent relies upon the award in *Tradex* in support of its position, and, in particular, the *Tradex* tribunal's finding that speech encouraging villagers to occupy property was insufficient to hold the occupation attributable to the State (see *ibid.*, paras. 1084-1087).

441 The Respondent submits that the popular uprisings which took place in February 2000 are not attributable to the State but are the doings of the "masses", the Settlers/War Veterans and the ZANU-PF, each in opposition to the Government. The Respondent asserts that everyone agrees the land-hungry masses, squatters and Settlers/War Veterans were motors of the uprising, and many among them were ZANU-PF members (see Resp. PHB, para. 258).

(3) The Tribunal's Analysis

442 Article 4 of the ILC Articles states as follows:

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

443 It is clear under Article 4 of the ILC Articles and the Commentary thereon that organs of State include, for the purposes of attribution, the President, Ministers, provincial government, legislature, Central Bank, defence forces and the police, *inter alia*, as argued by the Claimants. The Respondent does not seriously dispute this.

444 Responsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity (i.e., it includes *ultra vires* acts performed in an official capacity). Only acts performed in a purely private capacity would not be attributable. That issue does not arise in this case.

445 As the Claimants note, indirect liability for the acts of others can also occur under Article 4 – for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) was aware of it and did nothing to prevent it. The Tribunal finds, on the evidence before it, that this is the case here,

as regards police inaction in the face of Settlers/War Veterans' coming on to the Zimbabwean Properties.

446 The Claimants also rely on Articles 8 and 11 in connection with the Settlers/War Veterans. Article 8 of the ILC Articles states:

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

447 Article 11 of the ILC Articles states:

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

448 With respect to attributing acts of non-State organs to the Respondent, the acts of the Settlers/War Veterans do not appear to fall within the scope of Article 8 of the ILC Articles. While there is ample evidence of Government involvement and encouragement, the Tribunal is not persuaded that the acts of the invaders were based on a direct order or under the direct control of the Government when they initially invaded the Claimants' properties. Rather, the Government appears to have encouraged (and endorsed) the action once it had begun. Encouragement would not meet the test set out in Article 8. However, the Tribunal agrees with the Claimants that the State action of encouragement and facilitation, etc. should be considered separately when it comes to treaty violations (this includes the inaction of the police). The actions of the invaders themselves need not be considered.

449 Similarly, the Tribunal does not consider that Article 11 applies in this case.

450 Accordingly, the Tribunal dismisses the Respondent's objections relating to attribution, save for its objection relating to the attributability of the acts of Settlers/War Veterans to the State.

H. Proportionality, Regulation and Margin of Appreciation

(1) Respondent's Position

451 The Respondent considers that the LRP and its foreign exchange policy were non-discriminatory and non-arbitrary regulations, applied in good faith, and proportionally, and argues that those measures therefore cannot give rise to wrongful conduct, that the Respondent should be given a

wide margin of appreciation, and that it either had to "fire upon the masses" or bring about the aggressive phases of the LRP.

452 These principles appear to be raised by the Respondent both as defences which could preclude a finding of liability for its allegedly wrongful conduct and as a lens through which the Tribunal is invited to consider the alleged wrongful conduct.

453 The Respondent relies on two European Court of Human Rights ("ECHR") cases in support of its position that the Tribunal should give it a wide margin of appreciation as to its determination of what was required by way of land reform in the public interest and how the land reform was carried out. In particular, the Respondent refers to the following passage of the ECHR's judgment in *Jahn & Ors v. Germany* ("*Jahn*") (see CM, paras. 136, quoting RLEX-2):

91. The Court is of the opinion that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.

Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *James and Others*, cited above, p. 32, § 46; *The former King of Greece and Others*, cited above, § 87; and *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 67 in fine, ECHR 2002-IX). The same applies necessarily, if not a fortiori, to such radical changes as those occurring at the time of German reunification, when the system changed to a market economy.

454 The Respondent invokes the principle of proportionality in connection with a State's legitimate exercise of its police powers or "regulatory powers". The Respondent has observed that neither the Swiss BIT nor the German BIT addresses in any detail any limitation on the powers of Zimbabwean state regulation. The Respondent analogizes the present dispute to the *North American Free Trade Agreement* ("*NAFTA*") case of *Waste Management, Inc. v. United Mexican States* ("*Waste Management*") (see ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, CLEX-208), citing the following paragraphs from the *Waste Management* award (see Rejoinder, para. 203, citing CLEX-208, paras. 98, 114-115):

98. The Claimant affirms that the Resolution is arbitrary because the reasons invoked therein to deny the renewal of the permit that had been granted on November 19, 1997 (the «Permit»), under which the Claimant had operated the Landfill over the last year, are not proportional to the decision not to renew the Permit.

...

115. To establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to the Landfill or to its exploitation—had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance. Upon determining the degree to which the investor is deprived of its goods or rights, whether such deprivation should be compensated and whether it amounts or not to a de facto expropriation is also determined. Thus, the effects of the actions or behavior under analysis are not irrelevant to determine whether the action or behavior is an expropriation. Section 5(1) of the Agreement confirms the above, as it covers expropriations, nationalizations or

...any other measure with similar characteristics or effects...

The following has been stated in that respect:

In determining whether a taking constitutes an «indirect expropriation», it is particularly important to examine the effect that such taking may have had on the investor's rights. Where the effect is similar to what might have occurred under an outright expropriation, the investor could in all likelihood be covered under most BIT provisions.

116. In addition to the provisions of the Agreement, the Arbitral Tribunal has to resolve any dispute submitted to it by applying international law provisions (Title VI.1 of the Appendix to the Agreement), for which purpose the Arbitral Tribunal understands that disputes are to be resolved by resorting to the sources described in Article 38 of the Statute of the International Court of Justice considered, also in the case of customary international law, not as frozen in time, but in their evolution. Therefore, it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "...any form of exploitation thereof..." has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. To determine whether such an expropriation has taken place, the Arbitral Tribunal should not

.... restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.

....

(2) Claimants' Position

455 The Claimants note that there has been limited adoption of the principle of proportionality by investment treaty tribunals and that, even where adopted, proportionality does not generally shield a State from claims. Following a review of those authorities relied upon by the Respondent, the Claimants submit the following (see Cl. Skel., para. 97, referring to *Jahn*, RLEX-2; *James & Ors v. United Kingdom*, ("**James**"), RLEX-3; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* ("**Tecmed**"), ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, CLEX-202):

- A measure is disproportional if it causes the investor to carry an "individual and excessive burden";
- Racial discrimination will always be disproportional because it breaches a peremptory norm;
- Illegal measures can never be proportional because governments do not have a mandate or the discretion to act illegally; and
- Measures instituted by the State because of social or political pressures will not be proportional unless they are in response to a serious emergency and unless the investor's conduct is a cause of that social or political pressure.

456 In any event, the Claimants submit that evidence elicited at the Hearing establishes that the LRP lacked proportionality (see Cl. PHB, para. 121):

- The effect of the LRP was to reduce the number of white farmers from 4,500 to 300 (see Tr. Day 4, p. 1183 - Tsvakwi; Tr. Day 5, p. 1372 - Mutasa);
- The Claimants also note that 4,500 white farmers are carrying the land reform burden for 12 million people (see Cl. Skel., para. 98; *Mike Campbell (Pvt) Ltd. & Ors v. Zimbabwe*, CLEX-90);
- Compensation was not paid for the expropriation of the Zimbabwean Properties (see Tr. Day 4, p. 1207, Tsvakwi; Tr. Day 5, p. 1402 - Mutasa); and
- The LRP was not implemented as a result of a serious emergency (see Tr. Day 5, p. 1355 - Mutasa).

457 Similarly, the Claimants say that evidence elicited at the Hearing establishes that the foreign exchange policy lacked proportionality (see Cl. PHB, paras. 122-124):

- Mr. Machaya accepted the decision of the Zimbabwean High Court in *Zimbabwe Revenue Authority v. Reserve Bank of Zimbabwe & Anor*, where the Court directed the return of funds taken by the Reserve Bank pursuant to its monetary policy and rejected the Reserve Bank's position that it had discretion over the monies (see Tr. Day 5, p. 1989);
- Messrs. Machaya and Masiwa accepted that the decision of the Zimbabwean High Court in *Trojan Nickel Mine Ltd. v. Reserve Bank of Zimbabwe* was correct in holding that the Respondent had no authority under Art. 35 of the 1996 Regulations to issue R1303 and that money taken pursuant to that directive had to be repaid (see Tr. Day 5, p. 1317 – Masiwa; Tr. Day 5, p. 1489 – Machaya);
- Mr. Machaya accepted the Zimbabwean Supreme Court's decision of October 2013 in the *China Shougang* case, which came to the same conclusions as the Court in *Trojan Nickel* (see Tr. Day 5, p. 1489);
- Mr. Masiwa disagreed with the Supreme Court's decision in *China Shougang*, but accepted that all amounts that had been taken by the Respondent pursuant to R 1303 must be repaid (see Tr. Day 5, p. 1316);
- Mr. Masiwa did not deny that there was a difference of more than 2% between Zimbabwe's Official Rate and Unofficial Rate between 2003 and 2009 and the differences breached Article VIII(3) of the International Monetary Fund ("IMF") Articles (see Tr. Day 5, pp. 1292, 1301-1302 – Masiwa); and
- Mr. Masiwa acknowledged that the differential would have created difficulty for the Claimants (see Tr. Day 5, p. 1305).

458 The Claimants submit that it is irrelevant that a measure may be described as regulatory (see Cl. Skel., para. 101). In any event, the Claimants refer to the following evidence in support of their position that the LRP was carried out in bad faith (i.e. because of political and other interference) (see Cl. PHB, para. 125):

Ms. Tsvakwi accepted that the Provincial Land Committees included members of the ruling party (ZANU-PF) and representatives of the Army and the Police; she accepted that the Committees "should have been composed of people who were completely independent" (see Tr. Day 4, p. 1222).

459 Finally, the Claimants submit that measures that are discriminatory on grounds of race are absolutely prohibited and therefore made outside the bounds of a margin of appreciation, and that the margin of appreciation cannot be invoked in regard to illegal conduct (see Cl. PHB, para. 126; Reply, para. 289). In any event, the Claimants submit that the margin of appreciation principle has

developed in the context of human rights adjudication under the *European Convention for Human Rights*, and is not apt for use in the context of BIT claims (see Reply, paras. 282-297).

(3) The Tribunal's Analysis

460 The Tribunal is not persuaded by the Respondent's argument that the doctrine of proportionality should be employed here to balance the competing interests of the State and the individual in the present case. Although proportionality has featured in some investment treaty cases, the context has generally been in relation to whether a termination (for example of licence or contract) by the State has been a proportionate response to an alleged breach of obligations by the investor. This is a rather different application of the doctrine of proportionality from that advocated by the Respondent in the present case, whereby proportionality is being used as a defence to what would otherwise be a violation of the BIT (i.e., expropriation without compensation). To suggest that the aggressive phase of the LRP was a proportional response to the situation in Zimbabwe at the time and, therefore, that any violation of the BIT should be excused would be a "necessity" argument (which is discussed below), not proportionality.

461 The Tribunal also notes the following quote from *Tecmed*, referred to by the Claimants (see Cl. Skel., para. 97):

If the State instituted measures because of social or political pressures, such measures will not be proportional unless they are in response to a serious emergency, and unless the investor's conduct is a cause of that social or political pressure.

462 The situation in this case would not meet the *Tecmed* test.

463 The Tribunal therefore dismisses the Respondent's proportionality argument.

464 As regards the Respondent's case on regulatory powers, the Tribunal finds this line of argument - not fully developed by the Respondent in its pleadings - is also more appropriately addressed under "necessity". As the tribunal in *Saluka Investments B.V. v. Czech Republic* ("*Saluka*") observed, it inevitably falls to the adjudicator to determine whether particular conduct by a State "crosses the line" that separates valid regulatory activity from expropriation (see *Saluka*, UNCITRAL Arbitration Rules, Partial Award, 17 March 2006, para. 264, CLEX-217). Here, the Respondent has done little more than allege a regulatory powers defence, without clothing that allegation in any substance which would allow this Tribunal to determine whether the line has been crossed. Accordingly, this argument, too, is dismissed.

465 As to "margin of appreciation" and the Respondent's argument that it should be given a wide margin when determining what is in the Zimbabwean public interest, the Tribunal is of the opinion that due

caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law. The Respondent has only referred the Tribunal to European human rights cases in its arguments.

466 This is a very different situation from that in which margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no "margin of appreciation" qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine.

467 In any case, the Claimants have noted that neither the "margin of appreciation" nor the proportionality doctrine can be used to justify illegal conduct, such as a breach of an obligation *erga omnes*, by engaging in racial discrimination. As discussed below, there is ample evidence that the Claimants were targeted in the present case on the basis of skin colour.

468 Accordingly, the Respondent's arguments relating to margin of appreciation are also dismissed.

I. The Alleged Treaty Breaches

(1) Expropriation

(i) Claimants' Position

469 The Claimants contend that the Respondent has breached Article 4(2) of the German BIT and Article 6(1) of the Swiss BIT, which contain the expropriation provisions of the respective BITs.

470 The Claimants submit that expropriation is unlawful unless the expropriation is for a public purpose, is non-discriminatory, is against prompt, adequate and effective compensation and follows due process. The Claimants further submit that :

- A direct expropriation occurs when there has been a transfer of title to property to the State or to a third party, and that measures that take legal title but leave the former owner in control are an expropriation nonetheless (see Cl. Skel., para. 113); and
- An indirect expropriation occurs when there has been substantial deprivation of the economic substance of the investment, without title being affected, and that a finding of indirect expropriation is not conditional on the investor no longer controlling the investment (see Cl. Skel., para. 114; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, CLEX-184; *Suez, Sociedad General de Aguas de*

Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic ("Vivendi"), ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, CLEX-229).

471 The Claimants submit that the following have been expropriated :

- The Zimbabwean Properties were directly expropriated as of 14 September 2005, when the Constitutional Amendment vested in the State title to the 10 Forrester Properties, 21 of the 28 Border Properties, and six of the nine Makandi Properties⁶⁶. The Claimants note that, without title, they are no longer able to sell or otherwise realise the properties, they face criminal prosecution for continuing to occupy them, and certain parts of the Estates are now controlled by Settlers/War Veterans (see Cl. Skel., para. 116). The Residual Properties were indirectly expropriated as of 14 September 2005 by the Constitutional Amendment, as they are not viable without the directly expropriated properties. The Claimants say that the operations of the Residual Properties would be disjointed and economically unviable when compared to their original unified investment, which used scale to produce returns, and their rights in the assets have been rendered useless (see Cl. Skel., para. 118).
- The Income-Generating Assets and Zimbabwean Company Shares were indirectly expropriated as they have been rendered unviable and/or worthless on their own. The Claimants submit that Income-Generating Assets on the Residual Properties, including a pole treatment plant, two factories and a sawmill, have been indirectly expropriated because, like the Residual Properties on which they stand, these assets have been rendered unviable without the Zimbabwean Properties⁶⁷. The Claimants also argue that the shares of the Zimbabwean Companies which held the Zimbabwean and Residual Properties have been rendered worthless, as the value of the companies depends upon enjoying the economic and legal benefit of the Zimbabwean and Residual Properties (see Cl. Skel., para. 119). The Forrester Water Rights were either directly expropriated by the *Water Act 1998*, with effect from 1 January 2000, or indirectly expropriated since the rights granted under the permits in place of the Water Rights under the *Water Act* are different and much diminished such that there has been a substantial deprivation to the economic

⁶⁶ This also includes the Water Permits in respect of the Forrester and Makandi Estates, which the Claimants submit were expropriated along with the Zimbabwean Properties on those Estates: see Table 1 and Table 3 of the Claimants' Reply. See paras. 186/187 above.

⁶⁷ This also includes the "Other Investments" described at paragraphs: 315 (Forrester), 478 (Border) and 541 (Makandi) of the Claimants' Memorial, and include such things as investments in irrigation, road infrastructure, and moveable and immoveable assets such as machinery, trucks and storage and curing sheds.

substance of the von Pezolds' right to use public water for agricultural purposes (see Cl. Skel., para. 115).

- The Forrester Loans were indirectly expropriated as of 31 December 2001, when the Respondent refused to release foreign currency to enable the repayment of the Forrester Loans to Elisabeth, or as of 14 September 2005, when the Respondent expropriated the assets of the Forrester Estate, thereby also preventing the Forrester Loans from being repaid (see Cl. Skel., para. 120).
- Tobacco and its proceeds of sale (Forrester Estate) were either directly expropriated between 2004 and 2008 when the Respondent priced tobacco sales in US Dollars but paid the von Pezold Claimants in Zimbabwean Dollars at the Official Rate, which grossly overvalued the Zimbabwean Dollar, or else indirectly expropriated through the same process (see Cl. Skel., para. 121) (the "**Forrester Tobacco Shortfall**").
- US Dollar bank deposits from tobacco sales (Forrester Estate) were directly expropriated when the Respondent refused to release proceeds from the von Pezold Claimants' tobacco sales in US Dollars, despite having promised to release 25% of the proceeds in US Dollars. The Claimants submit that these measures were illegal under Zimbabwean law because they were not authorized by a Minister (see Cl. Skel., para. 122) (the "**Forrester Conversion Amount**").
- US Dollar export proceeds (Border Estate) were directly expropriated between 2004 and 2009 through the Respondent forcing the Claimants to sell a percentage of their US Dollar Border Estate export earnings to the Respondent in return for an "equivalent" amount of Zimbabwean Dollars based on Official Rates (see Cl. Skel., para. 123) (the "**Border Liquidation Shortfall**").
- US Dollars from Border's account were directly expropriated as of 5 September 2008 when the Respondent, without authority, debited foreign exchange from Border's and Border International's bank accounts. The Claimants submit that these measures were illegal under Zimbabwean law because they were not authorized by a Minister (see Cl. Skel., para. 124) (the "**Border Forex Losses**").
- The **Makandi Acquisition Rights** were indirectly expropriated as of 14 September 2005 when six of the Makandi Properties were directly expropriated, as the Makandi Acquisition Rights subsequently became worthless (see Cl. Skel., para. 125).

472 The Claimants also allege that on 17 January 2002, 6,000 tonnes of maize was seized by the Zimbabwean Grain Marketing Board from the Forrester Estate. The Marketing Board paid the Estate Z\$15,000.00 per tonne for 4,500 tonnes of the maize, but the Claimants submit that the market price of the maize was Z\$37,571.004. One thousand five hundred tonnes of the maize remained on the Forrester Estate, despite alleged attempts by the Respondent to remove the maize (see Mem., paras. 860-863) (the "**Seized Maize**").

473 The Claimants refer to the evidence of Ms. Tsvakwi and Mr. Machaya during the Hearing, during which both witnesses appeared to accept that all of the Claimants' Properties (both the Zimbabwean Properties and the Residual Properties "**Claimants' Properties**") have been expropriated (see Cl. PHB, para. 129; Tr. Day 4, p. 1183 – Tsvakwi; Tr. Day 5, p. 1469 – Machaya). The Claimants suggest that the Respondent now accepts that all of the Claimants' Properties have been expropriated (see Cl. PHB, para. 129 and note 420; Resp. Skel., para. 10.2.3). The Claimants also note that Ms. Tsvakwi and Minister Mutasa accepted during the Hearing that no compensation was paid for the expropriation of the Zimbabwean Properties and, further, that Ms. Tsvakwi accepted that the Constitutional Amendment prohibited the Claimants from challenging the expropriations in the courts (such that there was a lack of due process) (see Cl. PHB, para. 130; Tr. Day 4, p. 1207 – Tsvakwi; Tr. Day 5, p. 1403 – Mutasa):

Cross-Examination of Ms. Tsvakwi (see Tr. Day 4, pp. 1206-1207, 1244):

Q. So, is essentially you're seeking to punish people who happened to acquire land which once upon a time was owned by colonizers.

A. No, it's not to punish them. It's to correct the historical imbalance.

Q. But it's a big punishment. I mean, if you just imagine you've worked hard for a long time, you've complied with the laws and you've bought an asset and someone comes in, your life's work and they take it for no compensation, that's a punishment, isn't it? It is in our book.

A. Compensation is supposed to be paid.

Q. But it wasn't paid.

A. That was because of the shortage of resources, but it will be paid for both land and improvements.

...

Q. Do you accept as a general policy statement—you have stated that you respect due process. And that—my understanding was you're referring to the right to challenge expropriations in the courts.

A. Yeah. During that time it was too cumbersome because whatever the Government tried to acquire we would find ourselves in the courts because the acquisition process was being challenged at that time.

Q. So the—sorry. So the purpose of the Constitutional Amendment was to take away that due process so it was less cumbersome? That was one of the purposes?

A. The purpose was not to challenge the acquisition itself but only compensation.

Q. Okay. Again, that was because you could—yes, you could no longer go to court?

A. Yes.

Cross-Examination of Minister Mutasa (see Tr. Day 5, pp. 1403, 1384):

Q. And do you accept that compensation has not been paid to the von Pezolds with regard to the expropriation of their land?

A. They don't need it. I would—I would protest very violently that these people are being paid unfairly. They have lost absolutely nothing. They did not bring anything with them from Germany that should be compensated.

Q. And do we agree that up until the Constitutional Amendment of 2005, you agreed to provide due process in regards to expropriation?

A. Well, with the difference that we stated publicly that Land Reform problems should not be referred to courts. They should be settled by the Ministry of Lands, and that understanding still exists.

Q. Okay. And, again, I'm assuming you're familiar with the laws. Okay. So you're saying that the issue is being taken to the Ministry of Lands as opposed to the courts. So the Courts' jurisdiction in this regard no longer applies?

A. It doesn't apply at all.

Q. But only from 14 September 2005 onwards?

A. Uh-huh.

474 According to the Claimants, on either treaty standard, the lack of either compensation or due process means that the expropriations were unlawful.

475 Nonetheless, much of the Parties' argument and evidence has been focused on the other two criteria set out in the expropriation standards, namely public purpose and non-discrimination. The Claimants note that although public purpose is one of the elements of a lawful expropriation, it does not excuse the expropriating State from its obligation to pay compensation, as an expropriation for a public purpose is nevertheless an expropriation. The Claimants refer to the evidence elicited from both the Claimants' and Respondent's witnesses during the Hearing in support of their view that the expropriations were not carried out for a public purpose. In particular, the Claimants refer to the following evidence (see Cl. PHB, paras. 132-137):

- Professor Chan's evidence that the immediate cause of the Invasions was the Government's defeat in the February 2000 constitutional referendum. The Government

attributed the loss to the white vote. The referendum included proposals for land nationalization and was opposed by the MDC, who were perceived to be supported by whites; in response the Government quickly took control of and propelled the land invasions of predominantly white-owned farms, which commenced three days thereafter, fearing that if it did not it would lose the June 2000 parliamentary elections (see Tr. Day 3, pp. 937-938, 954-956; Chan I, paras. 21-23 and 43, C-37);

- Professor Chan's evidence that freedom fighters in the field informed him in 1980 that they primarily fought for political freedom, not land reform (see Tr. Day 3, pp. 943-944);
- Professor Chan's evidence as to the damage suffered by Zimbabwe because of the LRP in terms of hyperinflation, loss of agricultural productivity, dislocation of society, destruction of the middle class and loss of agricultural markets to surrounding countries (see Tr. Day 3, pp. 962-964; Chan I, paras. 64-65, C-37; Chan II, para. 52, C-680);
- John Robertson's written evidence (see Robertson I, paras. 12 and 16-27, C-36);
- Ms. Tsvakwi's acceptance that the LRP has caused suffering (although she attributes suffering at least in part to the lack of credit lines from the IMF and World Bank due to sanctions) (see Tr. Day 4, pp. 1230, 1235, and 1236);
- Ms. Tsvakwi's acceptance that the police, the army and ZANU-PF, through the membership of provincial land identification committees, participated in the allocation of land that had been expropriated, which the Claimants say is a clear indication that the distribution of land was not done by non-partisan means. Ms. Tsvakwi accepted that the provincial land committees "should have been composed of people who were completely independent" (see Tr. Day 4, p. 1222);
- Ms. Tsvakwi's admission that the letter from the Chief Lands Officer of Mashona Land Central to the Governor and Resident Minister and the Provincial Lands Committee Chairman, Mashona Land Central, dated 13 September 2012 was evidence that Government officials were using the LRP for political purposes (see Tr. Day 4, p. 1228; C-766);
- Ms. Tsvakwi's testimony in response to an excerpt from the letter, excerpted at the beginning of the quote below (see Tr. Day 4, pp. 1228-1229):

Q. Progress on bankable 99-year leases has reached landmark deals with the banking community. Draft document has been forwarded to the Justice and Legal Minister, who shall present it to the Cabinet for

approval. A1 permits have also been designed and shall be operationalized soon, in time for preparation for election campaign.”

That’s a clear indication, as your—someone at least, these two Government officials—are using the Land Reform Programme to curry favour with the electorate?

A. Yes, I’ve seen the document.

Q. Do you agree with that statement in 6?

A. I do.

Q. You do. Okay.

A. But I wanted to add that the fact that the document was going to be submitted to Cabinet, Cabinet was composed of all the Parties—the MDC and the ZANU-PF—so they were going to consider the document:

Q. Okay. Can you tell me which Party those two gentlemen are from who wrote the letter?

A. I don’t know the parties. It is just an official. I don’t know which Party he belongs to.

Q. What about the resident Minister? He would be—was he ZANU-PF?

A. That man is ZANU-PF.

- Ms. Tsvakwi’s evidence that the Government’s mandate came from the “spontaneous mobs” (see Tr. Day 4, p. 1250); and
- The political beneficiary table prepared by the Claimants identifying expropriated properties allocated to senior government officials (see C-519), the Claimants’ position being that the fact that such people received expropriated property contradicts the stated aims of the LRP (which was in the Respondent’s evidence) to give land “to landless indigenous people who were crowded in the arid communal areas” (see Tsvakwi I, para. 36, R-1; see also Cl. PHB, para. 136).

476 . As regards the criterion of non-discrimination, the Claimants refer to the following evidence given by Ms. Tsvakwi and Minister Mutasa at the Hearing (see Cl. PHB, paras. 139-142):

- Ms. Tsvakwi’s evidence that once a farmer had his land expropriated the determination as to whether or not he could stay on the land was based purely on the fact that he was white and/or the size of the farm (on cross-examination, Ms. Tsvakwi confirmed that the determination was made on the basis of the racial identity of the farmer; on redirect examination, Ms. Tsvakwi stated that the criterion for expropriation was based on size; finally, during re-cross-examination, Ms. Tsvakwi testified that nearly all of the white-owned

commercial farms fell within the size criterion and therefore qualified for expropriation by default) (see Tr. Day 4, pp. 1204, 1249 and 1251);

- Ms. Tsvakwi and Minister Mutasa's evidence that the effect of the Constitutional Amendment was to reduce the number of white farmers from 4,500 to approximately 300 (see Tr. Day 4, pp. 1183-1185 – Tsvakwi; Tr. Day 5, pp. 1372-1373 – Mutasa);
- Ms. Tsvakwi and Minister Mutasa's evidence that the Claimants' investments were expropriated because the Claimants are white and in their opinion are "in the mould of white colonizers", "colonialists" and "Rhodesians" (see Tr. Day 4, pp. 1204-1205 – Tsvakwi; Tr. Day 5, pp. 1350-1352, 1373 and 1374 – Mutasa);
- Minister Mutasa's evidence that the von Pezolds should never have held land in Zimbabwe because they are not Zimbabweans (see Tr. Day 5, pp. 1390-1391); and
- Ms. Tsvakwi's evidence as to the policy toward black farmers (in contrast to that toward white farmers) which was not to expropriate their farms, although a small number of black-owned farms were expropriated in breach of this policy; and Ms. Tsvakwi's confirmation that, under the new Constitution, black Zimbabweans were to be compensated for land and improvements, whereas white Zimbabweans were only to be compensated for improvements (see Tr. Day 4, pp. 1190 and 1248; Tr. Day 4, pp. 1190-1192; see also Utete Report, p. 35, s. 1(c), C-221 and Tr. Day 3, p. 657 – Theron; 2013 Constitution, s. 16.8(1) and 16.8(3), CLEX-331).

477 The Claimants also refer to the Respondent's opening submissions during the Hearing, in which counsel for the Respondent stated that, given that whites took the land prior to independence, it was the whites whose land had to be expropriated and that if it had been the Japanese who had taken the land then it would have been the Japanese whose land was expropriated (see Tr. Day 2, pp. 386-387; see also Resp. Skel., para. 177). The Claimants' position is that such statements only serve to highlight the arbitrary and discriminatory nature of the Respondent's conduct (see Cl. PHB, para. 141).

478 As regards Section 23(3)(g) of the Constitution, which deals with affirmative action, the Claimants note that this provision was enacted in order that the Zimbabwean courts could not rule that the 2005 Constitutional Amendment was discriminatory. The Claimants aver, however, that a domestic law provision does not prevent this Tribunal from holding that a measure is discriminatory and that, in any event, that provision was not retrospective, as confirmed by Mr. Machaya (see Cl. PHB, para. 142; Tr. Day 5, pp. 1473-75; Constitution Amendment, s. 23(3)(g), CLEX 19).

(ii) Respondent's Position

479 The Respondent's position regarding the Claimants' expropriation claim was initially set out as follows (see CM, para. 125-126):

The Claimants submit that the expropriation of their properties were in violation of Article 4(2) of the German BIT and Article 6(1) of the Swiss BIT. The Respondent concedes that the compulsory acquisition done in terms of the Land Acquisition Act and its Constitution is tantamount to expropriation. Respondent contends however that the measures it took were lawful and did not violate any of the BITs and Protocols. As regards the monetary and fiscal regulatory measures taken by the Respondent which are alleged to have expropriated their sales proceeds and profits, Respondent contends that as any other State it is entitled to regulate its monetary affairs, and investors in the country are obliged to comply with such regulatory measures.

The exercise of such discretion by the Respondent was not so unreasonable given the economic realities of the Republic at the relevant time. The discretion has to be viewed in the context of the country's prevailing circumstances and as such international law should not intervene. [citations omitted]

480 The Respondent argued that none of the Residual Properties had been expropriated, reasoning that the Respondent had not done anything to interfere with the use and enjoyment of such property, and that, while the Zimbabwean Properties had been expropriated, the Claimants continued to use and control them, even reaping handsome profits (see CM, paras. 128 and 144). In the Rejoinder, the Respondent argued that, as a matter of public international law, none of the Claimants' Properties had been expropriated because the Claimants still controlled them (see Rejoinder, paras. 1055-1060). In its Post-Hearing Brief, the Respondent reverted to the more nuanced argument that there has been no wrongful taking, as the Claimants received full compensation beginning promptly upon "enactment of the Constitutional Amendment in the form of eight years of substantially unencumbered use of the Forrester Estate, the Border Estate and the Makandi Estate during which time the Claimants continued to export product at their own independently set intercompany transfer prices" (see Resp. PHB, para. 231). The Respondent submits that the means (i.e., amount) of compensation is proportional "under broad Public Order circumstances" (see *ibid.*, fn. 827).

481 The Respondent submits that the expropriations were carried out for an overriding "public purpose", and for this reason were lawful (see CM, paras. 131-132):

Public purpose is considered by international law to be of such overriding importance that it is allowed to derogate from the principle of respect of private rights. The public need must be genuine and governed by the principle of good faith. The Claimants aver that the land reform in Zimbabwe was not for a public purpose as it benefitted the elite.

Respondent however contends that the expropriation was for a public purpose which overrides the interests of the individuals. As already stated in the historical background, there was a public need for land which had to be addressed.

Compulsory acquisition of land by the Respondent was in the interest of the general public and more particularly the indigenous people who were disadvantaged due to the colonial system of government regarding land tenure.

482 As regards the FTLRP, the Respondent avers that its goal was simply to maintain public order (see Resp. PHB, para. 255):

Once the uprisings 'happened', this Government like any Government had to react, to govern, to decide. Faced with the fact that the uprisings 'happened', understanding the pent-up pressure of history, it made the right decision not to turn on its people, not to risk a massacre, but to the best of their understanding of their own people to maintain the public order, and to follow the mandate of the masses marching with sticks and stones: war veterans' and the land hungry masses' hostility to the Government's slow pace of land reform forced the Government to embark on Fast Track Land Reform."

483 The Respondent also avers that elites having land does not negate public purpose. The Respondent likens President Mugabe to Nelson Mandela, freedom fighter turned politician, in support of its explanation as to why officials have been granted land (see Resp. PHB, paras. 267-269):

Given the overwhelming Public Interest, elite, having land, which is normal in any society, does not negate Public Purpose. One of the worst legacies of machine gun proclaimed "white superiority" was to crush African Zimbabweans' self confidence. Certain men rose above this handicap, men such as Nelson Mandela about whom it was said at the time of his funeral that Mr. Mandela never seemed to doubt that he was the equal of any man. The same can be said of Mugabe: Protester. Prisoner. Teacher. Peacemaker. President who advanced the education and healthcare of his people and who has strived to reduce inequalities and of Mutasa, each men of character, who do not purport to be submissive.

At the Nelson Mandela Memorial CNN aired on December 10, 2013, Christiane Amanpour commented that although the West may see them as dictators and that sometimes it is difficult for people in the west to get it, the fact is the huge crowd at Nelson Mandela's Memorial service gave an extraordinary applause for Robert Mugabe, a great liberation leader: one of the original to cast off the mantle of white oppression. People here don't forget that.

Senior officials holding land is not "corruption". Many of those officials risked their lives to liberate their country from the yoke of the foreign oppressor. "Zimbabwe Takes back its Land" concludes "Many Zimbabweans think fairness requires preference for war veterans and that occupiers should receive priority.": Minister Mutasa confirmed during his oral testimony: "If they are part of the Fighters, the people who actually went out to fight the illegal system of Ian Smith, well, they are entitled. That is part of what is their payment.

484 The Respondent also denies that the LRP is discriminatory (see Resp. PHB, para. 233):

There is no discrimination in Respondent's Land Reform Program. Respondent is not responsible for historic allocation of large-scale estates into few hands. Respondent did not pick any race by which to be exploited and it did not pick any race from which to re-distribute land but from the holders of the land. Prof. Chan agrees the historic holders were white. Has they been of a neighbouring black African State or Japanese, land had to be taken from those who had it, a clear

non-discriminatory criterion. As Mrs. Tsvakwi testifies, large-scale farms owned by blacks were taken for re-distribution as well. [citations omitted]

485 In its Counter-Memorial, the Respondent set out concisely the historical context underpinning the LRP, which forms the basis for its position that the taking of the Claimants' property was non-discriminatory (see CM, paras. 140-143):

... Land was at the heart of the problems in the Republic from Lobengula's time. It was one of the major reasons for waging war against the colonial powers and those who sought to perpetuate the colonial legacy. Land had to be taken from those who had (predominantly white) and restored to those who were historically disadvantaged (predominantly black). The issue of whether there was discrimination in the treatment of whites over the land question cannot be addressed without reference to the history of land ownership in the Republic. The First Chimurenga (uprising) in 1893 to 1896 was fought to restore land seized from blacks in 1890. The War of Liberation (Second Chimurenga) which ended with the Lancaster House Agreement in 1979 was over land and the Agreement nearly collapsed on account of the land question.

It is important to point out that the Colonial Government put in place policies that favoured the white commercial farmers. They could get training, direct grants, loan guarantees schemes, funding for agricultural research and funds for building roads. As a result of the government policy many whites bought farm lands. The areas reserved for white tended to be upland areas where rain fall was higher and the soil fertile.

The Land Policy then resulted in whites who constituted less than 1% of the population owning more than 70% of the arable land including most of the best land. As regards the blacks, very few could afford to buy small plots in Native Purchase Areas reserved for them by the Colonial Government. They had no access to finance and financial institutions.

The taking therefore was not discriminatory. It followed the realities of land ownership vis-à-vis the exercise for the redistribution of that same land.

486 As regards due process, the Respondent submits that prior to the 2005 Constitutional Amendment, it was open to the Claimants to apply to the municipal courts for review in connection with the taking of their property, referring to *Mike Campbell (Private) Limited and Anors v. Min. of National Security Responsible for Land, Land Reform and Resettlement and Anor*, which established that anyone affected by an acquisition could approach the court for review. The Respondent also relies on *James*, where the ECHR held that a decision not to grant judicial review where landlords were deprived of their property interest in the public interest was lawful. Thus, even once the 2005 Constitutional Amendment was enacted, which precluded farmers from challenging the expropriation of their farms before the courts, the Respondent contends that due process was not violated (see CM, paras. 146-148):

... The Constitutional Amendment number 17 was a response to the difficulties caused by the acquisition of farms (including those protected by bilateral agreements) on an individual basis through the courts. Litigation delayed the acquisition. The exercise was expensive and the pressure from the landless society agitating for resettlement was immense. The Amendment Number 17 was

clearly not a violation of due process. Further the claimants had reasonable advance notice that their properties were going to be expropriated. This was through the Section 5 Notices in terms of the Land Acquisition Act.

Furthermore the Government of Zimbabwe introduced Section 16B in its Constitution to acquire rural land that had been previously identified under Section 5 of the Land Acquisition Act. Section 16B put an end to litigation over rural land compulsorily acquired for resettlement which land had been identified under Section 5 for acquisition through the Land Acquisition Act. It is important to point out that litigation over the acquisition of land was put to an end only in respect of rural agricultural land that had been acquired by Government.

As regards compensation for improvements a person whose farm has been acquired and is not satisfied with the amount of compensation can approach the court for the determination of an appropriate amount.

487 Thus, in its Post-Hearing Brief the Respondent stated that "exceptional circumstances of maintaining Public Order" justified "constrained due process", noting that the acquisition process was expensive and pressure from the landless society agitating for resettlement was immense (see Resp. PHB, para. 232).

(iii) The Tribunal's Analysis

488 The Claimants contend that the Respondent has breached the expropriation provisions of the German and Swiss BITs⁶⁸.

489 Article 4(2) of the German BIT provides as follows:

Article 4

Protection and Safeguards

...

(2) Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalised or subjected to any other measure the effect of which would be tantamount to expropriation or nationalisation in the territory of the other Contracting Party except for a public purpose and against prompt, adequate, and effective compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or impending expropriation, nationalisation or other comparable measure becomes publicly known. Such compensation shall be paid without delay, shall carry the usual commercial interest until the date of payment and shall be effectively realisable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalisation, or other comparable measure of the determination and payment of such compensation. The legality of any such expropriation, nationalisation or other comparable measure and the amount of such compensation shall be subject to review by due process of law.

⁶⁸ It is recalled that Rüdiger claims only under the German BIT, apart from invoking Article 6(1) of the Swiss BIT by virtue of the German BIT MFN clause. It is further recalled that the Border Claimants claim only under the Swiss BIT.

490 Article 6(1) of the Swiss BIT provides as follows:

Article 6

Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The investor affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its territory, and in which investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure that compensation according to paragraph (1) of this Article will be made available to such investors.

491 Thus, the criteria for a lawful expropriation under the BITs are:

- Public purpose;
- Prompt, adequate and effective compensation paid without delay;
- Non-discriminatory basis (Swiss BIT only); and
- Due process

492 There is therefore, in practice, relatively little difference between the criteria under Art 4(2) of the German BIT and Art 6(1) of the Swiss BIT. Accordingly, where the Tribunal finds below an unlawful expropriation under the Swiss BIT, it also finds an unlawful expropriation under the German BIT. Although there could foreseeably arise a case in which an expropriation was lawful under the German BIT yet unlawful under the Swiss BIT (because, although satisfying the criteria under Art 4(2) of the German BIT, it was carried out on a discriminatory basis in breach of Art 6(1) of the Swiss BIT), those very specific circumstances do not arise here. It is therefore not necessary to consider Rüdiger's claim to be entitled also to rely on Art 6(1) of the Swiss BIT by virtue of the MFN clauses contained in the German BIT.

493 The Tribunal considers these criteria in connection with each major asset group in turn below.

a) Zimbabwean Properties

494 While the Respondent has vacillated on its position as to whether the Zimbabwean Properties (see above, para. 157) were expropriated, it has not seriously contested as a matter of fact that these properties were expropriated. The fact that the Claimants remain in control or possession of parts of the Zimbabwean Properties does not mean that they have not been expropriated. The Tribunal agrees with the Claimants' contention that the transfer of legal title is sufficient here to establish expropriation.

495 To recall, the properties that allegedly have been directly expropriated as a result of the Constitutional Amendment are all ten of the Forrester Properties, 21 of the 28 Border Properties (two of which contain a sawmill), and six of the nine Makandi Properties, collectively referred to herein as the Zimbabwean Properties (see above, para. 157), along with the Water Permits attaching to the Makandi and Forrester Properties (see above, paras. 147 and 153). As noted above, although legal title has been transferred, the Claimants remain in possession and control of large sections of the properties (according to the Claimants, one third of the Forrester Estate is occupied by Settlers/War Veterans, 16% of Border Estate is occupied by Settlers/War Veterans, and 29% of the Makandi Estate is occupied by Settlers/War Veterans.

496 The Respondent further argues that the expropriations were lawful or that there was no real expropriation because the Claimants remain on the land. In relation to deciding whether the expropriation was lawful under the BITs, the Tribunal notes that all of the conditions set out in the relevant BITs must be met. As set out above, this would require payment of compensation, that the taking be for a public purpose, and that there be access to due process. In the case of the Swiss BIT, the taking must also be conducted on a non-discriminatory basis.

497 It is clear that no compensation has been paid for the properties and therefore that the expropriation did not fulfil the "lawful" criteria. The Tribunal rejects the Respondent's argument that continued use of the properties constitutes compensation for the expropriation. Any income that may have been gathered after 14 September 2005 would not equate to prompt adequate and effective compensation without delay. Any continued income would instead be a factor in assessing damages and loss.

498 As no compensation was paid, there is no need to decide whether the acquisition was for a public purpose, whether there was access to due process or, in the case of the Swiss BIT, whether the acquisition was non-discriminatory.

- 499 However, as the Parties have pleaded extensively on these matters, the Tribunal addresses them briefly here. The 2005 Constitutional Amendment not only transferred legal title to the above-mentioned properties from the Claimants to the Government of Zimbabwe, it expressly denied the Claimants access to due process by removing the ability of landowners to challenge the acquisition of their land, as they had been entitled to do prior to the Amendment under the *Land Acquisition Act*. Ms. Tsvakwi acknowledged this during the Hearing (see Tr. Day 4, p. 1244, lines 2-21).
- 500 The Tribunal rejects the application of ECHR jurisprudence to the present case to justify the extinction of the right of challenge that previously existed for landowners under the Land Acquisition Act. The Tribunal notes that the Amendment also criminalized the continued possession or occupation of agricultural land expropriated pursuant to the Amendment. These steps did not constitute a "constraint" on due process, but rather its total elimination.
- 501 As regards to the criterion of non-discrimination in the Swiss BIT's expropriation provision, the evidence supports a conclusion that the Claimants were targeted as a result of their skin colour and, hence, the taking was discriminatory in breach of the Swiss BIT. The Tribunal notes, for example, Ms. Tsvakwi's evidence as to the policy toward black farmers (in contrast to that toward white farmers) which was not to expropriate their farms, although a small number of black-owned farms were expropriated in breach of this policy, as well as Ms. Tsvakwi's confirmation that under the new Constitution, black Zimbabweans were to be compensated for land and improvements, whereas white Zimbabweans were only to be compensated for improvements (see Tr. Day 4, p. 1191, lines 5-20)⁶⁹. The Tribunal also accepts the evidence of Mr. Machaya that s 23(3)(g) of the new Constitution was not enacted with retrospective effect, to the extent such a provision could have justified or shielded an otherwise discriminatory provision in the Constitution (a matter on which this Tribunal need not opine).
- 502 Finally, the Respondent has failed to establish that there was a legitimate public purpose behind the expropriation. The Tribunal has carefully considered the Respondent's arguments relating, in effect, to the righting of historical wrongs. The Tribunal cannot, however, accept these arguments as support for the expropriation of the Zimbabwean Properties having been carried out for a "public purpose". Once taken, large parts of the properties have not actually been re-distributed to a historically disadvantaged or otherwise landless population, but remain in the *de facto* possession of the Claimants. With regard to the land that has been re-distributed, there appears to be a clear trend towards politically-motivated allocations of land. Therefore, there is no evidence that the

⁶⁹ See the Tribunal's further discussion of racial discrimination in the context of the Repondent's necessity defence at Section VI.I.(7), especially paras. 648-657.

expropriation of the Zimbabwean Properties was in the public interest or served a genuine public purpose.

503 Based on the foregoing, the Tribunal finds that the Zimbabwean Properties (including the Makandi and Forrester Water Permits and the Tilbury and Charter Sawmills) were unlawfully expropriated by the Respondent as of 14 September 2005, on which date the 2005 Constitutional Amendment vested title in the Zimbabwean Properties in the State.

b) Residual Properties

504 The Claimants have shown that the Residual Properties not directly expropriated (seven Border Properties, two further properties on the Border Estate and three Makandi Properties, see above, para. 158) are essentially rendered worthless without the Zimbabwean Properties, as they are not economically viable as individual operations (i.e., without the use of economies of scale provided by the larger venture). This amounts to an indirect expropriation and therefore the Government has also breached the BITs in relation to the Residual Properties. The Tribunal includes here also the Makandi Acquisition Rights.

505 Accordingly, the Tribunal finds that the Residual Properties were also unlawfully expropriated by the Respondent as of 14 September 2005, on which date the 2005 Constitutional Amendment vested title in the Zimbabwean Properties in the State.

c) Income-Generating Assets on the Claimants' Properties and the Zimbabwean Company Shares

506 The Income-Generating Assets on the Claimants' Properties include Border's two factories, the pole treatment plant and the Sheba sawmill.

507 The Claimants have shown that the Residual Properties cannot sustain these assets and therefore they are effectively valueless or, at least, their value has been reduced to such an extent that they should be considered indirectly expropriated.

508 To this end, the Tribunal accepts the Claimants' submission at para. 851 of the Memorial:

...[T]he remaining seven properties, which between them cover an area of 6,430 ha, the two factories, the pole treatment plant, and the remaining sawmill ... are not viable on their own and therefore they become worthless to the Claimants. The reasons for this are as follows. First, the remaining seven properties do not have enough plantable area to sustain an integrated forestry operation. Second, there are insufficient numbers of saw logs available from third parties. Third, and in any event, the revenue generated from such an operation would not cover the costs of the operation.

509 Similarly, the Tribunal accepts the Claimants' submissions that, upon the expropriation of the Claimants' Properties, the Claimants' shares in the Zimbabwean Companies which held title to the Claimants' Properties were rendered worthless such that they must be considered to have been indirectly expropriated.

510 Accordingly, the Tribunal also finds that the Income-Generating Assets on the Claimants' Properties and the Zimbabwean Company Shares were unlawfully expropriated in breach of the BITs as of 14 September 2005, on which date the 2005 Constitutional Amendment vested title in the Zimbabwean Properties in the State.

d) Forrester Water Rights

511 The original Water Rights for the Forrester Estate were granted under the *Water Act 1976*. In 2000 these were replaced without compensation by Water Permits pursuant to the *Water Act 1998*. The main differences between a Water Right and a Water Permit are: (i) duration (in perpetuity versus 20 years); (ii) the possibility of a levy for consumption under the Water Permits (a levy was charged to the von Pezold Claimants from 2009); and (iii) there is no explicit provision for compensation if rights under a Water Permit are amended. The Claimants have submitted both indirect and direct expropriation claims in respect of the loss of these Forrester Water Rights.

512 The von Pezold Claimants' indirect expropriation claim is based on the premise that their rights under the Permits were "so different, and much-diminished" when compared with their rights under the previous system that their original Water Rights were effectively lost. While the changes to duration, levying process and compensation rights under the new Water Permits regime were significant, the Tribunal is not persuaded that they are sufficient to amount to an indirect expropriation of the Forrester Water Rights. This is particularly so given that, after 2000, the von Pezold Claimants remained able to use the surface water at the Forrester Estate as they had previously done under the Water Rights regime, and that no substantive levy was charged until well after all of the Forrester Properties themselves were expropriated in 2005. Accordingly, no indirect expropriation of the Forrester Water Rights in 2000 has been established. The loss suffered by the Claimants in this respect is more appropriately dealt with in the context of the von Pezold Claimants' FET claims below.

513 In terms of direct expropriation, the Forrester Water Rights (later the Water Permits) attached to the land, and were therefore, as the Tribunal has already found above, expropriated in 2005 along with all of the Forrester Properties. However, the value of the Forrester Water Permits is inextricably tied to, and accounted for as part of, the value of the Forrester land. The Tribunal is therefore not inclined to find any additional direct expropriation for the Forrester Water Permits

beyond the general expropriation of the Forrester Properties in 2005, and therefore dismisses this claim.

514 The von Pezold Claimants also assert a loss of value of the Forrester Shares as a result of the conversion of the Forrester Water Rights to Water Permits (see Reply, para. 545). As with the discussion of direct expropriation above, however, the Tribunal does not consider that this loss is sufficiently distinct from the loss caused by the general expropriation of the Forrester Properties to constitute a separate head of damage, and therefore dismisses this claim.

e) Forrester Loans

515 The Forrester Loans were made by Elisabeth to the Forrester Estate between 1994 and 1998. Twelve of the Forrester Loans remain outstanding. As with the Forrester Water Rights claim addressed above, the von Pezold Claimants have submitted both direct and indirect expropriation claims in respect of the Forrester Loans.

516 The indirect expropriation claim relates to the Government's refusal to release foreign currency to enable the repayment of the Forrester Loans in December 2001. It is unclear from the pleadings and the evidence, however, whether the von Pezold Claimants' inability to obtain the foreign currency would have become a permanent state of affairs, or whether foreign currency might have become available at a later date in order to allow repayment. The Tribunal is therefore not convinced that the Respondent's actions in December 2001 constituted an indirect expropriation – i.e., a permanent deprivation – of the value of the Forrester Loans. As with the von Pezold Claimants' claim for direct expropriation of the Forrester Water Rights considered above, the Tribunal considers that this issue is more appropriately dealt with in the context of the von Pezold Claimants' FET claims below.

517 The von Pezold Claimants' second submission is that the Forrester Loans were directly expropriated on 14 September 2005, when the Respondent expropriated the assets of the Forrester Estate – thereby also preventing the Forrester Loans from ever being repaid. However, the evidence shows that the Forrester Estate continued to produce income for the von Pezold Claimants and their companies (Forrester has been described as a "thriving business"). Thus this income (putting to one side the Respondent's refusal to release foreign currency, to be considered in more detail in the context of FET below) could well have been used to repay the outstanding balance of the loans. As a result, the Tribunal does not consider that the Forrester Loans were directly expropriated, and therefore dismisses this claim.

f) Border Forex Losses and Other Foreign Exchange Measures

518 The Tribunal finds that there has been a direct expropriation in relation to monies directly debited from the Claimants' accounts by the Respondent – namely, when the Respondent took US Dollars directly from the Claimants' accounts (the "**Border Forex Losses**"). That direct expropriation occurred on 5 September 2008, when the Respondent began debiting US Dollars from Border and Border International's bank accounts, and continued until 19 September 2008 (see Cl. Skeleton, para. 124; Heinrich I, para. 845).

519 With regard to loss of value resulting from the Respondent's other foreign exchange measures applicable to the conversion of US Dollars to Zimbabwe Dollars (namely, the Forrester Tobacco Value Shortfall, the Forrester Conversion Amount and the Border Liquidation Shortfall), however, the Tribunal considers that while an FET breach has been made out (see discussion below), expropriation has not. Accordingly, the Tribunal dismisses all other aspects of the Claimants' foreign exchange measures expropriation claim.

g) Seized Maize

520 Finally, the Claimants allege that 4,500 tonnes of maize was directly expropriated by the Respondent when the state-controlled Grain Marketing Board seized maize from the Forrester Estate on 19 January 2002. The Respondent does not deny that the Grain Marketing Board seized the maize; rather, it disputes the Claimants' contention that the maize should have been paid for at the market price rather than at the Respondent's fixed grain prices (see CM, para. 155). The Tribunal is satisfied that the 4,500 tonnes of maize were directly expropriated by the Respondent without due process. Whether the Claimants suffered loss as a result of receiving an inadequate price in return from the Grain Marketing Board is more properly considered in the *quantum* section below.

h) Conclusion

521 Accordingly, the Tribunal finds that the Claimants have established unlawful expropriation by the Respondent in breach of Article 4(2) of the German BIT and Article 6(1) of the Swiss BIT, in connection with: (a) the Zimbabwean Properties; (b) the Residual Properties; (c) the Income-Generating Assets on the Claimants' Properties and the Zimbabwean Companies Shares; (d) the Border Forex Losses; and (e) the Seized Maize. The quantification of damages for these breaches will be considered below.

(2) Fair and Equitable Treatment

(i) Claimants' Position

522 The Claimants allege that the Respondent has breached the FET standard contained in Article 2(1) of the German BIT and Article 4(1) of the Swiss BIT. The Claimants submit that the FET standard contained in the BITs is not referable to the customary international law minimum standard of treatment. However, to the extent that it does incorporate the minimum standard, the Claimants submit that the minimum standard has evolved since the *Neer* case and that outrage, bad faith and wilful neglect of duty are no longer required to establish a breach of the customary international law minimum standard (see Cl. Skel., para. 133).

523 The Claimants contend that the purpose of the FET standard is to insulate investors from political risk and to protect their "legitimate expectations" (i.e., expectations arising from the investor's reliance on the State's representations, promises and commitments and all other circumstances where the State is found to have breached the FET standard) (see Cl. Skel., para. 131). The Claimants note that the FET standard in the BITs may be breached whether or not specific representations or assurances have been made by the State. Finally, the Claimants contend that the following are all elements of the FET standard (see *ibid.*, para. 135, relying on *Tecmed*, paras. 153-154, CLEX-202; *Waste Management*, para. 98, CLEX-208; and *Saluka*, paras. 302-303 and 307-308, CLEX-217; see also Cl. PHB, para. 146, relying also on *Kardassopoulos*, paras. 71, 419, 434 to 441; CLEX-248):

The State's conduct must not affect the basic expectations that the investor formed when making the investment, including those that arise from representations made by the host State which were reasonably relied on by the investor. The State's conduct must not be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, expose the investor to sectional or racial prejudice, coerce or harass the investor, or lack due process. States must be consistent, even handed, unambiguous, transparent, candid, act in good faith and with procedural propriety. Compensation must be paid upon expropriation. The State's policies must be implemented bona fide through conduct reasonably justifiable by public policies, i.e. the State's measures must be proportional. Different treatment must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies. States must ensure a stable business environment. Breach is not dependent on bad faith or intention.

524 The Claimants submit that the FET standard in the BITs was breached in connection with the following (see Cl. Skel., paras. 137-140):

- The Forrester Water Rights, for failure to compensate the von Pezold Claimants upon their conversion to Water Permits in 2000;
- The Zimbabwean Properties, Residual Properties and the Zimbabwean Company Shares, for failure to compensate the Claimants for the expropriation of their investments, as well

as for the arbitrary, discriminatory and violent manner in which the aggressive phases of the LRP were applied to the Claimants and their investments. The Claimants also submit that the LRP did not bear a reasonable relationship to rational policies, the LRP lacked transparency and candour, and the 2005 Constitutional Amendment denied the Claimants due process in preventing court challenges of the expropriation. Finally, the Claimants submit that the Respondent breached the undertakings made to the Claimants, and on which they relied, when they made their investments;

- The Forrester Loans, for the arbitrary refusal to release foreign currency for the repayment of the Loans. The Claimants also note that the expropriation of the Estates, and therefore the expropriation of the Forrester Loans, was without compensation; and
- The foreign exchange policy, for the grossly unfair, idiosyncratic, arbitrary and bad faith manner in which the Respondent set and used the Official Rates of Exchange. The Claimants add that none of the expropriations that occurred through the foreign exchange policy (the Forrester Tobacco Value Shortfall, the Forrester Conversion Amount and the Border Liquidation Shortfall) have been compensated.

525 The Claimants state that they had basic and legitimate expectations at the time they made their investments that the Respondent would treat them and their investments in a just, consistent, transparent, even-handed, non-arbitrary and non-discriminatory manner, "follow due process and act in good faith proportionately without coercion or harassment and pay compensation upon expropriation" (see Cl. PHB, para. 146). The Claimants assert that President Mugabe recognized these norms when he made speeches at the time the Republic of Zimbabwe gained its independence, which caused the von Pezolds to invest in Zimbabwe over other African States "that were less progressive" (see *ibid.*, citing Tr. Day 3, p. 669 – Rüdiger; PM Elect R. Mugabe Address to the Nation, 4 March 1980, C-444; PM Elect R. Mugabe, Address on Independence Eve, 17 April 1980, CLEX-445).

526 The Claimants submit that these expectations are rooted in international norms (and in particular the concept of good faith) and are not dependent on a specific representation of the State (see Cl. PHB, para. 146 citing *Saluka*, para. 307, CLEX-217). The Claimants state that the Respondent is wrong when it asserts that they should have expected their investments to be "indigenized" (see RHEX-24, para. 3; Tr. Day 2, pp. 396-397). The Claimants note in any event that the issue of "indigenization" has not been pleaded and that Zimbabwean indigenization laws did not enter into force until April 2008 (see Cl. PHB, para. 147).

527 The Claimants submit that evidence elicited during the Hearing concerning the Respondent's placement of Settlers/War Veterans on their Properties, concerning disproportionality and arbitrary

regulation, and concerning discrimination, the absence of a public purpose and lack of compensation and due process, establishes that the application of the aggressive phases of the LRP to the Zimbabwean Properties, Residual Properties, Income-Generating Assets and Zimbabwean Company Shares, and Forrester Water Rights, and the application of the Foreign Exchange Measures, were all contrary to the Claimants' basic and legitimate expectations at the time of investing and therefore the Respondent breached the FET standards (see Cl. PHB, para. 148).

528 Notwithstanding the foregoing, the Claimants also submit that the Respondent has breached specific representations and assurances given to the Claimants in regard to their investments (see Cl. PHB, Sched. 1). The Claimants note that, in regard to the Respondents' assurances concerning the scope of the LRP, the following evidence was elicited during the Hearing (see Cl. PHB, para. 150):

- Ms. Tsvakwi accepted that the Land Reform and Resettlement Programme and Implementation Plan Phase 2 of the Ministry of Lands, Agriculture and Rural Resettlement dated April 2001 was a government policy document concerning the LRP (see Tr. Day 4, pp. 1170-1171; C-218;
- Ms. Tsvakwi also accepted that it was the Respondent's policy between 1980 and 12 March 2004 not to expropriate more than 8.3 million ha of the 15.5 million ha of large-scale commercial farm land (see Tr. Day 4, pp. 1170-1172); that underutilized land was to be the focus of the LRP expropriations (see Tr. Day 4, pp. 1173-1174); and that it was the Respondent's policy not to expropriate properties covered by the BITs or properties forming tea, coffee, timber and citrus plantations (see Tr. Day 4, pp. 1174-1176);
- Mr. Scofield testified that in June 2001 the Minister responsible for forestry assured Border that forestry plantations would be excluded from the LRP (see Tr. Day 3, pp. 723-724, 727 and 728; Tr. Day 3, p. 750; Scofield I, para. 31, C-27);
- Ms. Tsvakwi confirmed the Respondent's policy in regard to properties covered by BITs by way of a *Note Verbale* dated November 2000 to all diplomatic missions (see Tr. Day 4, pp. 1176-1177; see also circular from Ministry of Foreign Affairs to all diplomatic missions and international organizations accredited to Zimbabwe dated 21 November 2000, C-227); and
- Ms. Tsvakwi did not dispute the Claimants' submission that the *Note Verbale* of 16 September 2005 was consistent with the Respondent's prior policy statements that BIT properties would not, and therefore had not, been expropriated by the Constitutional Amendment (see Tr. Day 4, p. 1182; *Note Verbale* dated 16 September 2005, p. 2, C-230).

529 In regard to the Respondent's other alleged assurances, the Claimants refer to the following evidence elicited during the Hearing (see Cl. PHB, para. 152):

- Rüdiger confirmed the appreciation expressed by a member of the Board of the Reserve Bank and the Minister of Lands when the von Pezolds acquired the Forrester Estate in 1982 (see Tr. Day 5, p. 680; Tr. Day 3, pp. 700-701);
- Minister Mutasa did not deny that a senior civil servant and the Ministry of Lands wrote to the von Pezolds in 1991 encouraging them to develop Forrester (see Tr. Day 5, p. 1364; see also letter from the Secretary of Lands dated 29 November 1991, C-496);
- Mr. Machaya accepted that the Zimbabwean court orders of 2002 (see para. 547 below) were binding on the Respondent and are an acknowledgement that the German BIT applies to the Forrester and Border Estates (See Tr. Day 5, p. 1453–1460). Mr. Machaya testified as follows:

Q: ... you must surely accept that [the Order dated 16 September 2002 in *Forrester Estate (Private) Limited v Minister of Lands, Agriculture and Rural Resettlement* (CLEX-378)] is a binding commitment, an acceptance by the Government of the Zimbabwe, that the German BIT applies to the Claimants' investments?

A: At that stage -- yes, I agree.

[...]

Q: ... I assume that you consider [the High Court's Final Order dated 6 November 2002 in *Forrester Estate (Pvt) Ltd v Minister of Lands, Agriculture and Rural Settlement* (CLEX-80)] to be a statement by the State of Zimbabwe acknowledging that the German BIT applies to the Forrester Estate?

A: Yes, certainly. Domestically, we would simply say that our judiciary has made this pronouncement.

[...]

Q: ... So, you would accept that what you said in relation to [CLEX-80], the same applies in relation to [the High Court's Final Order dated 6 November 2002 in *Border Timbers (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement* (CLEX-81)] in that it's binding on the State?

A: Yes. I would accept that it's a binding statement from our courts, although it is very clear that, in the last two cases, the executive were contesting that outcome [because the Orders were not made by consent].

- Further, Mr. Machaya accepted that Section 16(9)(b) of the Constitution, enacted in 1996 and relied on by the Claimants, prevented the application of domestic law to foreign investors to the extent it derogated from the property and compensation rights granted to foreign investors under treaties. Mr. Machaya was unable to provide convincing authority

for his argument that Section 16(9)(b) of the Constitution had been overridden by Section 16B of the 2005 Constitutional Amendment, which did not prohibit expropriation of land protected under international treaties. The Claimants say that the case cited by Mr. Machaya, the Supreme Court's decision in *Nyahondo*, cannot be relied upon because reasons for the decision have never been published⁷⁰. At the Hearing, Mr. Machaya could only speculate as to the Supreme Court's reasoning, as follows (see Tr. Day 5, pp. 1463-1469; see also Tr. Day 5, pp. 1499-1501):

Q ... Now the issue arises as to whether, in fact, Section 16B, the Constitutional Amendment, overrides Section 16(9b). And I understand that this was an issue in Zimbabwe and that the general understanding was, up—at one point was that it did not, but then the Supreme Court ruled on that issue.

Is that a fair summary of the matter?

A: Where I have doubts is whether there was such a general understanding. There was certainly active discussion as to whether or not Section 16B overrode the provisions of Section 16(9). It was a very active debate, and it—the debate is more fully spelled out in that case you have just referred to, *Route Toute*.

...

Q. And since that decision [*Nyahondo*], the Supreme Court, although it hasn't given any reasoning, has confirmed, in effect, what everyone believes *Nyahondo* to have said, which is that properties covered by Bilateral Investment Treaties can be expropriated whether or not the terms and conditions of the Treaty have been followed?

A. No. I don't think even the Order went that far, to say whether or not the terms have been—have been followed.

Q. So, is it still the law in Zimbabwe that properties which have been taken but the terms of the relevant Treaty have not been complied with, is that still illegal under Zimbabwean law?

A. Well, I can only comment on what I believe—

⁷⁰ The Supreme Court issued an Order dated 6 November 2008 directing that the applicant's appeal be "dismissed in its entirety". The Order notes that "detailed reasons for the judgment will be handed down in due course", but these reasons were never released (see Mem. at paras. 832–836). In the High Court, the Honourable Mr. Justice Musakwa found that title had lawfully vested in the Respondent further to expropriation of the applicant's land under the Land Acquisition Act and by virtue of Section 16B of the Constitution. The applicant's title had been "extinguished by law" and therefore the former land owner had no standing to seek the eviction of settlers on the land. With respect to foreign investors' rights under international treaties, the Court held that the Constitution "does not prohibit the compulsory acquisition of land that is subject to a bilateral investment protection agreement. Rather, the law provides that there be fair and prompt compensation to the affected party." *Nyahondo Farm (Private) Limited v. Brigadier General A.W. Tapfumaneyi & Ors*, Case No. SC 176/08, High Court of Zimbabwe, Harare, 7 July 2008, aff'd on appeal to the Supreme Court of Zimbabwe, Harare, 6 November 2008, CLEX-91 and CLEX-92. The *Nyahondo* judgments have therefore been relied upon as authority for the proposition that Section 16B(2)(b) of the 2005 Constitutional Amendment overrides Section 16(9)(b) of the 1996 Constitution. See e.g. the High Court's judgment in *Route Toute v Minister of National Security Responsible for Land, Land Reform and Resettlement*: "I am bound by the contrary position recently adopted by the Supreme Court in [*Nyahondo*] to the effect that agricultural land covered by investment protection agreements under section 16(9b) is susceptible to acquisition in terms of section 16B" (CLEX-93, p. 19).

Q. Yes, sure.

A.—this basis upon which the Supreme Court made its decision because what I argued for was that Section 16B overrode the provisions of Section 16(9).

Q. Yes.

A. And that I believe that the Order was based on an acceptance of that argument because of the way Section 16B is prefaced.

...

Q. And that the people in Nyahondo and other subsequent Supreme Court cases were challenging the expropriation because the Treaty had not been complied with. So, they were saying, "Look, these expropriations Notices and the Constitutional Amendment must be ineffective because we haven't been paid."

But the Court said, "Well, doesn't matter that you haven't been paid. The effect of the Constitutional Amendment, Section 16B, is quite clear. Your properties can be taken and have been taken."

A. Yes. Here I am merely stating an opinion. I believe that that is what the Court was saying, because in the absence of reason—reasons for the judgment, I can't speak to it. But I believe that's what they were saying, in the belief that the—the payment of compensation could only follow a valid acquisition.

- Heinrich von Pezold's evidence that Minister Mahachi in 1999 stated that the von Pezolds' then-intended further investment into Border in 2000 was "very positive" and that he "supported it" (see Tr. Day 2, p. 583).

530 The Claimants submit that the aforementioned assurances were bolstered by the Respondent in applying the German BIT provisionally from 8 September 1996 and by entry into force of the Swiss BIT on 9 February 2001, matters of which the Claimants were aware (see Heinrich I, para. 695-696, C-18; Rüdiger I, para. 47, C 20; Scofield I, para. 29, C-27; Gadzikwa I, para. 16, C-30; see also Tr. Day 3, pp. 703-704, exchange between Rüdiger and the Tribunal; and Tr. Day 2, p. 460, cross-examination of Elisabeth).

531 The Claimants note that the principle of *pacta sunt servanda* dictates that it is no defence for a State to assert that the investor had no legitimate expectation that the State would fulfil its promises even in circumstances of political risk, the very purpose of BITs being to encourage investment by insulating investors from political risk (see Cl. PHB, para. 153).

532 Finally, the Claimants submit that Ad Article 3(a) of the German Protocol relied upon by the Respondent does not exclude "[m]easures necessary for reasons of public security and order, public health or morality" from the FET standard, but rather excludes such matters from the national treatment and MFN standards in Article 3, which are not relied upon by the Claimants. The

Claimants also submit that it is very doubtful that the Calvo Doctrine has any application in public international law, but in any event it is not applicable to the Claimants vis-à-vis the Respondent, as the BITs provide standards over and above the national treatment standard (see Surrejoinder, para. 412, referring to *CMS*, pp. 81 to 82).

533 The Claimants reason that, in any event, the Respondent's measures concerning the aggressive phases of the LRP and its foreign exchange were not taken for reasons of public security and order, public health or morality, but were taken in order to keep the government in power and to illegally spend foreign exchange (see Cl. PHB, para. 154).

(ii) Respondent's Position

534 The Respondent takes issue with the Claimants' description of the FET standard, averring that it simply prohibits dealing in a discriminatory manner and, more generally, requires meeting the legitimate expectations of the investor (see Resp. PHB, paras. 242, 246). The Respondent relies on the ICSID cases of *LG&E* and *Kardassopoulos* in respect of content of the FET standard, emphasizing the *Kardassopoulos* tribunal's caution that "the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns" (see Rejoinder, para. 618). The Respondent analogizes the redistribution of land at the heart of the LRP to the development of the Gachiani-Supsa pipeline, at issue in *Kardassopoulos*, in terms of the relative national importance of the LRP to Zimbabwe (see RHEX-014, para. 12).

535 The Respondent notes that an investor's legitimate expectations are to be evaluated as at the time when the investor made its investment, including facts known to the investor prior to making its investment (see Rejoinder, paras. 621-622). The Respondent submits that the Claimants accepted a high business risk at the time they made their respective investments (see Rejoinder, paras. 631-635). The Respondent notes that investments were made in the Border Estate from 1992 to 2007 and in Makandi from May 2005 to May 2006, but, as Ben Freeth wrote in "Mugabe and the White African", by 2004 the "government was clearly in eviction mode" (see Rejoinder, para. 635). The Respondent expresses incredulity at the Claimants' characterization of the Lancaster House Accords concluded in 1979 (see Rejoinder, paras. 645-647, 650):

Claimants and the Commercial Farmers Union's position as to "expectations" is based on their posturing in a scenario akin to the following: Oh my, how could the Republic of Zimbabwe "overhaul the system" of land ownership? We never would have thought that could possibly be in their minds. After all, Ian Smith did not anticipate that for a thousand years to come! So, why should we?

Claimants do not hesitate to read the African Zimbabwean's minds and to declare that "Respondent downplays the significance of the land issue at the Lancaster House Conference." Significance to whom a curious mind might ask. There is no reason for this Arbitral Tribunal, faced with history today, to doubt the significance land held and continues to hold for those who risked their lives to gain control of

their own country. For Americans, it would not be seen as naïve to say "The Land of the Free"; neither should it be for Zimbabweans to hold that ideal.

Claimants say that the urgent issue at the Lancaster House Accords was "the terms of the cease fire ... so as to minimize the risk of attack by Rhodesian forces." It was reasonable for the Freedom Fighters to consider safety as urgent given the risk of being attacked by sophisticated armed forces. It was a necessity. The term duress is in order to describe the situation at the time of the Lancaster House Accords.

...

The fact that "land redistribution was just one of the key economic demands" does not make it any less important. Even if it has been "just one" does not make it go away. Land redistribution has been and is key to the economic success and social stability of every post-colonial society from the United States of America, to Malaysia, to Singapore. Majority rule and land ownership by that majority go hand in hand. [citations and emphasis omitted]

- 536 The Respondent also submits that "a party who enters a country covertly, at the time of admission of investments violates the regulations, rules and policies making up the legal system of the Host State [and] cannot form any real legitimate expectations it can 'reasonably rely on' as to 'protected status'" (see Resp. PHB, para. 240). Relatedly, the Respondent criticizes the structure of the Claimants' investments in Zimbabwe, describing their corporate organogram as an "impenetrable challenge", and alleges that their economic model (one of vertical integration) is designed to enrich the Claimants, whilst the Respondent's economic model "is intended to advance the public purpose cases represented by the Statue of Liberty in New York harbour ... including liberty, peace, human rights, abolition of slavery, democracy and the opportunity for the people of Zimbabwe" (see Rejoinder, para. 788). In RHEX-1, submitted during the Hearing, the Respondent described the Claimants' investments as "carefully organised, nebulous, secret, off shore maze of untraceable trusts, some 'dormant', holding a portfolio of asserts" (see also RHEX-007 relating to the Respondent's comments on the Claimants' organograms setting out the structure of their investments for each Estate).
- 537 The Respondent asserts that the Claimants knew that land reform would flow from majority rule, that investment in Zimbabwe was risky between 1998 and 2007, and that the Claimants' expectations were based on Rhodesian business practices of the 1950s.
- 538 The Respondent avers that it could not counter the will of the masses and that it is "excused for not shooting the masses" to meet the Claimants' "impossible demands" (see Resp. PHB, para. 243). The Respondent seeks to draw analogies between the LRP and the growing pains experienced by Zimbabwe since the implementation of the LRP with other social movements and revolutions, such as French Revolution, the Russian Revolution of 1905/06, the American Revolution and the American Civil War (see Rejoinder, Section 6.5).

539 The Respondent concludes that land reform was foreseeable by the Claimants at the time they invested in Zimbabwe. Moreover, the Respondent submits that the Tribunal must engage in a balancing of the Claimants' legitimate expectations, on the one hand, and the common interest of the Zimbabwean people, as well as "moral standards and international law", on the other hand (see Rejoinder, paras. 705, 1034-1036). The Respondent invites the Tribunal to consider the respective backgrounds and interest of the Parties. In this regard, the Respondent contrasts the noble background of the von Pezold Claimants, alleged to have familial ties to the British Monarchy, to the comparatively poor and activist background of several of the Respondent's main protagonists, namely President Mugabe, Minister Mutasa, and Ms. Tsvakwi (see Rejoinder, paras. 724 ff).

540 The Respondent also relies on Ad Article 3(a) of the German Protocol, which states 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" (emphasis added). The Respondent refers to certain of its defences to the expropriation claim, set out above, in defence to the Claimants' FET claim, namely that the expropriations were not discriminatory, were for a public purpose and followed due process. The Respondent reiterates that the Claimants remain on their land and are running "thriving concerns" (see CM, para. 152). The Respondent also submits that its foreign exchange policy regime was justified in the prevailing circumstances, noting that Zimbabwe has had all lines of credit withdrawn and economic sanctions imposed on it. The Respondent refers to the IMF Articles of Agreement, which it states recognize the application of exchange control arrangements and have been implemented into Zimbabwean law through various legal instruments (see CM, para. 155).

541 Finally, the Respondent refers to the Calvo doctrine, by which it asserts that foreigners have the right to national treatment, but not any better treatment (see Rejoinder, paras. 409-411). The Respondent argues that the Claimants benefitted from treatment at least as good as national treatment.

(iii) The Tribunal's Analysis

542 The Claimants contend the Respondent has breached the FET provisions of the German and Swiss BITs⁷¹.

543 Article 2(1) of the German BIT provides as follows:

⁷¹ It is recalled that Rüdiger claims only under the German BIT, and the Border Claimants only under the Swiss BIT.

Article 2

Promotion and Protection of Investments

(1) Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments into its territory in accordance with its laws. It shall in any case accord such investments fair and equitable treatment.

....

544 Article 4(1) of the Swiss BIT provides as follows:

Article 4

Protection, treatment

(1) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of investments in its territory of investors of the other Contracting Party.

....

545 The Tribunal endorses the Claimants' description of the FET standard and finds the FET standard to be substantively the same under both the Swiss and German BITs.

546 In particular, the jurisprudence supports the Claimants' contention that a breach of FET can be based on State actions that are "arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, expose the investor to sectional or racial prejudice, coerce or harass the investor, or lack due process" and/or a breach of specific representations made to the investor (legitimate expectations). A State is thus expected to behave, as the Claimants submit, in a "consistent, even handed, unambiguous, transparent, candid" manner. To the extent FET incorporates the minimum standard of treatment under international law, it is clear that this standard has moved on since the *Neer* case.

a) Zimbabwean Properties

547 The relevant assurances provided by the Government and various officials to the Claimants that their investments would not be subject to expropriation are sufficient to establish the Claimants' legitimate expectation that their investments would not be included in the LRP and consequently would not be subject to expropriation in breach of the BITs. The Tribunal summarizes some of these assurances below, as well as events that might have eroded these expectations. On

balance, the Tribunal considers that the positive assurances are sufficiently numerous and specific to warrant the legitimate expectations claimed by the Claimants:

- From 1980, Zimbabwe's policy was to take no more than 8.3 million ha of the 15.5 million ha of large scale commercial farms. Properties covered by BITs (796,000 ha) were excluded from the LRP. In 1988, the von Pezolds acquired their interest in the Forrester Estate. The Central Bank also encouraged the investment (see C-775). In March 2004, 8.3 million ha subject to the LRP was increased to 11 million ha.
- In 1991, Civil Servants encouraged further investment in Forrester and Government policy was that forestry plantations would not be included in the LRP.
- The von Pezolds acquired a 25% stake in Border in 1992, and from 1994-1998 Elisabeth made a series of Loans to the Forrester Estate, which remain unpaid. In 1995, there was general encouragement of German investment in Zimbabwe.
- In 1998, the Zimbabwean Minister of Agriculture assured the Claimants that the Respondent would never forcibly acquire the Claimants' properties (President Mugabe later repeated this assurance).
- In 2000, Zimbabwe ratified the German BIT and the Government stated that German property would be excluded from the LRP. A *Note Verbale* confirmed that property covered by BITs would not be included in the LRP (see C-227). The Zimbabwean Supreme Court also condemned the invasion of white farms and the lack of police action. In this same year, the von Pezolds acquired a further 20% interest in Border. The first Section 5 Notices were, however, issued against parts of the Border and Forrester Estates (see C-118) and the aggressive phase of the LRP began with the first "invasions" of the Forrester and Border Estates (although no Settlers/War Veterans stayed on the Estates at this time).
- In 2001, Zimbabwe ratified the Swiss BIT. The Zimbabwean Minister of Environment told the Claimants that forest plantations were excluded from the LRP, and LRP policy documents excluded tea, coffee, timber and citrus plantations from the LRP. However, the attempted payment of Elisabeth's loans was unsuccessful due to lack of foreign currency.
- In 2002, the Zimbabwean High Court declared Section 5 Notices and Section 8 Orders to be invalid as a breach of the German BIT (Cases 8859/02 and 8892/02) and no further Notices/Orders were issued by the Government against the Forrester or Border Estates. The Zimbabwean ambassador to Germany also stated that the Government had removed all German farms from the list of farms to be expropriated. However, during this year, the Invasions started again and continued every year after settlement began.
- In 2003, the von Pezolds acquired a further 37.5% interest in the Border Estate.
- In 2005, several important events occurred. In May and July, the Parent Claimants acquired an interest in the Makandi Estate. In September, the 2005 Constitutional Amendment was enacted, but in the same month the Government of Zimbabwe issued a *Note Verbale* assuring the Claimants that the Constitutional Amendment did not apply to their investments (see C-230).
- In 2006, the Parent Claimants acquired an interest in the Makandi Estate.
- Finally, in 2007, the Government of Zimbabwe acknowledged that the Parent Claimants' investments had been expropriated by the 2005 Constitutional Amendment.

548 As noted above, the *Note Verbale* from the Zimbabwean Government, dated 15 September 2005, assured the Claimants that the 2005 Constitutional Amendment did not apply to their investments, notwithstanding the terms of Section 16B. Specifically, the *Note Verbale* recorded the following (see C-230):

By way of a concluding observation on Section 16B, owners of agricultural land who are protected by bilateral or international investment protection agreements are not affected by Section 16B. Although the State may exercise its sovereign right to expropriate them, they will continue to be able to challenge the expropriation in our courts and to receive full compensation for agricultural land, as well as for any improvements thereon.

549 It was not until 2007 that the Government changed its mind and declared that the Constitutional Amendment had expropriated their investments.

550 The Claimants state that all Section 5 Notices and Section 8 Orders in relation to Border, Forrester and Makandi were withdrawn by the Republic or nullified by the Courts. Hence, even after these Orders/Notices were issued, the Claimants' legitimate expectation that their investments would not be expropriated remained in place.

551 Based on the foregoing, the Tribunal finds a breach of the Respondent's FET obligations in respect of the Zimbabwean Properties as of 14 September 2005, on which date the 2005 Constitutional Amendment vested title in the Zimbabwean Properties in the State.

b) The Residual Properties, Zimbabwean Company Shares, and Income-Generating Assets

552 The reasoning expressed above also applies *mutatis mutandis* to the the Zimbabwean Company Shares, the Residual Properties, and the Income-Generating Assets, the value of which was severely diminished by the expropriation of the Zimbabwean Properties. The fact that the Claimants were able to continue to operate on some parts of the Estates and therefore generate income is relevant primarily to the damages calculation, rather than liability. Accordingly the Tribunal finds a breach of the Respondent's FET obligations in respect of the Residual Properties, Zimbabwean Company Shares and Income-Generating Assets as of 14 September 2005, on which date the 2005 Constitutional Amendment vested title in the Zimbabwean Properties in the State.

c) Forrester Water Rights

553 The von Pezold Claimants submit that the Respondent's conversion of the von Pezold Claimants' Forrester Water Rights into Water Permits on 1 January 2000 through implementation of the *Water Act 1998* constituted a breach of its FET obligations.

554 The *Water Act 1976*, which created the Forrester Water Rights, provided that compensation would be paid if the Water Rights were ever amended. When the Forrester Water Rights were converted into Water Permits from 1 January 2000, however, no such compensation was paid by the Respondent. This reversal of the von Pezold Claimants' legitimate expectations that the Forrester Water Rights would be protected, coupled with the significant change in the nature of the von Pezold Claimants' rights that accompanied the transition to the Water Permit regime (i.e., implementation of a finite duration for the Water Permits and the imposition of levies), constitutes in the Tribunal's view a clear breach of the Respondent's FET obligations from 1 January 2000.

d) Forrester Loans

555 The Respondent's failure to release currency to allow the Forrester Loans to be repaid to Elisabeth constitutes a clear breach of the Respondent's FET obligations. This is particularly so given that the economic difficulties that may have facilitated the currency shortage were the direct result of the Government's own policies.

556 From 31 December 2001, the date on which the Respondent refused to release foreign currency to enable due repayment of the principal and interest of the Forrester Loans (see Cl. Skeleton, para. 120), the Respondent was accordingly in breach of its obligation to treat Elisabeth's investment fairly and equitably.

e) Foreign Exchange Measures

557 The Tribunal agrees with the Claimants' assertion that the Respondent breached its FET obligations through its Foreign Exchange Measures, as a result of the "grossly unfair, idiosyncratic, arbitrary and bad faith manner in which the Respondent set and used the Official Rates of Exchange". Accordingly, the Respondent's imposition of the relevant Foreign Exchange Measures against the Claimants constitutes a breach of its FET obligations.

558 The Respondent's breach of the FET standard in this respect caused the Claimants to suffer three distinct losses: (i) the Forrester Tobacco Value Shortfall; (ii) the Forrester Conversion Amount; and (iii) the Border Liquidation Shortfall. The Tribunal accordingly finds a breach in respect of each of these Heads of Damage.

559 In respect of the Forrester Tobacco Value Shortfall and the Border Liquidation Shortfall, the FET breach occurred on 1 January 2004, the date on which the Respondent's foreign currency requirements came into force (see SI 9 - Exchange Control (Currency Exchange) Order 2004, Section 7(1), CLEX-47). In respect of the Forrester Conversion Amount, the relevant breach occurred on 31 December 2008, at which time the Reserve Bank of Zimbabwe refused to release 25% of the Claimants' tobacco sales in US Dollars as required (see Cl. Skeleton, para. 122).

f) Respondent's Ad Article 3(a) defence

560 In defence of the FET allegations in general, the Respondent relies on Ad Article 3(a) of the German Protocol, which states that "measures necessary for public security and order ... or morality shall not be deemed 'treatment less favourable' within the meaning of Article 3". However, the FET standard is contained in Article 2 of the BIT and is therefore not subject to Ad Article 3(a). The Tribunal therefore dismisses this defence.

g) Conclusion

561 Accordingly, the Tribunal finds that the Claimants have established a breach of the FET standard contained in Article 2(1) of the German BIT and Article 4(1) of the Swiss BIT by failing to accord the Claimants FET in connection with (a) the Zimbabwean Properties; (b) the Residual Properties, Zimbabwean Company Shares and Income-Generating Assets; (c) the Forrester Water Rights; (d) the Forrester Loans; (e) the Forrester Tobacco Value Shortfall; (f) the Forester Conversion Amount; and (g) the Border Liquidation Shortfall. The quantification of damages for these breaches will be considered below.

(3) Impairment or Diminishment

(i) Claimants' Position

562 The Claimants invoke Article 5(5) of the Danish BIT through the MFN clauses of the German and Swiss BITs, respectively, to assert a comparably more favourable provision than in the German and Swiss BITs in connection with the compensation of shareholders in the Zimbabwean Companies for losses arising from measures directed at the Zimbabwean Companies as impairing or diminishing their value.

563 The Claimants state that the effect of these provisions in this case is as follows (see Mem., para. 1337):

Therefore in summary, under Article 6(2) of the Swiss BIT and Article 5(5) of the Danish BIT, the first precondition for compensation is that the host state has expropriated the assets of a Zimbabwean company. However, under Ad Article 4 of the German Protocol, a precondition for compensation is that the host state has expropriated the assets of a Zimbabwean company or breached the full security and protection standard in regard to it (the Claimants do not rely on the full security and protection standard for the purpose of its impairment cause of action).

564 The Claimants note that the Respondent has expropriated the underlying assets of the Forrester Companies, the Border Companies and the Makandi Companies through the 2005 Constitutional Amendment and therefore the first condition of Article 6(2) of the Swiss BIT and Article 5(5) of the Danish BIT has been satisfied. The above provisions provide for compensation to be paid to shareholders. However, the Claimants take the position that the threshold of damage that must

occur to those shares before compensation is paid to the shareholders is lower in the Danish BIT than in the German and Swiss BITs; therefore the Claimants rely on the standard of "any" impairment suffered as set out in the Danish BIT. The Claimants refer to the *Saluka* tribunal's discussion of the meaning of "impairment", which found this term to mean any negative effect or impact (see Mem., paras. 1350-1351 referring to *Saluka*, CLEX-217).

565 According to the Claimants, the Respondent appears to have accepted Mr. Levitt's evidence that a reduction in the value of the underlying assets causes an equal reduction in the value of the Shares (see Cl. PHB, para. 144, referring to CM, para. 151; Levitt II, para. 1.02.1) (see Second Expert Report of Anthony Levitt, Corrected CE-7). The Claimants reason that, as the Claimants' Properties were the only valuable assets held by the Zimbabwean Companies, and none of the other investments have any value without the Zimbabwean Properties, it must therefore follow that the expropriation of the Zimbabwean Properties has rendered the Forrester, Border and Makandi Shares worthless in breach of the above standard. The Claimants note that compensation has not been paid for the Shares.

(ii) Respondent's Position

566 The Respondent's only apparent defence to this cause of action is that the Claimants have in fact been compensated by continuing to enjoy substantially unencumbered use of the Estates (see Resp. PHB, para. 239; CM, para. 151).

(iii) The Tribunal's Analysis

567 The Claimants invoke Article 5(5) of the Danish BIT, which contains an impairment and diminishment standard, through the MFN clauses of the German and Swiss BITs⁷², respectively, to assert a comparably more favourable provision than in the German and Swiss BITs, and assert that the Respondent has breached this standard⁷³. The Claimants rely on this clause specifically in relation to the Zimbabwean Company Shares.

568 Given the Tribunal's above findings on expropriation, it is unnecessary for the Tribunal to decide this issue, as it would have no substantive effect on the compensation due to the Claimants.

569 Accordingly, the Tribunal finds this issue to be moot.

⁷² Specifically, Article 3(1) and 3(2) of the German BIT and Article 4(2) of the Swiss BIT.

⁷³ It is recalled that Rüdiger claims only under the German BIT, and the Border Claimants only under the Swiss BIT.

(4) Non-Impairment

(i) Claimants' Position

570 The Claimants allege that the Respondent has breached Article 2(2) of the German BIT and Article 4(1) of the Swiss BIT.

571 The Claimants note that the operative terms of the non-impairment standard in the BITs have been interpreted by other investor-State tribunals in the context of similar provisions. Thus, for example, the Claimants refer to the meaning given to the term "reasonable" by the tribunal in *Siag* (CLEX-243) and to the terms "reasonable" and "non-discrimination" by the tribunal in *Saluka* (CLEX-217). The *Saluka* tribunal found that reasonableness requires a showing that the State's conduct bears a reasonable relationship to some rational policy and that non-discrimination requires a rational justification of any differential treatment of a foreign investor (see CLEX-217, para. 60). Similarly, the Claimants refer to the discussion of the term "arbitrary" by the tribunals in *Occidental Exploration and Production Company v. Republic of Ecuador* (CLEX-210) and *Joseph C. Lemire v. Ukraine* ("**Lemire**") (see ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, CLEX-318), where both tribunals defined the terms by reference to the substitution of reason or rule of law for prejudice, preference or bias (see CLEX-210, para. 162 and CLEX-318, para. 263). The Claimants refer to *Saluka* for an interpretation of the term "impair", as also discussed above in connection with the non-diminishment and impairment standard (see Mem., paras. 1470-1479).

572 The Claimants submit that the same conduct that breaches the FET standard also breaches the standards in Article 2(2) of the German BIT and Article 4(1) of the Swiss BIT (see Mem., para. 1481).

573 The Claimants also submit that the LRP measures damaged and devalued their investments because the Claimants have lost title to the majority of the Claimants' Properties; leaving the remainder uneconomical; the use and enjoyment of these Properties has been impaired because Settlers/War Veterans have destroyed infrastructure, occupied land, disrupted the cropping rotation, and harassed staff; and without title the Claimants cannot dispose of the Zimbabwean Properties. In regard to the foreign exchange measures, the Claimants contend that the measures impaired their use of the proceeds of sale on farm and timber products because the Respondent denied them the amounts they should have received. Finally, in regard to the Forrester Loans, the Claimants submit that the Respondent prevented them from being repaid (see Cl. Skel., para. 143).

574 The Claimants refer to the evidence elicited during the Hearing as to the disproportionality, lack of due process and compensation, and absence of public purpose in connection with the LRP to establish breach of the non-impairment standard. The Claimants also refer to the evidence elicited during the Hearing that the Respondent's foreign exchange policy was in breach of local law and IMF rules to support its position that the policy was unreasonable and arbitrary in breach of the non-impairment standard (see Cl. Skel., para. 143; Cl. PHB, para. 156).

(ii) Respondent's Position

575 The Respondent submits that it has demonstrated that the LRP was "ineluctable", for a reasonable public purpose, non-discriminatory and not arbitrary, and therefore the Claimants' non-impairment claim fails (see Resp. PHB, para. 247).

(iii) The Tribunal's Analysis

576 The Claimants allege that the Respondent has breached Article 2(2) of the German BIT⁷⁴ and Article 4(1) of the Swiss BIT. Article 2(2) of the German BIT provides as follows:

Article 2

Promotion and Protection of Investments

...

(2) Neither Contracting Party shall in any way impair by unreasonable, arbitrary or discriminatory measures the management, maintenance, use, enjoyment, or disposal of investment in its territory of nationals or companies of the other Contracting Party.

577 Article 4(1) of the Swiss BIT provides as follows:

Article 4

Protection, treatment

(1) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of investments in its territory of investors of the other Contracting Party.

... [emphasis added].

⁷⁴ It is recalled that Rüdiger claims only under the German BIT, and the Border Claimants only under the Swiss BIT..

578 The Tribunal considers that the Respondent's actions have resulted in a breach of this provision of the Swiss and German BITs by impairing, *inter alia*, the Claimants' use, management, enjoyment and disposal of their investments.

579 In relation to the occupations (including, without limitation, failure to prevent them and/or remove Settlers/War Veterans, providing assistance to Settlers/War Veterans, issuing offer letters etc.), the Respondent impaired the Claimants' ability to farm the Estates effectively. However, given that the Claimants retained use of large sections of the properties, the economic impact may not have been so great had the Government not also expropriated the properties through the 2005 Constitutional Amendment. Clearly, the expropriation has impaired use, enjoyment and – in particular – disposal such that the non-impairment clause has been breached.

580 This provision is also particularly apt in relation to the foreign currency issues. The Tribunal is persuaded that the Government's refusal to release foreign currency to allow the Forrester Loans to be repaid to Elisabeth and the Government's forcing of the Claimants to exchange currency at artificial rates impaired the use and enjoyment of funds generated by the Estates.

581 Under the German BIT, the impairment must be caused by "unreasonable, arbitrary or discriminatory measures", and similarly for the Swiss BIT by "unreasonable or discriminatory measures". For the reasons that have already been set out above, the Tribunal finds that the Respondent's behaviour was unreasonable, arbitrary and discriminatory. Accordingly, the Claimants have, in respect of all these investments additionally established a breach of the non-impairment provisions of the BITs.

(5) Full Protection and Security

(i) Claimants' Position

582 The Claimants allege that the Respondent has breached Article 4(1) of the German and Swiss BITs, which provide that the investments of German and Swiss investors shall be granted FPS. They also invoke, in tandem, Article 18 of the Zimbabwean Constitution, which provides that "every person is entitled to protection of the law".

583 The Claimants note that the Parties agree that the above standards require the State to act vigilantly and take all measures necessary to ensure the full enjoyment of protection and security of the investor's investment (see PHB, para. 157; Respondent RHEX-22, para. 2 citing *Saluka*, paras. 483-484, which in turn cites *American Manufacturing and Trading Inc. v. Zaire*, para. 6.05, CLEX-178).

584 The Claimants note the Respondent's opening statement during the Hearing that the standard requires the State to show that it has met these requirements. Specifically, counsel for the Respondent stated the following, by reference to the *Saluka* award (see Tr. Day 2, pp. 381-382):

And so if we come to a more legal aspect in full protection and security, I refer to the partial award in *Saluka Investments v. The Czech Republic*, which says in Paragraph 484, "The standard does not imply strict liability of the host State however." The Tecmed Tribunal held that "the guarantee of full protection in [sic] security is not absolute and does not impose strict liability upon the State that grants it." And it refers specifically to, "Accordingly, the standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners" or certain groups of foreigners. But, you know, it's a situation where we're talking about a reasonable standard.

....

585 The Claimants submit that the following constitute breaches of the FPS standard (see Cl. Skel., para. 147):

- Failure to stop the Invasions and to remove the Settlers/War Veterans (see Heinrich I, paras. 584-586; *Commissioner of Police v. CFU*, p. 477E, CLEX-76);
- Instructing the police not to act and the police accepting those instructions (see Mugabe statements, C-460; Police Commissioner's statement, C-448; *Commissioner of Police v. CFU*, pp. 515 and 516, CLEX-75);
- Issuing "Offer Letters" instructing people to come onto the Claimants' properties;
- Assisting people in coming onto the Claimants' Properties (see *CFU v. Minister of Lands & Ors*, p. 477E-G and 482, CLEX-76; Chan I, para. 32, C-37; Heinrich I, paras. 575-586, C-18; and local press reports, C-449 and C-460); and
- Making public statements that may reasonably be expected to initiate or prompt harassment and violence against the Claimants (which in fact occurred) (see press reports, C-449 and C-460).

586 The Claimants refer to the following additional evidence elicited at the Hearing of the Respondent's breach of the FPS provisions (see Cl. PHB, para. 157):

- Minister Mutasa's admission that the government transported Settlers/War Veterans on to the farms, provided them with food and allocated them with units of lands (see Tr. Day 5, pp. 1415-1416); and

- The involvement of the State in the Invasions as confirmed by Professor Chan, Mr. Theron and Ms. Tsvakwi (see Cl. PHB, paras. 113-115 and references therein).

587 The Claimants refer to the evidence of Heinrich as to the force that would be necessary to remove Settlers/War Veterans from the farms. Heinrich's evidence was that, in the few instances where Settlers/War Veterans have been removed, they have been removed in large numbers without the use of firearms, and that the Settlers/War Veterans on the Estates today do not carry firearms (see Heinrich V, paras. 40-41, C-776). Accordingly, the Claimants submit that the removal of Settlers/War Veterans, if they resisted, would only require reasonable and proportionate force (see Cl. PHB, para. 158).

588 The Claimants note the Respondent's pleading that, pursuant to Article 4(3) of the German BIT and Article 7(1) of the Swiss BIT, full protection and security need not be provided in instances of "war or other armed conflict, revolution, a state of national emergency or revolt and insurrection or riot". The Claimants disagree that this is an appropriate interpretation of these provisions and aver that the purpose of such provisions is to provide a floor of treatment, as opposed to a ceiling, in the event the circumstances stated therein occur (see Cl. PHB, para. 159).

(ii) Respondent's Position

589 The Respondent submits that the Invasions were not planned or directed by the Respondent and that they happened spontaneously and across the country such that the police were overwhelmed. Thus, the Respondent explains that constraints on the Zimbabwean police led to the Claimants facing the treatment complained of. The Respondent notes that, to arrest the situation, the Respondent reacted by putting into place legal instruments to enable the acquisition of more land for redistribution. The Respondent has also noted that the Claimants wished to have all Settlers/War Veterans removed from their property, thus failing to make a distinction between "invaders" and "land beneficiaries" who were lawfully settled in terms of the LRP (see CM, paras. 156-158).

590 The Respondent avers that "Rhodesian style security" is not the standard under these treaty provisions. The Respondent also submits that it exercised due diligence "as reasonable under the circumstances and that more brutal intervention could have led to many deaths, particularly under the volatile circumstances of the spontaneous uprisings of the land hungry masses" (see Resp. PHB, para. 249). The Respondent notes that Elisabeth acknowledged during the Hearing that one can never have a complete guarantee of personal safety (see *ibid.*, para. 250).

591 The Respondent submits that the choice not to have the Zimbabwean police fire upon the Zimbabwean people was the right choice (see Rejoinder, para. 359). The Respondent asserts that, in their demands for full protection and security, the Claimants "fail to distinguish between an

isolated event where police protection would be possible and even normal from a national-wide uprisings [sic] in the control of a pent up explosive national consciousness in mobs where police intervention would risk being deadly” (see Rejoinder, para. 356). The Respondent relies on accounts in Ben Freeth’s book “Mugabe and the White African” in support of its position that the State risked great bloodshed if it had attempted to assert greater control through its police (see Rejoinder, para. 374-375).

592 The Respondent notes that Article 4(3) of the German BIT and Article 7(1) of the Swiss BIT recognize that the concept of “full security” is not applicable in certain circumstances, such as, under the German BIT, in cases of “war or other armed conflict, revolution, a state of national emergency or revolt”, and under the Swiss BIT, in cases of “war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory” (see RHEX-022, para. 4).

(iii) The Tribunal’s Analysis

593 The Claimants allege that the Respondent has breached Article 4(1) of the German⁷⁵ and Swiss BITs, which provide that the investments of German and Swiss investors shall be granted FPS. They also invoke, in tandem, Article 18 of the Zimbabwean Constitution, which provides that “every person is entitled to protection of the law”.

594 Article 4(1) of the German BIT provides as follows:

Article 4

Protection and safeguards

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

....

595 Article 4(1) of the Swiss BIT provides as follows:

Article 4

Protection, treatment

(1) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of investments in its territory of investors of the other Contracting Party..... [emphasis added]

⁷⁵ It is recalled that Rüdiger claims only under the German BIT, and that the Border Claimants only under the Swiss BIT.

596 The Parties agree that the FPS standard is not a strict liability test, but is an "all reasonable measures" (i.e., a due diligence) standard. The Tribunal also considers that this standard relates to physical security and threats of violence and is materially the same under both BITs.

597 The Tribunal finds that the Respondent has breached this FPS standard in relation to the failure of police to protect the Claimants' properties from occupation or to remove Settlers/War Veterans. The Tribunal also finds that the Respondent breached this standard in relation to the non-responsiveness of police to various violent incidents that occurred, as detailed in the Witness Statements of, for example, Heinrich von Pezold and John Gadzikwa.

598 The Tribunal is of the opinion that the exception in the BITs for situations of war, revolution, etc. does not apply in the present case. The Respondent's further defences that the police were overwhelmed, or that intervention would have required disproportional force, were also unconvincing.

599 Accordingly, the Tribunal finds that the Respondent breached its obligations under the BITs to provide full protection and security to the Claimants in respect of the Claimants' Properties. In light of the Tribunal's finding in respect of the FPS standard in the BITs, it is unnecessary for the Tribunal to consider the Claimants' arguments regarding Section 18 of the Constitution.

(6) Free Transfer of Payments

(i) Claimants' Position

600 The Claimants contend that the Respondent breached Article 5 of the German BIT and of the Swiss BIT, which provide that the Respondent must guarantee to German and Swiss investors FTP in connection with an investment, including the transfer of "returns" on investment and the "repayment of loans".

601 The Claimants submit that the above standards, set out in the BITs, establish a *lex specialis* for the regulation of foreign currency and the free transfer of payments, and that these standards are incorporated into the 1996 Exchange Control Regulations at ss. 28 and 29 (see CLEX-38). Sections 28 and 29 of the 1996 Regulations provide as follows:

Remittability of funds

28. (1) Subject to subsection (2), a person who receives or is entitled to receive any of the following amounts shall have the right to remit the whole or any part of the amount concerned out of Zimbabwe—

(a) in the case of an individual, money held by him in a foreign currency account;

(b) any dividend or interest, up to such maximum amount as may be prescribed, on a security acquired by that person from money held in a foreign currency account;

(c) without derogation from section 29, any amount which the recipient has the right to remit out of Zimbabwe in terms of any enactment or any convention, treaty or agreement to which the Government is a party;

(2) The remittance of any amount referred to in subsection (1) shall be effected through an authorised dealer.

(3) Nothing in this section shall be construed so as to preclude the remittance out of Zimbabwe of any amount with the permission of an exchange control authority.

Grant of permission, authority, etc

29. (1) Where—

(a) any person has acquired a right to do anything or an entitlement to anything in terms of any enactment or any convention, treaty or agreement to which the Government is a party; and

(b) that right or entitlement is by these regulations subject to permission or authority granted by an exchange control authority;

the exchange control authority shall without delay grant the permission or authority necessary to enable the person to exercise his right or obtain the benefit of his entitlement, as the case may be.

(2) Subsection (1) shall apply where the enactment, convention, treaty or agreement which confers the right or entitlement concerned provides, expressly or by implication, that the right or entitlement is to be exercised subject to permission or authority granted under these regulations.

602 The Claimants contend that the effect of the standards is that the State must permit an investor to transfer funds out of the country if the investor has the necessary funds to do so, and that it amounts to a promise that, in all circumstances, it will have sufficient foreign currency reserves available to German and Swiss investors so that it can honour its obligations under the standard (see Cl. Skel., para. 150; referring to *Biwater*, para. 735, CLEX-233).

603 The Claimants allege that the Respondent breached this standard on 31 December 2001 when it refused to release the necessary foreign currency in order to enable the Forrester Estate to repay the foreign currency Forrester Loans to Elisabeth. The Claimants also allege that, between 2004 and 2008, the Respondent forced the von Pezold Claimants to be paid for their tobacco in Zimbabwean Dollars; that between 2003 and 2009, the Respondent forced the Claimants to exchange some of their US Dollar proceeds from the Border Estate's exports in return for Zimbabwean Dollars; and finally that the Respondent has refused to release US Dollars that were earned through the sale of tobacco (that is, the Forrester Tobacco Shortfall, the Border Liquidation Shortfall and the Forrester Conversion Amount). The result is that the Claimants have been unable to transfer their returns on investment out of Zimbabwe (see Cl. Skel., para. 151).

(ii) Respondent's Position

The Respondent's only direct response to this claim is that land reform constitutes a legitimate public purpose and that this suffices to qualify the measure of land reform and the ensuing police power decisions as being "a normal exercise of non-compensable police powers irrespective of the magnitude of its effects on the investment" (see Resp. PHB, para. 252).

(iii) The Tribunal's Analysis

604 The Claimants contend that the Respondent breached Article 5 of the German BIT⁷⁶ and of the Swiss BIT, which provide that the Respondent must guarantee to German and Swiss investors FTP in connection with an investment, including the transfer of "returns" on investment and the "repayment of loans".

605 Article 5 of the German BIT provides as follows:

Article 5

Transfer of Funds

Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with an investment, in particular:

- a) of the principal and additional amounts to establish, maintain or increase the investment;
- b) of the return;
- c) in repayment of loans;
- d) of royalties and fees for the rights referred to in Article 1.1.d);
- e) of the proceeds from the liquidation or sale of the whole or any part of the investment;
- f) of the compensation provided for in Article 4.

⁷⁶ It is recalled that Rüdiger claims only under the German BIT, and the Border Claimants only under the Swiss BIT.

606 Article 5 of the Swiss BIT provides as follows:

Article 5

Free transfer

Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the free transfer of the payments relating to these investments, particularly of:

- (a) returns;
- (b) repayments of loans;
- (c) amounts assigned to cover expenses relating to the management of the investment;
- (d) royalties and other payments deriving from right enumerated in Article 1, paragraph (2), letters (c), (d) and (e) of this Agreement;
- (e) additional contributions of capital necessary for the maintenance or development of the investment;
- (f) the proceeds of the sale or of the partial or total liquidation of the investment, including possible increment values.

607 The Tribunal considers that the Respondent breached this provision of the Swiss BIT in refusing to release foreign currency to allow the Forrester Estate to repay the Loans to Elisabeth in 2001.

608 The FTP provisions were further breached between 2004 and 2008 when the Respondent forced the Claimants to be paid for tobacco in Zimbabwean Dollars and between 2003 and 2009 when it forced the Claimants to exchange US currency for Zimbabwean Dollars (the Forrester Tobacco Value Shortfall and the Border Liquidation Shortfall). The Respondent's failure to release US Dollars earned through the sale of tobacco also breached this standard (the Forrester Conversion Amount).

(7) Necessity

(i) Respondent's Position

609 The Respondent argues that there was a state of emergency in effect in Zimbabwe from 16 February 2000 until 16 March 2013 which posed a real threat to the "ongoingness" of the State, and that the only way to safeguard the "ongoingness" of the State was to implement the FTLRP.

610 The March of History, the Respondent submits, commenced on 16 February 2000 and was an "ineluctable" event (see Resp. Skel., para. 128.). This event is submitted to have commenced with an attempt by the "masses to negotiate with the commercial farmers" over the resettlement of said masses onto land legally possessed by these commercial farmers (see *ibid.*, para. 82). This

culminated in the occupation of over 1,000 plots of land by Settlers/War Veterans (*see ibid.*). The Respondent asserts that the Settlers/War Veterans were motivated by anger, fuelled by "land-hungriness, and fed not by government but by families, husbands, friends and relatives of the occupiers" (*see ibid.*). It is argued that this motivation was further spurred by the prior success of the Settlers/War Veterans and accordingly history had forged the popular view that physical occupation of land was the most effective means of bringing about land reform (*see ibid.*, para. 108). In support, the Respondent cites witness statements from occupiers that indicate that, in early 2000, the "objective was to frustrate the white farmer until he could no longer operate effectively and left" (*see ibid.*, para. 167).

611 Prior to 2000, the Respondent highlights that it had no issues with servicing its foreign debts and was well regarded in the financial markets with its capital account traditionally in surplus (*see ibid.*). However, by 2006, the opposite held true. From 2007 to 2009 the economy had entered a crisis of catastrophic proportions (*see ibid.*, paras. 913-918). This crisis had been the result of a number of factors, namely: (i) a decline in export performance and reduced capital inflows; (ii) a corresponding decline in foreign exchange reserves, and a significant build-up of external payments arrears, which had reached US\$2.5 billion by the end of 2006; (iii) the suspension of all forms of payments support from multilateral financial institutions; (iv) the implementation of sanctions; (v) the suspension of technical assistance, grants, and infrastructure development inflows to both the Government and private sector; and (vi) the cessation of lending to the State. This also had the effect of degrading the international community's perceptions of the State and affected the ability of Zimbabwean companies to access affordable credit, forcing them to pay above-market interest rates. Accordingly, unemployment increased and standards of living decreased, leading to large outflows of skilled labour (*see ibid.*).

612 The Respondent submits that the legal test for establishing a state of necessity is found in Article 25 of the ILC Articles on State Responsibility. The Respondent frames its case for necessity under Article 25 as follows (*see Rejoinder*, para. 863):

... Necessity is invoked by the State of Zimbabwe as a ground for precluding any wrongfulness of acts not in conformity with an international obligation of that State because the act of land reform: a) is the only way for the State of Zimbabwe to safeguard an essential interest against a grave and imminent peril; and b) land reform in Zimbabwe does not seriously impair an essential interest of Germany and/or Switzerland, or of the international community as a whole.

613 The Respondent notes that an "essential interest" is to be determined based on the particular conditions in which the State finds itself in a given situation, and submits that the mass movements of the landless Zimbabweans presented a serious and imminent danger to an essential interest (*see ibid.*, paras. 869-870). The Respondent does not define the "essential interest" in this case, but argues that "a grave danger to the existence of the State itself, to its political and economic

survival" constitutes conditions of necessity under international law and suggests that the "ongoingness" of the State was threatened through the uprisings in 2000 (see Resp. PHB, para. 208; see also RHEX-014, para. 13, where the Respondent analogizes the LRP to the Gachiani-Supsa pipeline (*Kardassopoulos*) to illustrate its national importance; see also RHEX-020, paras. 9-13; *LG&E Energy Corp et al v. Argentine Republic ("LG&E")* (see ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 246, 251, CLEX-221) and *Continental Casualty Company v. Argentine Republic ("Continental Casualty")* (see ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 175, CLEX-236). The Respondent states that the absence of a local decree of emergency does not concern the international law analysis that the relevant events were an emergency posing a real threat to the ongoingness of the State of Zimbabwe (see Resp. PHB, paras. 210, 306).

614 The Respondent relies upon *LG&E* for the proposition that the damages suffered during the state of necessity should be borne by the Claimants (see Rejoinder, para. 877; Resp. PHB, para. 308). The Respondent reasons that the facts in *LG&E* are analogous to those here, although the Respondent contends that the facts here are even more dramatic than those at play in *LG&E*. The Respondent notes that all of the major economic indicators of the Zimbabwean economy reached catastrophic proportions in 2007, 2008 and 2009; multilateral financial institutions suspended all forms of balance of payments support, technical assistance, grants, and infrastructural development flows to government and the private sector in Zimbabwe, and stopped all lending operations to the country. The Respondent notes the following additional indicators of crisis (see Rejoinder, paras. 913-918):

Zimbabwe's balance of payments position has deteriorated significantly since 2000 from the combined effects of inadequate export performance and reduced capital inflows. Foreign exchange reserves declined as a result, from US 830m representing three months import cover in 1996 to less than one month's cover by 2006. The foreign exchange shortages severely constrained the country's capacity to meet foreign payment obligations and finance critical imports such as drugs, grain, raw materials, fuel and electricity.

There has been a significant build up in external payments arrears. Total foreign payments arrears increased from US\$109m at the end of 1999 to US\$2.5bn by the end of 2006. The worsening of the country's creditworthiness and its risk profile has led to the drying up of sources of external finance. The withdrawal of the multilateral financial institutions from providing balance of payments support to Zimbabwe has also had an effect on some bilateral creditors and donors who have followed suit by either scaling down or suspending disbursements on existing loans to the government and parastatal companies.

Prior to these developments, Zimbabwe had an impeccable record of prompt debt servicing and was highly rated in the international financial markets. The capital account, traditionally a surplus account, has been in deficit since 2000. As such, international investors preferred other countries for investment, thus depriving Zimbabwe of much-needed foreign direct investment. Sanctions have also affected the image of the country through negative perceptions by the international

community. Zimbabwean companies are thus finding it extremely difficult to access lines of credit. As a result, our companies have to pay cash for imports.

Also as a result of the risk premium, the country's private companies have been securing offshore funds at prohibitive interest rates. This has had a ripple effect on employment levels and low capacity utilisation as reflected by shortages of basic goods and services. Declining export performance has also adversely affected the standards of living for the general population, and because of the deteriorating economic conditions, the country has experienced large scale emigration, especially of skilled labour, thus further straining the economy.

The sanctions have adversely impacted on Foreign Direct Investment (FDI) to Zimbabwe. Investors are shying away and FDI inflows have collapsed from US\$444.3m in 1998 to US\$50m in 2006. In addition, Anglo-American companies have been strongly discouraged from investing in Zimbabwe by their home governments. This has adversely affected investment levels into the country, thus accentuating the foreign exchange shortages leading to further shortages of fuel and imported raw materials. The shortage of fuel has had a debilitating impact on all sectors of the economy, leading to continuous decline in economic activity. This has generated additional inflationary pressures and speculative behaviour in the economy. ...

In response to the Zimbabwe land reform programme, sanctions have been imposed on the Republic of Zimbabwe by multilateral financial institutions. Such sanctions and the suspension of international support have devastated economic and social life in Zimbabwe. The heaviest blows have fallen on the poor, the young and ill. ...

615 The Respondent submits that the decisions of the respective tribunals in *LG&E* and *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* ("*Gabčíkovo-Nagymaros*") (see 1997 Judgment, I.C.J. (25 September) CLEX-396), support its essential interest (and broader necessity) submission (see *ibid.*, paras. 127-131 generally). However, the Respondent does not cite any specific parts of the respective decisions as authority for its claim. Instead, the submissions point only to general statements made by the respective tribunals on the effect of a successful necessity plea (i.e., as precluding wrongfulness) (see e.g., *ibid.*, para. 130, which cites para. 261 of the *LG&E* decision, which states that a State that successfully invokes necessity is excluded from any wrongfulness caused by the act of the State and, therefore, the State is exempt from liability).

(ii) Claimants' Position

616 The Claimants agree that the legal test for establishing the defence of necessity under international law is set out in Article 25 of the ILC Articles on State Responsibility.

617 The Claimants assert that, throughout the entirety of the time that the Respondent claims the state of necessity took place, not once did the Government declare a state of emergency or pass a similar resolution. Accordingly, there was never any threat to an essential interest of the State (see Cl. Skel., para. 152). In support of this, the Claimants also adduce evidence of a *Note Verbale*

issued by the Zimbabwean Government on 16 September 2005 explaining that the 2005 Constitutional Amendment had not affected the Claimants' rights under the BIT (see *ibid.*).

618 Citing *Gabčíkovo-Nagymaros*, the Claimants note that the elements of necessity are cumulative and are not self-judging (see *ibid.*, *Gabčíkovo-Nagymaros*, p. 51, CLEX-396) and, citing the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("**Construction of a Wall**") (see 2004 I.C.J. 136, Advisory Opinion, p. 140, CLEX-211), the conditions upon which necessity may be invoked must be "exceptional". The Claimants contend that none of the elements have been met on the evidence in these cases (see Cl. Skel., paras. 153-159). The Claimants note, for example, that the police were capable of dealing with the so-called "mass movements", as found by Zimbabwe's courts, that the aggressive phases of the LRP targeted the Claimants because they are white and therefore breached the prohibition against discrimination (i.e., they breached an essential interest of the international community as a whole), and that the BITs implicitly exclude the defence of necessity (see Cl. Skel., paras. 154-157; see also *BG Group*, para. 409, CLEX-231). The Claimants further note that, during the Hearing, the Respondent's witnesses conceded that not all of the required elements had been satisfied (see Cl. PHB, paras. 162-164):

- Minister Mutasa stated that the Government had transported Settlers/War Veterans onto the farms, provided them with food and allocated them with units of land, thereby acknowledging that the State "contributed to the situation of necessity" (see Tr. Day 5, p. 1415);
- Professor Chan's evidence that once the Invasions began in 2000, the Government quickly mobilised to provide material support to the Settlers/War Veterans, thereby expanding the Invasions from being a local event in Masvingo Province to expanding throughout the country, and that the President's Office and the CIO were very much involved in the direction of the Invasions (see Tr. Day 3, pp. 935-936, 938, 948, 949, 969);
- Mr. Theron's evidence that vehicles with government markings were used to transport Settlers/War Veterans onto farms (see Tr. Day 3, pp. 657-658); and
- Ms. Tsvakwi's evidence that the Respondent issued Offer Letters to Settlers/War Veterans instructing them to take up possession of the plots of land identified in the Offer Letter (see Tr. Day 4, p. 1246).

619 The Claimants also refer to the Expert Report of Mr. de Bourbon, SC, in which he stated that, pursuant to Section 31(1) of the Zimbabwean Constitution, the President had the power to declare a state of emergency and that, pursuant to Section 31(6), Parliament had the power to resolve that such a situation existed. Mr. de Bourbon opined that the President and Parliament could only

exercise such powers if there were grave threats to society and the State, and that the threats in question were imminent. The Claimants reason that the test under Zimbabwe's Constitution is therefore the same as the test set out in Article 25 of the ILC Articles. The Claimants further note that Minister Mutasa testified during the Hearing that, between 1 January 2000 and 2013, neither the President nor the Parliament exercised their powers to declare/resolve that a state of emergency existed, and that, if there had been a state of emergency, this would have been declared (see Cl. PHB, para. 163; see also Tr. Day 5, pp. 1357-1358).

620 Finally, the Claimants submit that, even if the elements of the necessity defence were established, Article 26 of the ILC Articles prevents the existence of a state of necessity from precluding the wrongfulness of an act that breaches an obligation arising under a peremptory norm.

621 It is the Claimants' case that the LRP breached the prohibition against discrimination on the basis of race, which they say is a peremptory norm, and the Respondent's conduct is therefore wrongful in any event (see Cl. PHB, para. 165).

622 As regards the Respondent's reliance on Ad Article 3(a) of the German Protocol, the Claimants observe that the provision of the US-Argentina BIT (to which the Respondent seeks to draw a parallel), is much broader than Ad Article 3(a), such that the awards in *LG&E* and *Continental Casualty* are inapposite. Moreover, the Claimants aver that they do not allege a breach of the national treatment and MFN standards of the BITs in regard to the Respondent's conduct, and therefore Ad Article 3(a) is not relevant (see Cl. PHB, para. 167).

(iii) The Tribunal's Analysis

623 While the Claimants have reasoned that the test under the Zimbabwean Constitution is the same as the test set out in Article 25 of the ILC Articles, the international law analysis is not affected by the domestic test which gives rise to a state of emergency. Accordingly, a domestic declaration of a state of emergency can only serve as evidence of a state of emergency that may give rise to a necessity defence under international law. Under customary international law, the Parties agree (see Rejoinder, para. 860; Cl. Skel., para. 152) that the test for establishing the defence of necessity is set out in Article 25 of the ILC Articles, which provides as follows:

Article 25. Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;

and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.

624 The Tribunal shall consider each element in turn.

a) Essential Interest

625 The Tribunal considers the Respondent's submission on the State's "essential interest" is threefold: (a) the existence of the State itself; (b) its political survival; and (c) its economic survival (see Resp. Skel, para. 128). The Respondent submits that the threat to its essential interest was the result of a spontaneous occupation of land by Settlers/War Veterans in what it calls the "March of History" (see *ibid.*, paras. 81 and 132). The Tribunal notes that the Settlers/War Veterans, although termed "non-Governmental", were instrumental in the struggle for "liberation" that preceded the Lancaster House Conference and the birth of the Republic of Zimbabwe.

626 The Claimants acknowledge that the existence of a State, as well as the maintenance of the public order of a State, is an essential interest (see Cl. Skel., para. 153). However, the Claimants assert that the plight of landless Zimbabweans is not an essential interest, nor is placing them in possession of land at the expense of the legitimate landowner while revoking the landowners' legal rights of recourse (see *ibid.*).

627 The Parties are correct in their affirmation that the existence of a State, as well as the maintenance of public order of a State, is an essential interest, and therefore applicable to ILC Article 25(1)(a).

628 The Tribunal recognizes that the "March of History" was indeed a challenging time for the Zimbabwean Government. This was particularly so because the Settlers/War Veterans were largely the same people who were directly responsible for overthrowing the former Government and installing the current revolutionary President, Robert Mugabe. Understandably, the Government supporting President Mugabe found itself in a predicament as to how to deal with these individuals, as they formed a long-standing part of its political support base. These Settlers/War Veterans were, however, a minority of the overall citizenry – a point that becomes potently clear when one takes into account that the proposal for the implementation of the FTLRP was rejected by the Zimbabwean people at a referendum (see Tr. Day 3, pp. 954-955).

629 The Claimants' assertion, that no state of emergency or similar legislation was enacted because no such state existed at the time that the March of History commenced, is, in the Tribunal's consideration, valid evidence indicating that the March of History was not tied to a State-wide interest. The initial actions of the Settlers/War Veterans were of a scale that was not uncontrollable by the Government and the police forces. However, the Tribunal finds that the Zimbabwean Government chose to inflame the situation rather than dissolve it through legal means.

630 The Respondent has clearly demonstrated that the essential interest was to ensure the survival of the incumbent Government and its President at a political level. Such a conclusion is reasonably satisfied by the fact that the uprising was wholly instigated and performed by those who were traditionally faithful to the incumbent party. Indeed, it is not uncommon for an incumbent government to fall out of favour with the voting majority, or even their most staunch supporters, only to be replaced by a new government in an election. Accordingly, it cannot automatically follow that a threat to the existence of a political party is a threat to the existence of a State and therefore an essential interest that is necessary to protect at all costs. The Respondent has failed to demonstrate how this threat to the survival of the incumbent party at a political level was a threat to the State itself.

631 Accordingly, it must follow that there was no threat demonstrated by the Settlers/War Veterans to an essential interest of the State that would satisfy the essential interest requirement in ILC Article 25(1)(a).

b) A Grave and Imminent Peril

632 The Respondent argues that the mass uprising of millions of people was an "irresistible force ... beyond the control of the State" (see Resp. Skel., para. 116), openly challenging the Zimbabwean Government and its President (see *ibid.*, para. 109). The Respondent highlights that the international response to its decision to pursue a policy of "moderation and reconciliation" in implementing the FTLRP was wholly negative (see Rejoinder, para. 97). This additional factor resulted in greater distress and crisis in Zimbabwe's economic, political and social sectors (see *ibid.*, para. 910), analogous to that suffered by the Argentine Republic in *LG&E*. The Tribunal is aware that the necessity judgments in *LG&E*, *Enron* and *Sempra Energy International v. The Argentine Republic* (see ICSID Case No. ARB/02/16, Award, 28 September 2007, CLEX-230 ("*Sempra*")) were subsequently annulled, as well as parts of the necessity award in *CMS*, and so the discussions on necessity in relation to these cases are meant solely to address the Parties' discussions of these cases.

633 The Claimants submit that Zimbabwe has failed to submit evidence proving that the Settlers/War Veterans posed a threat sufficient to trigger such a peril or threat to the existence of the State and

maintenance of public order (see Cl. Skel., para. 154). The Claimants identify statements made by the Zimbabwean police force to the effect that they were capable of "dealing with the so-called 'mass-movements' and that the State was not facing a 'bloody conflagration'" (see *ibid.*). Likewise, and drawing from the case of *Commissioner of Police v. Commercial Farmers' Union* (see 2000 (1) ZLR 503 (H) – High Court, Harare, p. 515, CLEX-75), the Claimants note that there was no evidence supplied by Zimbabwe to support the claimed millions of occupiers, with the police putting the figure at closer to 58,000 persons (see Cl. Skel., para. 154).

634 Consequently, the Claimants argue that Zimbabwe had failed to prove the claimed crisis in the political and social sectors and that, prior to the FTLRP, there had been no threat of an economic crisis. Accordingly, there could not have been an economic threat prior to the FTLRP, let alone one that could threaten the existence of the State or maintenance of public order. The Claimants aver that the FTLRP and affiliated policy decisions taken by the Government of Zimbabwe contributed to Zimbabwe's economic crisis (see *ibid.*).

635 The evidence presented demonstrates that the initial land occupations by the Settlers/War Veterans did not constitute a threat to the survival of the State, but rather a threat solely to the incumbent political party which could have been brought under control by the police. As to the economic threat, the Tribunal agrees there is little doubt that the Zimbabwean economy was in a more robust state prior to the March of History and that the economy entered an increasingly sharp decline in stability as the decade drew on. However, any alleged imminent peril to the State only materialized after the implementation of the FTLRP and its associated policies, which was the State's own response to the initial land occupations by the Settlers/War Veterans. The Respondent admits that this response was poorly received internationally, and had a detrimental impact on the State's ability to obtain foreign direct investment. In view of the Respondent's initial response, a necessity plea would ultimately fail because of Article 25(2)(b) of the ILC Articles.

636 The Respondent has also failed to adduce evidence that the FTLRP was a policy initiative implemented for the long-term economic interests of the State. The Respondent's evidence, that the policy was implemented in response to the demands of the occupying Settlers/War Veterans who were "attacking" the President (see Resp. Skel., para. 87), only serves to emphasize the point that the FTLRP was implemented to appease disgruntled political supporters. This becomes even clearer when one takes into account that the FTLRP had the exact opposite effect on the economy to that which was necessary to avoid its collapse. Accordingly, the Tribunal finds that the Respondent has not satisfied the "grave and imminent peril" requirement.

c) The Only Way

637 As noted earlier, the Respondent argues that humanitarian considerations must be accounted for in the determination of whether an alternative course of action was available (see Resp. Skel., para. 118, citing the *Rainbow Warrior case (New Zealand v. France)* (Arbitral Tribunal) (1990) 82 Int'l L. Rep. 499). Insofar as its options to respond to the March of History are concerned, the Respondent argues that there was no other way than the FTLRP (and its associated policy measures) to save lives and safeguard the "ongoingness" of the State (see *ibid.*, paras. 118, 122-132). The Respondent appears to reach this conclusion by relying on its previous attempts to reason with the "squatters" to no avail, as well as its analysis of the situation as extremely volatile, akin to a fire which was "symbolic of the invasions", which would have resulted in the loss of many other lives if the Respondent had pursued "Rhodesian style security", as it asserts is being argued by the Claimants (see Rebutter, para. 324; *ibid.*, para. 113). Accordingly, the Respondent argues that, by not ordering its police to fire on the land occupiers, it made a "correct" decision (see Resp. Skel., para. 94). The Respondent contends that it attempted to reason with the "squatters" to no avail (see *ibid.*, para. 113).

638 As evidence that other means had been attempted, the Respondent states that, in March and April 2000, it sent police to evict occupiers, while in August the Lands Minister, John Nkomo, declared to the occupiers that their occupation had to cease, and passed legislation that rendered the occupations illegal (see *ibid.*, para. 87). However, the Respondent notes that the "mob" was "unpredictable and dangerous" (see Rejoinder, paras. 374-375), the occupiers would "brandish their machetes and axes whenever they saw any white people" and negotiations were "almost always impossible as the invaders were usually too high on mbanje, or else too drunk to listen to reason" (see *ibid.*). Owing to the absence of Government resistance the occupations continued, with 42% of all occupations occurring between 2001 and 2002 (see Resp. Skel., para. 87). Prince Machaya also notes at para. 3 of his first Witness Statement that when the police:

[W]ent on the ground to try and stop the invasions and as events continued unfolding, it became obvious that the situation had become volatile and the problem monumental as more and more landless Zimbabweans took up land. [The land invaders] were no longer impressed by the law which they perceived to be the continuation of colonial times and which was stopping them from getting land.

639 The Respondent has also posited its analysis as a riotous mob, using the metaphor of an uncontrollable fire to indicate that the police were unable to tame such a force (see Rebutter, paras. 320-326). Along with emphasizing the overwhelming scale of the land occupier movement, the Respondent contends that there were political and racial overtones, adding another element of unpredictability, which it describes as being akin to a "powder keg" (see *ibid.*, para. 454). Accordingly, the Respondent argues that the FTLRP was the only option available because it was

demanded by the occupying Settlers/War Veterans, and therefore the only non-violent means available to quell unrest (see Resp. Skel., para. 121).

640 The Claimants, as the Tribunal summarized above, draw evidence from the case of *Commissioner of Police v. CFU* in which the Zimbabwean High Court determined that the police force was capable of stopping the land invasions but seemed to have been stymied by the Executive (see Cl. Skel., para. 155). The Claimants have noted that “the Police are an effective force ... and among their number are units that specialize in civil disturbances, including riots” (see Mem., para. 675; Gadzikwa I, para. 15; Heinrich I, paras. 106, 584). The Claimants also assert that the occupation movement was political and racial in nature and so no action was taken due to the police force’s bias; the police force was essentially directly and indirectly a supporter of ZANU-PF (see Laurie I, para. 20). While there were different accounts between witnesses on both sides, owing to the political nature of the conflict, ultimately the Claimants’ contention was that the Respondent “instructed, directed and controlled the Invasions” (see Mem., para. 693). The Claimants further submit that the FTLRP was not a policy initiative supported by the masses, but rather was the direct result of instigation by the Government (see Cl. Skel., para. 155). Additionally, the Claimants submit that the reason for the international community’s failure to endorse the FTLRP and accompanying policies was because it had wanted to work with Zimbabwe to ensure orderly land reform (see *ibid.*).

641 The Tribunal notes that the Parties are in agreement that the occupation movement was political and racial in nature; the Parties then diverge in their approach towards such a movement. The Respondent’s contention that political and racial movements should not be addressed because of their volatile nature cannot be accepted. The purpose of any State, and particularly its police force, is to maintain order in spite of such instabilities rather than stepping back and allowing the citizenry to devolve into anarchy. The Tribunal further notes that there seemed to be a promotion of such racial and political overtones, instead of an attempt to subdue them, with Minister Mutasa analogising the current police force’s refusal to aid its white farmers to the British police force’s refusal to aid the Zimbabweans in 1968 (see Mutasa I, paras. 11-14). Such retributive justice indicates unjustified discrimination, but this element will be discussed in greater depth below. As the Tribunal cannot accept a State’s refusal to diffuse a situation by virtue of its characterisation as political and/or racial in nature, whether the FTLRP was the only way to address the occupation movement will turn on the facts.

642 The Respondent asserts that it had sent the police force to try and stop the Invasions, but the Tribunal finds that these assertions are largely unsubstantiated. Prince Machaya’s statement is not attested by any facts, and subsequently he seems to contradict the same assertion by acknowledging that the Zimbabwean courts were not convinced by the Respondent’s position that

the police force was incapable of restoring order (see Machaya I, para. 5). The Respondent also relies on a publication, *Zimbabwe Takes Back Its Land*, to indicate that efforts to stabilise the situation were attempted in 2000, but fails to mention that the same page referenced also stated that "the state did not have a clear or consistent policy ... and the nature of the issue was determined more significantly by individual politicians in particular areas" (see R-72, p. 72). The Claimants' witness, Professor Chan, has also indicated that the response to the occupation movement was not unified because of political divisions, with Mr. Dumiso Dabengwa being "reluctant to endorse the land invasions in the first instance and, in fact, want[ing] them stopped" (see Tr. Day 3, pp. 951-952). During this period of political uncertainty and argument between the factions, there were clearly alternatives mooted, which were subsequently ignored when the incumbent party, ZANU-PF, reestablished itself politically.

643 In addition to these political alternatives, the Tribunal finds that there were alternative means provided by the Zimbabwean courts, as well as the international community, that the Respondent clearly ignored. The High Court, with the advantage of specific information regarding the police force's capabilities and the numbers of farm invaders, rejected the police force's contentions that there were insufficient resources to combat such invasions. Sympathetic to the police force's dependence on resources provided by the Executive, the High Court had issued a consent order, comprising multiple options, with "the underlying perception ... that the police force would, to the best of its ability and with the resources available to it, act to terminate the farm invasions ... [but] what is, however, glaringly apparent is that the [police force] has not acted at all" (see *Commissioner of Police v. CFU*, 2000 (1) ZLR 503, April 2000, CLEX-75, p. 514). The High Court further noted that "farm invasions are not a new phenomenon in Zimbabwe. They have occurred in the past and when the police, with the support of the Executive have acted, the invasions have been brought to an end" (see *ibid.*, p. 518). Finally, the Tribunal also notes that alternatives were provided by the international community. The British, in 2000, were willing to release 36 million pounds sterling to Zimbabwe on the condition that "farm occupations and violence were to end first", but the Respondent "insisted on financial assistance without any conditionality" (see *Zimbabwe 2003 - Report of the Presidential Land Review Committee on the Implementation of the Fast Track Land Reform Programme 2000-2002*, p. 16, C-221).

644 The Tribunal finds that there has been a total failure on the part of the Respondent to divorce the politics of the situation from the underlying necessary duty of the State to protect its citizenry. It is the Respondent's burden to prove that it took the "right" or "correct" decision by doing nothing. The Respondent has submitted that there were no alternative means, except that of appeasement, on the one hand, or "Rhodesian style security" on the other (which would have resulted in bloodshed and loss of life): However, such arguments are pitched in such broad terms as strongly to suggest that the Respondent took an intuitive *a priori* decision of avoiding any kind of measure that would

involve physical confrontation of the invaders and did not give detailed consideration to the alternative approaches. The Respondent did not offer any evidence of the specific measures that could have been explored as possible methods of addressing the Invasions and the reasons why those specific measures were dismissed (including, *inter alia*, any possible solutions that would have been offered by the police and armed forces, and alternatives provided by both the Zimbabwean courts⁷⁷ and the international community⁷⁸). The Respondent has not demonstrated that it carried out a rigorous process of assessing all possible alternatives, and it failed to take control of the situation by maintaining law and order. Instead, it instructed the police and other officials not to act. The Tribunal finds on the evidence that the Government was assisting and encouraging the Settlers/War Veterans after the Invasions. Indeed, in the short period of "ten days to two weeks of the beginnings of the land invasions, [President Mugabe] declared himself in favor of these land invasions" (see Tr. Day 3, p. 968).

645 Accordingly, the Tribunal finds that the Respondent has not satisfied the requirement that the implementation of the FTLRP was the only means available to stop the advances of the Settlers/War Veterans.

d) Impairment of Other States or International Community as a Whole

646 Insofar as ICSID jurisprudence is concerned, the process of assessment of this condition by the tribunals in *CMS*, *Sempra*, *Enron* and *LG&E* was notably lacking, a criticism echoed by the subsequent annulment committees. Accordingly, a lacuna exists that needs to be filled.

647 In order to determine whether the Respondent's acts seriously impair an essential interest of other States or the international community as a whole, the Tribunal must determine whether the Respondent's acts constitute acts of racial discrimination, which are undisputedly obligations *erga omnes* (see *Barcelona Traction*, CLEX-153).

648 The Claimants' argument is fairly straightforward, claiming that the Zimbabwean Government racially discriminated against them as "white" farmers, singling out landowners of a similar skin colour as part of the FTLRP (see Cl. Skel., para. 156). Such activities, it is argued, were a breach of obligations *erga omnes*, as well as a peremptory norm. Accordingly, the Claimants submit that the FTLRP and its associated policies were a serious impairment of an essential interest of the

⁷⁷ These would include the orders given by the Zimbabwean High Court in *Commissioner of Police v. CFU*. See Re-direct examination of Stephen Chan: Tr. Day 3, pp. 969-970).

⁷⁸ These would include the British offer to release 36 million pounds sterling on the condition that "farm occupations and violence were to end first" (see Zimbabwe 2003 - Report of the Presidential Land Review Committee on the Implementation of the Fast Track Land Reform Programme 2000-2002, p. 16, C-221).

international community as a whole. Furthermore, the violation of a peremptory norm is contrary to ILC Article 26 and therefore precludes Zimbabwe from invoking necessity (see *ibid.*).

649 The Respondent submits a number of arguments to contend that it has not engaged in racially discriminatory acts. Generally, the Respondent submits that the Lancaster House Agreement granted Zimbabwe the right to expropriate land that was not being properly used, so long as market compensation was paid to the owners (see Rejoinder, para. 253). The Tribunal agrees that this was a component of the Lancaster House Agreement and a valid exercise. As the redistribution of land was supported by the international community, the Respondent further argues that it was mutually agreed that the LRP was not about race. The Tribunal does not agree with the Respondent that land redistribution ceases to be about race by virtue of the support of the international community. Rather, the redistribution of land was considered to be a justified exercise of discrimination in favour of indigenous Zimbabweans to repair Rhodesian wrongs.

650 To this effect, the Respondent's argument that the FTLRP did not discriminate against persons based on their race (see Resp. Skel., para. 177) also fails. The Respondent submits that any racial discrimination arising from the redistribution of land is a "given" because of the history of the State and the way the land had been distributed during the Rhodesian era (see Rejoinder, para. 253). The Respondent argues that, if the foreign invaders who stole the land from the African Zimbabwean people had included a neighbouring black African State or the Japanese, the ones from whom land could have been taken today would have included estate owners of the neighbouring black African State or Japanese estate owners and no discrimination would be intended (see Resp. Skel., para. 177). The Tribunal rejects any such speculation attempting to minimize the racial aspect of Zimbabwe's history, as the fact remains that the estate owners were not of a neighbouring black African State or Japanese. In fact, the Tribunal disagrees with the Respondent's attempts to downplay the significance of the historical distribution of land while also utilising it to justify the aggression displayed by the Settlers/War Veterans. The policies of land reform, both the LRP and the FTLRP, undoubtedly distinguished between persons based on race and were *prima facie* racially discriminatory.

651 It is at this juncture that the Tribunal must discuss the obligation *erga omnes* not to engage in racially discriminatory acts. As argued by the Respondent in its Rejoinder, it is accepted by the international community that situations will arise where racial discrimination is justified and will remain so for as long as is necessary. Policies that discriminate in favour of the aboriginal inhabitants of a particular State (affirmative action) may, generally speaking, fall within this category as justifiable. These policies aid in promoting, *inter alia*, the health and well-being, general knowledge, social integration, skills, and commercial know-how of, and added employment and business opportunities for, indigenous persons and their broader communities. Such policies may

be reasonably expected to exist until the social and economic indicators of the aboriginal population are brought in line with the corresponding averages of the general population for developed States, or global averages for developing States. The Respondent has referred broadly to this general principle, citing examples such as the policies implemented in States such as the United States of America, Malaysia, Singapore and New Zealand⁷⁹. In comparison, the Respondent claims that the FTLRP was also "meant to change the system and to open the road that African Zimbabweans over time enjoy 'their full rights and obligations as citizens'" (see Rejoinder para. 284). The Tribunal is not unsympathetic to national aspirations to correct colonial wrongs. Yet, while the Tribunal can agree to these principles to a broad extent, it finds the Respondent's position too extreme. Some of the examples of policies that the Respondent has cited, which provide incentives and preferential treatment to indigenous persons, are good examples of policies that actually intend to, and lawfully do address such inequalities. However, the Tribunal rejects the Respondent's attempt to align the FTLRP with other legitimate policies that justifiably discriminate by race in order to address historical injustices.

652 The Tribunal does not question the legitimacy of the Lancaster House Agreement and its corresponding policy from 1979-2000 that expropriated land, with compensation, for redistribution. The discrimination in favour of indigenous Zimbabweans was necessary in order to remedy the unconscionable anti-aboriginal policies implemented throughout the Rhodesian era. For Zimbabwe's FTLRP to be considered legitimate, however, it must be established that the racial discrimination associated with this land redistribution programme was justified and necessary as well. The Respondent has submitted that the FTLRP was a means of quelling civil unrest and its inherently discriminatory policy was necessary to satisfy the demands of the Settlers/War Veterans who threatened the State during and after the March of History.

653 The Respondent blames the aggression displayed by the Settlers/War Veterans solely on the former Rhodesian Government, claiming that the land sought by the Settlers/War Veterans was originally "stolen" from the Zimbabwean people by the Rhodesians (see Resp. Skel., para. 83). The Respondent submits that the Claimants, as "European farmers", contributed to the March of History by using force to resist the change to the FTLRP and therefore prolonging Zimbabwe's situation of necessity (see *ibid.*, para. 110). Mr. Mutasa's testimony noted, "In Somoh (phonetic), we have a saying that, if you go to warm yourself by the fire of a thief, you become a thief. And so the von Pezolds [the Claimants], in coming to Rhodesia, them being white became identified with the Rhodesians, and they became Rhodesians by that stroke of the pen" (see Tr. Day 5, p 1373). The Hearing further confirmed that the objective criteria in determining which farmers would stay on their land was purely based on whether they were white (see Tr. Day 4, pp. 1200-1203). Of

⁷⁹ See Rejoinder paras. 342, 498, 666 and Section 6.3.2.

pertinence, it should be noted that the Claimants invested in Zimbabwe in 1988, after its establishment as an independent State when it ceased being Rhodesia (see Heinrich V, para. 5).

654 The Tribunal has determined earlier in the Award that the March of History was not a threat to the State, but rather the incumbent political party (see above paras. 636-637). Furthermore, the Tribunal has found above that the FTLRP was not the only means of addressing this alleged threat (see above para. 646). The Tribunal now also finds that the aggressive nature of the Settlers/War Veterans' demands was not justified and necessary so as to give rise to a corresponding justified and necessary response by the Government. Rather, the aggression displayed by the Settlers/War Veterans was a product of prejudice and racial discrimination.

655 From the Tribunal's analysis, a clear line can be drawn between Zimbabwe's original expropriation policy from 1979-2000, which was adequately founded and justifiable, and the FTLRP (2000 onwards), which Zimbabwe enacted in response to political pressures, rather than an underlying need to remedy the anti-indigenous land policies of the former Rhodesian Government. Zimbabwe has therefore failed to provide sufficient evidence or jurisprudence to support the proposition that the FTLRP is a justifiable form of discrimination against all foreign land owners, in favour of the indigenous population.

656 Accordingly it cannot be said that Zimbabwe has provided a legitimate reason for implementing an unjustified policy that discriminated against the landowners on the basis of their skin-color and foreign ancestral heritage, thereby contravening its obligation *erga omnes* not to engage in racial discrimination. This breach of an obligation *erga omnes* by Zimbabwe, through the implementation of the FTLRP and associated policies, was an impairment to the international community as a whole and ILC Article 25(1)(b) precludes a defence of necessity. Similarly, and on the same evidence, Zimbabwe's violation of its obligation *erga omnes* means that it has breached ILC Article 26 and is therefore precluded from raising the necessity defence in relation to any events upon which the FTLRP policy touches. As the Respondent has failed on these two points by breaching its obligations *erga omnes*, the Tribunal considers it unnecessary to determine whether the Respondent's racial discrimination was also a breach of a peremptory norm, as the Claimants submit.

e) Exclusion of Necessity due to International Legal Obligations

657 Unfortunately there is limited jurisprudence available on ILC Article 25(2)(a), as the tribunals in *CMS*, *Sempra*, *Enron* and *LG&E* skimmed over the matter on a case-by-case factual basis and the corresponding annulment committees noted the inadequacy of the respective tribunals' decisions. Additionally, neither Party has provided any substantive evidence in support of their respective BIT arguments in relation to necessity. The BITs in question do not specifically mention or seek to

withdraw from the doctrine of necessity and there is no similar provision within the BITs that is to be regarded as *lex specialis*. Accordingly, it cannot be said that the BITs preclude Zimbabwe from invoking necessity.

658 However that may be, the Tribunal has found that the Respondent has contravened its international legal obligations *erga omnes* by engaging in racial discrimination through the implementation of the FTLRP. Accordingly, the Respondent has failed to satisfy this requirement.

f) Exclusion of Necessity due to a Contribution by the Invoking State

659 Citing a number of cases as authority (see *Vivendi, AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, para. 263, CLEX-411; and *Impregilio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 356, CLEX-412), the Claimants argue that the contribution must be sufficiently substantial; however, it need not be intended or planned and may be the result of ill-conceived policies (see *Cl. Skel.*, para. 158). Accordingly, the Claimants submit that Zimbabwe had not only contributed to a state of necessity, but had directly caused it (see *ibid.*). The Claimants submitted numerous pieces of evidence which indicate that, *inter alia*:

- (a) Settlers/War Veterans had received transport and financial aid from the Government while occupying land;
- (b) The police and army had contributed in the invasion process through the provision of transport assistance;
- (c) The police had refused to stop occupiers when requested by landowners;
- (d) The decision to put agricultural land in the hands of inexperienced persons, when the economy was heavily dependent upon revenue from agricultural exports, contributed to the economic decline of the State;
- (e) The Zimbabwean President had instructed the police and army not to attempt to evict the occupiers from the land; and
- (f) The Government had directly settled 59 families on the Claimants' Estates, complete with "Offer Letters" issued by the Government of Zimbabwe, instructing the Settlers/War Veterans to occupy the identified plots of land (see endnotes 513 to 518 of *Cl. Skel.* generally, and para. 158, see also *Tr. Day 5*, p. 1415).

660 The Respondent concedes that the March of History was owing in part to a failure of the Government to support the Settlers/War Veterans' "land-hungriness" by not implementing the FTLRP earlier (see *Resp. Skel.*, para. 82), contending that the Government was not sympathetic

to the occupations (see *ibid.*, para. 87). In response to the Claimants' submissions regarding the inactivity of the police, the Respondent submits that the actions of the police in standing down did not contribute to the state of necessity, but rather avoided an imminent peril (presumably a civil conflict) appearing in the long term (see *ibid.*, paras. 367-371).

661 The Tribunal finds that the Claimants have presented detailed evidence that demonstrates that the Government was directly assisting and supporting the Settlers/War Veterans in their pursuit of land ownership. This evidence directly contradicts the assertion by Zimbabwe that it did not sympathise with the plight of the occupying Settlers/War Veterans and had initially refrained from implementing a policy similar to the FTLRP for this reason.

662 The Respondent also blames other causes of the alleged state of emergency, such as the former landowners for failing to teach the incoming Settlers/War Veterans how to utilize the land and the "international community" for failing to meet their Lancaster House undertaking to fund compensation for the redistribution of land (see *ibid.*, para. 105). In addition, the Respondent highlights that it was shouldering a debt of over \$700 million, apparently inherited from the previous Rhodesian Government, which it argues was the result of a war initiated by the Rhodesian Government to maintain "white rule" (see *ibid.*). Accordingly, the Respondent claims that it could not afford to purchase the land outright when the international payments ceased (see *ibid.*).

663 As noted above, the state of the Zimbabwean economy, as well as the level of civil order within Zimbabwe, was not a cause for immediate concern prior to the implementation of the FTLRP. Zimbabwe's assertion that the international community is equally to blame for the State's economic downfall is unsubstantiated.

664 The international community was permitted to respond in a manner that was proportional to the actions of the Government of Zimbabwe, as stated in Chapter II of the ILC Articles (see ILC Articles 49-54). The international community (in particular those States which had been providing financial assistance in the past) was under no obligation to assist Zimbabwe, to offer financial aid or provide preferential treatment to Zimbabwean exporters when the Government had engaged in a policy that racially discriminated against persons based on their race and seized their foreign currency to bolster the State's dwindling reserves.

665 The Government could not have been completely unaware that the compulsory expropriation and redistribution of land from the seasoned and skilled farm owners to the unskilled Settlers/War Veterans would have a detrimental impact on the State's agricultural exports. Likewise, Zimbabwe's additional argument that these landowners whose land had been expropriated contributed to the State's economic decline by failing to voluntarily provide technical assistance and training to the new Settlers/War Veterans landowners is irrational. A landowner whose land had been

expropriated by hostile Settlers/War Veterans could not have been expected to render any form of technical assistance or capacity-building education to these persons when the Government had instructed the police not to provide protection to foreign landowners.

666 Accordingly, the Tribunal finds that Zimbabwe not only contributed to its economic decline, but was also one of the primary instigators of the situation that gave rise to the imminent peril. Consequently, Zimbabwe has not satisfied ILC Article 25(2)(b).

667 The Tribunal has carefully considered the Respondent's arguments relating to necessity as a defence to the above alleged treaty breaches. The argument that Zimbabwe was in a state of emergency from 16 February 2000 to 16 March 2013, so that the Government had no other reasonable choice but to expedite the LRP and expropriate land without compensation, is unconvincing. The Respondent cannot invoke ILC Article 25.

J. Remedies

(1) Introduction

668 The Tribunal has found liability on the merits in favour of the Claimants, as discussed above. In particular, the Tribunal has found that the Respondent unlawfully expropriated the Claimants' Zimbabwean and Residual Properties, among other property, and breached its FET, FPS and other obligations under the German and Swiss BITs. The Tribunal has also rejected the Respondent's necessity defence. Accordingly, it remains for the Tribunal to consider and determine an appropriate remedy based on the Parties' submissions.

(2) Restitution

(i) Claimants' Position

669 The Claimants seek declaratory relief, restitution in kind (i.e., the reinstatement of title to the Zimbabwean Properties) and compensation for losses not covered by restitution in kind. In the alternative, they seek declaratory relief and compensation.

670 During the Hearing, Professor Williams put the following question to the Parties on the availability of restitution as a remedy, to be addressed in their Post-Hearing Briefs (see Tr. Day 6, p. 1902):

... I would like some assistance on the Claimants' request for restitution in a situation where the BITs, as I understand it, do not prohibit expropriation but say – accept that the only relief there is the full compensation standard. In other words, is it permissible with these BITs to be asking for restitution when expropriation, putting it colloquially, with compensation is not, as I understand it, a breach of the Treaty? How can you in that situation be asking for restitution?

671 Although the Claimants have not addressed this question directly, they take the position that, under customary international law, restitution is required where a peremptory norm has been breached and, because they say the evidence bears out that the aggressive phases of the LRP were a serious breach of the prohibition against racial discrimination, the Tribunal must order restitution in kind (see Cl. PHB, para. 172).

672 More broadly, the Claimants submit that restitution has primacy among the forms of reparation available at international law and that restitution is the usual form of reparation for a breach of an international obligation (see Cl. Skel., para. 186, citing *Chorzów Factory* (see *Germany v. Poland*) (Merits) (1928) PCIJ (Series A) No. 13, CLEX-148); *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic* ("*Texaco*") (see Award on the Merits, 1979, 53 ICR 389, CLEX-157).

673 The Claimants note that, pursuant to Article 35 of the ILC Articles, restitution is not required if it is "materially impossible" or if any burden it creates is disproportional to the benefit derived. Article 35 of the ILC Articles provides as follows:

A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- a. is not materially impossible; and
- b. does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

674 The Claimants note the following circumstances relevant to the Tribunal's determination as to whether restitution in kind should be granted in these cases (see Cl. Skel., para. 187; Cl. PHB, para. 171):

- The Claimants occupy the majority of the Estates and operate them;
- Third parties do not hold legal title over the Zimbabwean Properties (see Cl. Skel., para. 187);
- The Respondent has acknowledged that it previously granted restitution to foreign investors whose farms were expropriated pursuant to the 2005 Constitutional Amendment (see *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe* ("*Funnekotter*"), ICSID Case No. ARB/05/06, Award, 22 April 2009, CLEX-242).

675 The Claimants further note that, pursuant to Article 41 of the ILC Articles, if the aggressive phases of the LRP were a serious breach of an obligation arising under a peremptory norm of general international law, which in this case concerns the prohibition against racial discrimination, restitution must be ordered. Article 41 of the ILC Articles provides as follows:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
2. No state shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.
3. This Article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

676 The Claimants refer to the ICJ case between Israel and Palestine relating to Israel's construction of a wall in occupied Palestinian territory. In that case, the ICJ held that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" and an obligation "not to render aid or assistance in maintaining the situation created by such construction of the wall". The ICJ found that Israel was obligated to cease work on the wall and to dismantle the structure erected, as well as to make reparation for all damage caused by the construction of the wall (see Construction of a Wall, CLEX-211).

(ii) Respondent's Position

677 As noted above, during the Hearing, Professor Williams put the following question to the Parties on the availability of restitution as a remedy, to be addressed in their Post-Hearing Briefs (see Tr. Day 6, p. 1902):

... I would like some assistance on the Claimants' request for restitution in a situation where the BITs, as I understand it, do not prohibit expropriation but say – accept that the only relief there is the full compensation standard. In other words, is it permissible with these BITs to be asking for restitution when expropriation, putting it colloquially, with compensation is not, as I understand it, a breach of the Treaty? How can you in that situation be asking for restitution?

678 In its Post-Hearing Brief, the Respondent answered Professor Williams' question regarding the availability of restitution under the German and Swiss BITs by asserting that the international standard is full compensation, and therefore increasing compensation to higher levels by the "artifice of restitution" is inappropriate.

679 More broadly, the Respondent states that restitution is not possible in these circumstances and that the end of the alleged state of emergency on 16 March 2013 cannot give rise to measures that would recreate the state of emergency. The Respondent also submits that the taking was not

wrongful because there was a strong public purpose involved. The Respondent also points to a statement by the World Bank that land reform cannot be reversed, and to reports in *Zimbabwe Takes Back Its Land* that Settlers/War Veterans will not allow restitution and that people on the properties will not leave. The Respondent notes somewhat rhetorically that the Claimants' demand for restitution in a legal sense is also a demand for "restoration" in a historical and political sense, drawing analogies to a period of restoration following the French Revolution, restoration involving the Ku Klux Klan following the U.S. Civil War and restoration of the Tsarist regime following the Russian Revolution (see Resp. PHB, paras. 369 to 375).

(iii) The Tribunal's Analysis

a) Overview of Restitution

680 Dr. Borzu Sabahi's text *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press, New York, 2011, CLEX-306 ("Sabahi")) offers an overview on the law regarding restitution. Dr. Sabahi states that (see *ibid.*, p. 61):

Restitution has been recognized as the primary legal remedy in international law, because it has the potential to eliminate, legally and materially, the consequences of an unlawful act, rather than providing compensation, which is mainly a monetary substitute for restitution.

681 The principle that restitution is the primary legal remedy for international wrongs is attributed to *Factory at Chorzów*. The Permanent Court of International Justice ("PCIJ") stated: "It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation" (see *ibid.*, p. 27). Then, more fully, the PCIJ stated (see *ibid.*, p. 47):

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. [emphasis added]

682 While restitution was impossible in that case, the PCIJ's statement of law has had considerable influence. Dr. Sabahi credits *Chorzów Factory* as "the authoritative principle governing determination of reparation due for committing wrongful acts in international law" (see Sabahi at p. 47, CLEX-306).

683 The ILC Articles confirm restitution as the principal form of reparation in international law (see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction Text and Commentaries* (Cambridge University Press, Cambridge, 2002) ("**Articles on State Responsibility**"), CLEX-266 to 275). ILC Article 31(1) provides that a "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." ILC Article 34 expands on this:

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.

684 ILC Article 35, which is set out in full below, deals specifically with restitution:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. [emphasis added]

685 Restitution restores "the situation that existed prior to the occurrence of the wrongful act" (see *Articles on State Responsibility*, p. 213, CLEX-273), also known as restitution of the *status quo ante*. However, restitution is only one form of reparation. If restitution alone fails to adequately restore a claimant to the situation it was in prior to the wrong, then other forms of reparation may also be awarded. As the commentary to the ILC Articles confirms, the reparation awarded must achieve "re-establishment of the situation which existed before the breach" (see *Articles on State Responsibility*, p. 211, CLEX-272). Accordingly, "[w]iping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused" (see *ibid.*).

686 Restitution may take, in practice, a wide range of forms: "this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act" (see *Articles on State Responsibility*, p. 213, CLEX-273).

687 Generally, restitution is demarcated between material restitution and juridical restitution. The former usually involves the returning of property, whereas the latter involves modifying the legal situation. They are not exclusive; both may be awarded if the situation requires it.

688 In respect of the limitations provided for in ILC Article 35(a) and (b), the commentary to the ILC Articles notes that "the phrase 'provided and to the extent that' makes it clear that restitution may only be partially excluded, in which case the responsible State will be obliged to make restitution to

the extent that this is neither impossible nor disproportionate" (see Articles on State Responsibility, p. 216, CLEX-273).

689 Material impossibility "would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these" (see *ibid.*). Internal laws, per ILC Article 32, do not justify the failure to provide reparation; obstacles in administration or politics are also insufficient. Proportionality is such that restitution is only barred if "there is a grave disproportionality" between the remedy awarded and the relevant breach (see Articles on State Responsibility, p. 217, CLEX-273).

690 Although this dispute arises between an investor and a State, it is apparent that the ILC Articles will be of considerable guidance to this Tribunal.

691 With this broad background, the Tribunal turns now to restitution in respect of investment treaties.

b) Restitution and Investment Treaties

692 Dr. Sabahi's comments provide a suitable introduction. He notes that "[m]odern investment treaties, apart from codifying how the compensation due for a lawful expropriation should be computed, do not codify rules relating to how restitution should be awarded" (see *Sabahi* at p. 62, CLEX-306). He then states that (see *ibid.*, p. 63):

The power of an arbitral tribunal to award restitution is derived from its jurisdiction to decide a case. The fact that some jurisdictional instruments specifically grant the power to award restitution does not detract from the customary nature of this power. The scope of such powers, however, may be circumscribed in the same instruments that grant the jurisdiction or in other instruments, as the parties may agree.

693 The text of the ICSID Convention does not state with specificity whether ICSID tribunals may only award pecuniary remedies, or whether material restitution is also envisioned. However, a view into the Convention's drafting history confirms that "an award could well order the performance or non-performance of certain acts" (see *History of the ICSID Convention*, Vol. II, p. 991), which may include "restitution of seized property" (see Christoph Schreuer, "Non-Pecuniary Remedies in ICSID Arbitration" (2004) 20 *Arb. Int'l* 325 at pp. 325, 332, CLEX-280).

694 Indeed, ICSID tribunals are amongst the ranks of investment tribunals that have affirmed their jurisdiction to award non-pecuniary remedies. In *Enron*, it was stated that (see *Enron*, para. 79, CLEX-207):

An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available.

695 The *Enron* tribunal soon after also said (see *ibid.*, para. 81):

The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts.

696 Again, in *Ioan Micula*, the tribunal stated (see *Ioan Micula*, para. 166, CLEX-237):

Under the ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitution, i.e., re-establishing the situation which existed before a wrongful act was committed. As Respondent itself admits, restitution is, in theory, a remedy that is available under the ICSID Convention. That admission essentially disposes of the objection as an objection to jurisdiction and admissibility. The fact that restitution is a rarely ordered remedy is not relevant at this stage of the proceedings.

697 Nevertheless, Dr. Sabahi indicates that "restitution in international investment law, particularly in modern practice, is not awarded often" (see Sabahi, p. 61, CLEX-306).

698 While not awarded often, this seems to be driven mostly by pragmatic concerns. It is rare that the property in dispute can be returned because of damage. Further, parties often prefer the simplicity of a monetary award, also for enforcement purposes.

699 The main conclusion to be drawn from the above analysis is that it is beyond doubt that non-pecuniary remedies, including restitution, can be awarded in ICSID Convention arbitrations under investment treaties.

c) Examples of Material Restitution

700 A number of examples can be cited in which international courts or tribunals have recognised or awarded restitution (see Sabahi, pp. 65-71, CLEX-306).

701 In *Texaco*, Professor Dupuy sat as sole arbitrator. Professor Dupuy extensively analysed the international law on restitution before concluding (see *Texaco*, para. 100, CLEX-157):

... [T]his Tribunal must hold that *restitutio in integrum* is, both under the principles of Libyan law and under the principles of International law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the status quo ante is impossible.

702 Professor Dupuy allowed the Libyan Government five months to fully perform its obligations under the Deeds of Concession, breached when the Government unlawfully nationalised the Claimants' properties, rights and assets. This amounted to an award of restitution.

703 In *Construction of a Wall*, the ICJ concluded that (see *Construction of a Wall*, para. 153, CLEX-211):

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.

704 Two other examples discussed by Professor Dupuy in *Texaco* may be briefly stated. In *Republic of El Salvador v. Republic of Nicaragua* (see discussion in *Texaco*, para. 99, CLEX-157), it was ordered that "the Government of Nicaragua is *under the obligation* – availing itself of all possible means provided by international law – to reestablish and maintain the legal status that existed prior" [emphasis in original] to the relevant acts of the Government (see *ibid.*). In the case concerning *Temple of Preah Vihear (Cambodia v. Thailand)* (see 1962 ICJ 6, Judgment, CLEX-152) the order made was that (see *ibid.*, p. 35):

Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

705 Given that little evidence was presented particularising the property taken, the Court noted that it could "only give a finding of principle in favour of Cambodia, without relating it to any particular objects" (see *ibid.*, p. 34).

706 Finally of note is *Funnekotter*, a case particularly relevant to this Tribunal's analysis. In *Funnekotter*, the claimant did not pursue restitution but, in the early stages of the proceedings, the respondent - Zimbabwe - submitted that it was "in position to restore the claimants to their properties and has already restored other owners of bilaterally protected investments to their properties", noting that "restitution is practicable and possible" (see *Funnekotter*, para. 68, CLEX-242). Four examples of restitution were mentioned by Zimbabwe. However, the respondent later withdrew its willingness to offer restitution. Accordingly, the Tribunal did not have to concern itself with the granting of restitution in that case.

d) Application to the Claimants

707 This section considers whether the Tribunal should award restitution in the present case in the light of the relevant BITs and the evidence adduced by the Parties.

i) The Relevant Legal Framework

708 As mentioned, ICSID tribunals have jurisdiction to award restitution, unless otherwise agreed (for example, where the BIT prohibits it). In this dispute, neither BIT prohibits the Tribunal from ordering restitution.

709 First, the German BIT does not prohibit restitution. If anything, it contemplates it in at least one limited respect. Article 4(2) provides for expropriation "for a public purpose and against prompt, adequate and effective compensation." Article 4(3), however, entitles those protected by this Treaty:

... [W]hose investments suffer losses in the territory of the other Contracting party owing to war or armed conflict, revolution, a state of national emergency or revolt ... treatment no less favourable by such other Contracting Party than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third state, whichever is the more favourable, as regards restitution, indemnification, compensation or other valuable consideration. [emphasis added]

710 Further, Article 11(2), concerning investment disputes between a State and an investor, entitles the arbitral tribunal to reach its decision by considering, amongst other things, "such rules of general international law as may be applicable". This wording supports the award of restitution as recognised by customary international law.

711 Accordingly, nothing in this BIT prevents an award of restitution.

712 Secondly, the substance of the Swiss BIT mirrors that of the German BIT. The above comments therefore apply here. Article 6(1) recognises compensation for expropriation, while Article 7(1), like Article 4(3) of the German BIT, goes further in recognising the possibility for restitution.

713 Article 7(1) concerns compensation for 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". That article goes on to say that an investor who suffers losses from "requisitioning of their property" by the other State's "forces or authorities" "shall be accorded restitution or adequate compensation." This Article indicates that the BIT anticipates restitution as a ground for relief in the event of a dispute.

714 Finally, Article 10(3) of the Swiss BIT also allows a tribunal to determine the dispute, amongst other things, based on "such rules of international law as may be applicable".

715 As a result, restitution is not prohibited under the Swiss BIT either.

716 In light of the language of the two BITs, this Tribunal finds that it has jurisdiction to award restitution, if appropriate.

ii) Basis for Restitution

717 There appear to be two grounds under which the Claimants seek restitution. In the Claimants' Memorial they state:

1618. The matters stated in paras 1583 to 1617 above constitute sufficient grounds for the tribunal to order restitution in relation to the Zimbabwean Properties.

1619. However, Professor Sarooshi in his expert witness statement opines that there is a further ground for restitution. This further ground is the fact that the Land Reform and Resettlement Programme as applied to the Claimants is a "serious breach" by the Respondent of a peremptory norm of general international law, namely the prohibition against racial discrimination ...

718 The "sufficient grounds" referred to in paragraphs 1583 to 1617 of the Claimants' Memorial involve unlawful expropriation without compensation of the Zimbabwean Properties. This is the first stated ground for restitution. The second ground is breach of a peremptory norm.

719 This is consistent with the Claimants' Post-Hearing Brief. The Claimants affirm that the "Respondent must make full reparation which will wipe out all of the consequences of its breaches of the BITs, customary international law and Zimbabwean law" (see Cl. PHB, para. 169).

720 However, an important point of distinction between these grounds is the Claimants' argument that the breach of peremptory norm, if it succeeds, requires that restitution be ordered as a mandatory requirement (see Cl. PHB, para. 172).

721 Nevertheless, it would seem sensible that either breach could be a ground for restitution. Breach of the BIT would be an internationally wrongful act within Article 2 of the ILC Articles as a "breach of an international obligation", which can include treaty obligations (see Crawford, *Articles on State Responsibility*, p. 83, CLEX-266). Breach of a peremptory norm could also justify restitution.

iii) Whether Restitution Should Be Awarded

722 If the Tribunal finds that there has been a breach of a BIT or a peremptory norm, then *prima facie* it seems that the Claimants are entitled to restitution unless one of the "defences" in Article 35 of the ILC Articles applies.

723 In the following section, therefore, the Tribunal first considers the two defences to restitution, namely, material impossibility and disproportionality. Secondly, the Tribunal considers whether a breach of a peremptory norm requires restitution irrespective of those defences.

iv) Material Impossibility

724 As noted, material impossibility usually arises in a situation where property is permanently destroyed or lost. The standard is high: the commentary to Article 35 of the ILC Articles provides that "restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these" (see *Articles on State Responsibility*, CLEX-385, p. 98). Further, Article 32 of the ILC Articles prohibits a state from relying on its internal laws to justify non-compliance with its international obligations.

725 Examples where the material impossibility defence has been applied successfully are rare, given that most parties are likely to pursue monetary compensation if it appears that restitution is impossible (see *ibid.*, p. 97). The decision in *Occidental Petroleum Corporation v. Republic of Ecuador* recognised that material impossibility may arise in circumstances where performance is plainly legally impossible, though it did so in a somewhat different context. There, the Tribunal stated that (see *Occidental Petroleum Corporation v Republic of Ecuador*, Decision on Provisional Measures (ICSID Case No ARB/06/11), para. 79, CLEX-228):

It is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible.

726 Viewed through this lens, the Tribunal finds that restitution is not materially impossible in the present case.

727 First, restitution here essentially requires reinstatement - or reissuing - of title to the Zimbabwean Properties acquired by the Government in 2005 (see Cl. Corrected Request for Relief, para. 8.12.1). This is clearly not legally impossible - it simply requires an administrative act on the part of the Government. Especially relevant here is the fact that the Claimants remain in substantial occupation of most of their properties (see Heinrich I, paras. 596, 683 and Appendix I – Heinrich estimates that, across the three Estates, Settlers/War Veterans occupy between 16 to 41% of the land area). Thus if the Claimants had legal title restored, it would in fact serve to legitimise the *de facto* position in which the Claimants remain (at least in respect of the land they occupy; not all land is occupied). Given that there is no legal impossibility in reissuing legal title to the Properties (and the Respondent cannot rely on its own internal laws to prevent restitution in any case), the *Occidental Petroleum* decision mentioned above is clearly distinguishable.

728 Second, although the Claimants' Estates have suffered property damage, there is no indication that this is irreparable or that the Claimants are unwilling to restore the land to its original position. Indeed, if restitution were granted, then the Claimants could pursue their legal rights against other occupiers of the land via the domestic courts in trespass or other causes of action. It is notable that,

as discussed above, the Respondent has acknowledged in the context of the *Funnekotter* case that it has previously restored the owners of other bilaterally protected investments to their properties.

729 Finally, the rights of the third parties currently resident on the land - that is, the Settlers/War Veterans - are fragile at best. Not all of those who are on the land appear to have been given Offer Letters (see e.g. Tr. Day 4, p. 1258 - Tsvakwi: "... the properties were acquired in 2005, and there are some people with Offer Letters, but there were some people who went and occupied the properties"). Even those occupiers who have received Offer Letters from the Government have not gained legal title. There is uncertainty even now as to who is entitled to what portions of the expropriated land (see e.g., Tr. Day 3, p. 965 - Chan: "So, we are in a position of some inchoate nature whereby we do not know exactly who owns what ..."). It appears from the evidence that the Settlers/War Veterans may in any event be less concerned about legal ownership and more worried to protect the usage they have acquired through occupation (see e.g., Tr. Day 5, p. 1372 - Mutasa: "And, indeed, it is that usage which is important to us and not the usage that people like yourself and Mr. von Pezold are thinking of lining individual pockets and depriving all other people of their livelihood and their means of livelihood").

730 This leads the Tribunal to the following conclusion: there is no material impossibility in returning the land. Legal title simply needs to be issued. Indeed, Zimbabwe has admitted to four occasions in the past where it has provided restitution to foreign investors. However, of most concern is the partial occupation of the Claimants' lands and the consequences of restoring title. The Respondent principally seems to argue material impossibility because the LRP cannot be reversed and the Settlers/War Veterans will not allow "their" land to be taken (see Resp. Skel., paras. 235–238). The Respondent says restitution "would trigger instability, insecurity and possible breach of peace by those who are settled and believe land reform is moving the country forward" (see CM, para. 166).

731 While the Tribunal does not consider this to support material impossibility, the possibility of some disturbance should not be overlooked. Also, occupation on the Claimants' Properties has involved the planting of some subsistence crops and the construction of some buildings. If the Claimants sought to exercise their rights by having these removed, this may involve conflict, which is, realistically, a matter for the police and local authorities. The Tribunal considers that it must operate on the assumption that there is sufficient rule of law to enable the Respondent to carry out whatever award the Tribunal decides upon, including an award of restitution. Indeed, the Tribunal has found no compelling evidence otherwise. In this respect, the Tribunal has had occasion to call upon the Respondent for assistance and the Respondent has always complied. The Tribunal bases itself on several Procedural Orders discussed above in Section III.E of this Award and attached as

Annexes to the present Award, where the Respondent and its organs, including the police, have complied with the Tribunal's directions⁸⁰.

732 In any event, the possibility of conflict would not prevent restitution in this case as it does not constitute material impossibility. Moreover, chaos does not appear to have ensued on the four occasions where Zimbabwe has provided for restitution in the past (see Mem., para. 1615; *Funnekotter*, para. 82, CLEX-242).

v) Disproportionality

733 This head ensures that restitution is not awarded when it involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation" (see *Articles on State Responsibility*, Article 35, CLEX-385).

734 The answer, to this Tribunal, is plain. It is not disproportionate to award title to lands unlawfully expropriated. This decision is limited to the Claimants and so will not have systemic influence across Zimbabwe. This does not involve any widescale juridical restitution or attack on Zimbabwe's sovereignty. In the light of compensation and restitution anticipated by the relevant BITs, the Tribunal does not consider that restitution would be disproportional.

vi) Peremptory Norm

735 The Claimants submit that restitution has a different flavour when applied in respect of a peremptory norm. The Claimants have relied on an opinion by Professor Sarooshi of Oxford University in support of this claim (C-38). Practically, this submission seeks to avoid any defences to restitution.

736 Professor Sarooshi relies upon Articles 34, 35, 40 and 41 of the ILC Articles on State Responsibility and its corresponding commentary. ILC Articles 34 and 35 refer to the forms of reparation available, noting the primacy of restitution, as well as the ability to use these various forms of reparation, singly or in combination, in order to ensure full reparation. ILC Articles 40 and 41 refer, respectively, to international responsibility and the corresponding obligations attached to a breach of a peremptory norm.

737 The Tribunal notes that the prohibition of racial discrimination is an obligation *erga omnes* as confirmed by the ICJ in *Barcelona Traction* (Second Phase, Judgment, CLEX-153). Yet it is still arguable as to whether this obligation has evolved to the level of *jus cogens* due to the many exceptions to and permissible derogations from it. Forms of differentiation are allowed if they are objectively justifiable. This is evident from the *International Convention on the Elimination of All*

⁸⁰ See above paras. 42-47.

Forms of Racial Discrimination and from the commentary to the US Restatement in Section 712, which states that “classifications, even if based on nationality, that are rationally related to the state’s security or economic policies might not be unreasonable”. As discussed above at paras. 648–657, the Tribunal has found that the Respondent had engaged in racially discriminatory acts through the implementation of the FTLRP and its associated policies. The Tribunal reiterates its earlier finding that it is unnecessary in this case to determine whether racial discrimination is also a peremptory norm. Indeed, based on well accepted international law principles of reparation alone, as discussed below, the Tribunal finds that the primary relief claimed by the Claimants (i.e. restitution) is the most appropriate relief to award.

(e) Restitution and the effect on third parties

738 The von Pezold Claimants, in seeking restitution of the *status quo ante* with respect to the expropriated Zimbabwean Properties, ask for legal title to be restored in the name of the Zimbabwean Companies. The Zimbabwean Companies, as already noted, are not parties to this arbitration. However, the Tribunal has already found that because the von Pezold Claimants exercise legal and factual control over the Zimbabwean Companies, their rights and interests are aligned insofar as their claims for the underlying assets are concerned. The Tribunal thus finds that it would be appropriate for restitution of legal title to the Zimbabwean Properties, if ordered, to be rendered to the respective Zimbabwean Companies which formerly held that title.

739 Restitution to the Zimbabwean Companies will ensure that the von Pezold Claimants (in respect of both the indirect expropriation of their shareholding in the Zimbabwean Companies and their right to claim for the direct expropriation of the underlying assets: see above paras. 317-326) are made whole (see *Factory at Chorzów*, CLEX-149). Although it is not necessary to determine the point in light of the circumstances of control exercised by the von Pezold Claimants over the Zimbabwean Companies in the present case, the Tribunal considers that the von Pezold Claimants would be entitled in any event to appoint a third-party nominee to receive property on their behalf – especially if doing so had the effect of restoring the previously-prevailing situation. There is nothing in the ILC Articles on State Responsibility which would preclude such an approach (indeed, see *James Crawford, Commentary to the ILC Articles on State Responsibility*, p. 213, CLEX-273: “[t]he term ‘restitution’ in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.”)

740 Although the issue has never been raised directly by the Parties, the Tribunal believes it is a further relevant consideration that, in ordering restitution in favour of the Zimbabwean Companies, the Tribunal will affect to some extent the interests of those third parties who also hold shares, directly or indirectly, in the Makandi and Border Companies. Indeed, third-party shareholders stand to derive benefit from the Tribunal’s grant of restitution, because the value of their shareholdings in

the Makandi and Border Companies will likely be increased by restoration of the Zimbabwean Properties belonging to those companies.

741 To the extent, however, that third-party shareholders will benefit from a grant of restitution, that is merely reflective of the fact that their respective minority shareholdings have endured the same erosion of value as the von Pezold Claimants' controlling participation in the Zimbabwean Companies, and that the Tribunal's order of restitution will restore the situation prevailing but for the Respondent's breaches of international law. The effect on shareholder value (including the von Pezolds' shareholding) will be the same, for instance, whether restitution of the Border Properties to the Border Companies is enforced through the Tribunal's remedial jurisdiction over the von Pezold Claimants' claims or the Border Claimants' claims.

742 It is trite to say that the Tribunal has a broad discretion in fashioning an appropriate and fair remedy to do justice in the circumstances. In all the present circumstances, the Tribunal considers that a compelling case for restitution has been made out, bearing in mind the severity of the breaches of international law which have taken place and the paramount principle of providing full reparation to wipe out all consequences of the Respondent's unlawful acts⁸¹.

(f) Conclusion

743 In summary, the Tribunal finds that restitution of the Zimbabwean Properties expropriated in 2005, including attached Water Permits, should be ordered in favor of the Claimants. While this Section of the Award has focused on restitution in kind, the Tribunal considers that it is further necessary to award compensation for the losses incurred by the Claimants due to, *inter alia*, land damage and losses to productivity. This is necessary to achieve full reparation and is addressed below.

(3) Compensation

(i) Claimants' Position

744 The Claimants contend that, in addition to restitution, compensation must also be ordered to cover losses sustained which would not be covered by restitution in kind and that, to ensure an effective

⁸¹ As discussed below, the von Pezold Claimants (and the Border Claimants) have also sought compensation for their losses in respect of the Forrester, Makandi and Border Estates – either to provide reparation in the event that the Respondent does not provide restitution, or else to make up the “Restitution Shortfalls” between the value of the Estates on a “but for” and “as is” value. The above discussion about the effect of restitution on third parties does not arise in respect of these claimed compensatory sums, because those sums will be awarded directly to the von Pezold Claimants and have been calculated taking into account the von Pezold Claimants' proportionate shareholdings in the Makandi and Border Estates (see e.g. Second Expert Report of Anthony Levitt, Schedule 2.2 (Makandi) and para. 2.04.9 (Border), Corrected CE-7).

remedy, in the alternative, compensation must be ordered to be payable in the event restitution in kind is not effected by the Respondent within sixty days (see Cl. PHB, para. 172).

- 745 The Claimants submit that Article 4(2) of the German BIT and Article 6(1) of the Swiss BIT require that compensation for a lawful expropriation be "prompt, adequate and effective compensation". The German BIT in particular provides that such compensation "shall be equivalent to the value of the expropriated investment". The Swiss BIT states that such compensation "shall amount to the real value of the investment expropriated". According to the Claimants, the effect of these provisions is that compensation must indemnify the Claimants to a level corresponding to the fair market value of the investments expropriated (see Cl. Skel., para. 190, citing *Vivendi*, CLEX-315; *Funnekotter*, CLEX-242; *The World Bank Guidelines on the Treatment of Foreign Direct Investment 1992*, CLEX-118; and the Danish BIT, CLEX-7).
- 746 The Claimants note that the appropriate date for valuation under this standard is the earlier of: (i) the date immediately before it became publicly known that the investment had been expropriated; and (ii) the date immediately before it became publicly known that the investment would be expropriated. For most of the expropriations, including those relating to the Zimbabwean Properties and the Zimbabwean Company Shares, the Claimants identify this date as 13 September 2005. The Claimants note that the Zimbabwean Constitution and the *Land Acquisition Act* derogate from the applicable international standard for compensation as they do not provide for full reparation under Zimbabwean law. The Claimants note in particular that the *Land Acquisition Act*, in regard to investors not protected by treaties, merely requires that compensation for agricultural land acquired for resettlement be limited to improvements to the land and does not provide for compensation for the value of the lost land itself. The Claimants take the position that Section 16(9)(b) of the Zimbabwean Constitution enacted in 1996 prevents the application of Zimbabwean law to foreign investors to the extent it derogates from the property and compensation rights granted to foreign investors under treaties. The Claimants note that the Parties disagree as to the effect of Section 16(9)(b) of the Zimbabwean Constitution; however, with or without its application, the Claimants submit that the international standard is the applicable one under the treaties (see Cl. PHB, paras. 173 to 174).
- 747 The Claimants note that the standard of compensation for an unlawful expropriation is governed by customary international law. The Claimants say the customary international law standard requires compensation to "wipe out all the consequences" of the State's wrongful act (see Cl. Skel., para. 191, citing *Factory at Chorzów*, CLEX-148; ILC Articles 31 and 36(1)). The Claimants take the position that this is done by assessing compensation on the basis of the fair market value of the investment rights lost as at a date elected by the Claimants between, on the one hand, the earlier of the date immediately prior to the breach or the date immediately before the impending

breach became public knowledge and, on the other hand, the current date. The Claimants elect 30 September 2012, the date which gives them the highest reparation when compensation and interest are combined (see Cl. Skel., para. 191).

748 The Claimants note that the State cannot benefit from its own breaches and, therefore, in assessing fair market value no account must be taken of the measures that breached the BITs and the Respondent's other obligations toward the Claimants, or the fact that other properties of third parties were expropriated. The Claimants state that their valuations are therefore on a "but for" basis. The "but for" factors taken into account in the Claimants' valuation are: (i) the effect that Settlers/War Veterans had on the Claimants' investments; and (ii) the effect that the aggressive phases of the LRP had on Zimbabwe's economy. The Claimants note the specific adjustments made by its valuation experts at para. 178 of its Post-Hearing Brief. The Claimants note that, whatever use they have had of the Zimbabwean Properties, this does not negate the Respondent's obligation to pay compensation as they have pleaded. The Claimants state that they have reinvested all profits back into the Estates since they were expropriated, and that these amounts will remain in the Estates and will inure to the Respondent unless restitution is ordered. If restitution is ordered or compensation is awarded at a current date, there can be no objection to these amounts inuring to the Claimants because, under customary international law and circumstances of unlawful expropriation, if a claimant elects damages to be assessed at the current date, the increase in value since expropriation inures to the claimant (see Cl. PHB, para. 182).

749 Finally, the Claimants note that the level of damages due should not be reduced or delayed according to the Respondent State's ability to pay or according to the fact that the expropriation is part of a large-scale nationalization (see Cl. Skel., para. 197, citing *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, CLEX-191; *Funnekotter*, CLEX-242).

(ii) Respondent's Position

750 The Respondent takes the position, on the basis of Article 34 of the ILC Articles, that once wrongfulness of a measure is excluded, compensation as a form of reparation cannot be required (see Resp. PHB, para. 310). Article 34 of the ILC Articles provides as follows:

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

751 The Respondent submits, on the basis of its position that the takings were consistent with public order principles or public policy, that no compensation is due. In the event any compensation is due, and as regards the date of any valuation of the Claimants' claims, the Respondent notes that Article 4 of the German BIT stipulates that "effective compensation... shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or impending expropriation, nationalization or other comparable measure becomes publicly known". The Respondent states that its valuation expert, Mr. Moyo, has valued the claims and the Estates as of 10 August 2012 (see Moyo III, para. 1). The Respondent notes, however, that if the Claimants are to receive any compensation for the expropriation of land, the appropriate date of valuation should be 13 September 2005, and the burden is on the Claimants to prove the market value of assets that they allege as the basis of their claims as at that date. The Respondent also submits that while the theoretical valuation should be as at the day before the date of the expropriation complained of, the circumstances in this case are extraordinary in that while the Claimants were "on paper" expropriated, they remain on the properties and are still on the properties carrying on business as usual, disposing of moveable assets at will, all without paying rentals to the State. The Respondent therefore argues that whatever amounts may be due for compensation, indemnity or interest, any appreciation that has taken place between the date of the taking and now must be attributed to the Claimants, and this constitutes full payment (see Resp. PHB, paras. 367 to 368).

752 The Respondent has also argued that the Tribunal should take into consideration Zimbabwe's ability to pay any compensation ordered. The Respondent refers to a number of sources in support of its proposition that compensation should be "just" (see Rejoinder, paras. 1061-1077).

753 The Respondent also submits that delayed payment of any compensation awarded is contemplated by the German and Swiss BIT Protocols, which each contain derogation provisions regarding payment of compensation in certain situations by enabling payments over a period up to six years or that payment could be frozen in a local bank (see Rejoinder, para. 1080).

(iii) The Tribunal's Analysis

a) Standard of Compensation for Expropriation

754 The Tribunal considers that compensation is appropriate in two circumstances. The first situation is where the Respondent refuses to comply with an award of restitution. If that occurs, then the value of the assets subject to restitution will be awarded in the alternative. Secondly, even if restitution is complied with, in respect of the Forrester and Border Estates there is a shortfall between the current "as is" value of the assets and the "but for" value of the assets had there been no breach by the Respondent. This is properly reflected in the award of a further pecuniary sum to the Claimants, which will hereafter be referred to as the "Restitution Shortfalls". The Tribunal discusses the *quantum* of this compensation below.

b) Applicable Standard of Compensation

755 The starting point for compensation must be the German and Swiss BITs. Relevantly, Article 4(2) of the German BIT reads:

Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalised or subjected to any other measure the effect of which would be tantamount to expropriation or nationalisation in the territory of the other Contracting Party except for a public purpose and against prompt, adequate and effective compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or impending expropriation, nationalisation or other comparable measure becomes publicly known.

756 Similarly, the relevant portion of Article 6 of the Swiss BIT provides:

Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable.

757 As will be apparent, both BITs provide the appropriate level of compensation for lawful expropriation; "lawful" meaning expropriation according to the terms of the BITs. However, the Tribunal is not confronted by lawful expropriation in this situation. As the Tribunal has determined, the acquisitions of the Claimants' Estates were unlawful. Neither BIT purports to provide for the appropriate level of compensation for unlawful expropriation.

758 In such circumstances, the Tribunal must instead approach relief under customary international law. This principle was recognised in *ADC Affiliate Limited v. Republic of Hungary ("ADC")* (see ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 483, CLEX-220):

Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.

759 ICSID tribunals have treated this approach as authoritative and followed it elsewhere (see e.g., *Siemens*, CLEX-223; *Siag*, CLEX-243; *Kardassopoulos*, CLEX-248; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, 18 May 2010, CLEX-250). As Dr. Sabahi remarks, "in the post-ADC world, there is a recognition among most arbitral tribunals that there should be a distinction between the international law applicable to lawful vis a vis unlawful expropriations" (see Sabahi, p. 102, CLEX-306). The Tribunal accepts that the

ADC approach is the approach it should adopt. Therefore, the Respondent is liable for compensation under customary international law for unlawful breaches of the two BITs.

760 The approach of customary international law to reparation is founded in *Factory at Chorzów*, which is reflected in the ILC Articles on State Responsibility. Customary international law requires the Tribunal to "compensate for the damage caused", which includes "any financially assessable damage including loss of profits insofar as it is established" (see *Articles on State Responsibility*, p. 218, CLEX-273). Usually a Tribunal will assess compensation based on the value of the assets at the time of expropriation (or just before). Most BITs provide for this standard. However, this is not always appropriate. As the Tribunal in *ADC* stated (see *ADC*, para. 496, CLEX-220):

The present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, since the value of the investment after the date of expropriation (1 January 2002) has risen very considerably while other arbitrations that apply the Chorzów Factory standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages.

761 Then, after analysing decisions departing from the "date of expropriation" approach, the *ADC* tribunal continued (see *ibid.*, para. 498, CLEX-220):

Based on the foregoing reasons, the Tribunal concludes that it must assess the compensation to be paid by the Respondent to the Claimants in accordance with the Chorzów Factory standard, i.e., the Claimants should be compensated the market value of the expropriated investments as at the date of this Award, which the Tribunal takes as of September 30, 2006.

762 The Tribunal accepts that this is the correct approach to use in this case. The Tribunal is faced with one of those rare cases where the value of the unlawfully expropriated assets has increased from the time of the unlawful expropriation. As compensation is an alternative remedy to restitution (applying if the Respondent does not perform restitution), the sum of compensation should be the financial equivalent to that which would have been returned to the Claimants. This principle was stated by former ICJ President Jimenez de Arechaga and cited by Professor Dupuy in *Texaco* (see *Texaco*, para. 102, CLEX-157): "Since monetary compensation must, as far as possible, resemble restitution, the value at the date when the indemnity is paid must be the criterion".

763 In conclusion, the Tribunal considers that compensation should be calculated at the time of the Award, rather than at the time of the unlawful acts. The Tribunal has no difficulty in reaching this conclusion because, as Heinrich's evidence shows (see *Heinrich I*, paras. 43–538), the Claimants have continually reinvested the returns from their investments. Whoever has ownership of the land (and other assets) has the benefit of that reinvestment.

c) Restitution Shortfalls

764 In the event that restitution is awarded and performed, the Claimants contend that they still require compensation to put them in the position they would have been in "but for" the Respondent's breaches (see Cl. PHB, para. 223). The Claimants express this as the difference between the "as is" value and the "but for" value of the Forrester and Border Estates. The Claimants do not claim a Restitution Shortfall in respect of the Makandi Estate (see Second Expert Report of Anthony Levitt, para. 7.03.13, Corrected CE-7).

765 It is important to clarify the conceptual difference between the "as is" and "but for" valuations. The "as is" value reflects the current value of the respective Estates in light of all the circumstances, including the breaches committed by the Respondent and the reinvestment carried out by the Claimants. The "but for" value, in contrast, is a hypothetical value; it is the value of the Estates which would have existed had the Respondent not acted unlawfully. This approach is conceptually consistent with providing full compensation under the *Chorzów Factory* principle. The Restitution Shortfalls provide the Claimants with compensation for the value that the Estates would have held "but for" the Respondent's breaches. Even if the Claimants receive restitution of the Estates, that will only return to them the current "as is" value of those properties. Accordingly, the Tribunal accepts that the Restitution Shortfalls are necessary to provide full reparation to the Claimants.

766 As the Claimants make clear, Mr. Levitt's methodology for calculating the "as is" value of the Estates to arrive at the Restitution Shortfalls is essentially the same as the methodology he has used for calculating the "but for" value, although without a "but for" adjustment. As such, the Restitution Shortfalls will be appropriately calculated along the same lines as the "but for" values so long as there is scrutiny of the inputs used to quantify the "as is" value of the Estates. Once the Tribunal considers the "as is" valuations and is satisfied with them, calculating the Restitution Shortfalls is then straightforward (the difference between the "but for" value and the "as is" value). This approach appears fair to the Tribunal, and it is noted that while the Respondent has attacked the valuations generally, it has not specifically challenged the calculation of the Restitution Shortfalls.

(4) Valuation

(i) Claimants' Position

a) Forrester and Makandi Estates

767 The von Pezold Claimants submit that, while their valuation expert, Mr. Levitt, considered various possible approaches to valuing the Forrester and Makandi Estates, settling on the Fair Market Value ("FMV") and market-based approaches respectively, the Respondent's expert, Mr. Moyo, considered only one approach, the Depreciated Replacement Cost ("DRC") method. The von Pezold Claimants also note that, while Mr. Moyo challenged the comparator transactions proposed

by Mr. Stephenson for valuation of the Makandi Estate, he has not substantiated his assertion that farms in neighbouring countries are bad comparables because they are in different prevailing economic conditions (see Cl. PHB, paras. 187-188; Moyo II, para. 7, R-15). Mr. Moyo did, however, expand on this assertion in response to a question from Professor Williams (see Tr. Day 6, pp. 1670-1671):

ARBITRATOR WILLIAMS: I just have a couple of questions. If you would look at your Second Witness Statement, which is in Tab 2 of this binder. Paragraph 7, "Farms in the neighboring countries are not good comparables as they are in 'different prevailing economic conditions.'"

Could you just tell me what that means, "different prevailing economic conditions"?

THE WITNESS: Different prevailing economic conditions.

In Zimbabwe, at that time what—we had the Land Reform Programme was ongoing, the—was no market, or there were no farms which were being sold through—through the market because if your are selling a farm—if you want to sell a farm, you have to offer the farm to the Government.

Not only that, the labor in Zimbabwe, the labor is freely available, farm laborers. If you go to South Africa, you see that they use laborers from neighboring countries. There are things like—other factors, like even the salary structures, they are different.

So, those are some the factors which were different from—which we indicated that they were different.

768 The von Pezold Claimants reason, on the basis of Mr. Kanyekanye's evidence, that the DRC method is inappropriate to value the Makandi and Forrester Estates as these entities are going concerns. The von Pezold Claimants refer to the following testimony of Mr. Kanyekanye given in relation to valuation of the Border Estate (see Cl. PHB, para. 189, quoting Tr. Day 6, p. 1726):

THE WITNESS: Okay. Thank you very much.

This is my explanation. The explanation is that Border is a going concern, and as a going concern, you then ask yourself what is the appropriate method to use for valuation.

So I said, okay, let's look at all the valuations method that could be used. So, we looked there to say, let's start off by saying, a Net Asset Value, does it work. And I think if you read through my Submissions, I said for a going concern, you cannot use a Net Asset Value.

769 The von Pezold Claimants also note that Mr. Moyo acknowledged on cross-examination during the Hearing that the valuation of a going concern must consider future profits and business assets, which are not accounted for when applying the DRC method (see Cl. PHB, para. 189; Tr. Day 6, pp. 1668-1670):

ARBITRATOR HWANG: And I can't find the exact paragraph, but I know it's there somewhere, you've indicated some other possible methods, for example, Residual Value, Profits, Capitalization of Earnings, and so on.

You have not discussed in your--any of your reports why those methods would not have been an appropriate method of valuation for the land, including the improvements--I mean, in other words, valuing the business as a business based on earnings?

THE WITNESS: Like the valuation of a going concern: That one, when you are valuing as a going concern, you have to look at the future profits and the assets. But it was not possible for us to do that given the circumstances and what was available before us.

ARBITRATOR HWANG: So, are you saying that you could not do it because you didn't have the materials to do it? That you didn't have the accounts of the companies and so on?

THE WITNESS: It was not--it was not applicable.

ARBITRATOR HWANG: You had predetermined that it was not applicable--those methods were not applicable?

THE WITNESS: They were not applicable.

ARBITRATOR HWANG: They were not applicable because of the statutory provisions under the Land Acquisition Act, or it was not applicable for professional valuation reasons?

THE WITNESS: They were not applicable because of the prevailing circumstances, not because of the statutory situations.

ARBITRATOR HWANG: Yes, but what do you consider to be the prevailing circumstances that made it inapplicable to measure the value of the land by its capacity to earn money for the owner?

THE WITNESS: There are several variables which will affect the value of land. And the market also--market conditions also affect the value of land. As I indicated, at the time, there was no longer any market for--for farms.

ARBITRATOR HWANG: Yeah, but that gets you into comparable sales.

But if you had traced the track record of what the company had been earning from the farming activities, then you have a basis for creating a model for one of the alternative methods of valuation, wouldn't that be so?

THE WITNESS: What we did is we looked at the various methods, and it was, in our--our opinion that the methods were not applicable.

ARBITRATOR HWANG: Okay. Thank you.

770

The von Pezold Claimants observe that, save for an unsupported comment in the Respondent's Skeleton Argument, no criticism has been levelled at Mr. Levitt's application of the Discounted Cash Flow ("DCF") method to value the Forrester Estate or the application of the market-based method to value the Makandi Estate. The comment in question relates to Mr. Ridley's cattle valuation

based on South African cattle, which the Respondent alleged are not comparable to Zimbabwean cattle values (see Cl. PHB, para. 191; Resp. Skel., para. 243).

771 The von Pezold Claimants submit that Mr. Moyo's valuations should be rejected, and Mr. Levitt's valuations preferred for several fundamental reasons (see Cl. PHB, paras. 192-195):

- Mr. Moyo made errors in his calculations that he has failed to correct (see Tr. Day 4, p. 1097, Levitt Direct examination);
- Mr. Moyo's purported land values for Forrester and Makandi respectively cannot be tied back to the three comparables that he allegedly used to carry out his valuation (see Tr. Day 4, pp. 1096-1107, Levitt Direct examination);
- Mr. Moyo's three comparators are not based on arm's-length transactions or other appropriate comparators and inappropriate dates for each transaction were used (see Tr. Day 4, pp. 989-995, Stephenson Direct examination); and
- Mr. Moyo is not a credible witness because he is not independent of the Respondent (see Moyo I, para. 1, R-3; Tr. Day 6, pp. 1594 and 1688, exchange between Respondent and the Tribunal).

b) Border Estate

772 The Claimants submit that Mr. Levitt also considered a variety of alternative approaches to valuing the land and forestry assets of Border Estate.

773 With respect to land, Mr. Levitt used the market-based method, relying on comparator transactions provided by Mr. Stephenson, and, with respect to standing timber, Mr. Levitt used three different methods according to the age of the tree: (1) the Accumulated Current Actual Cost ("ACAC") method for the least mature trees; (2) the actual current felling values for overmature trees; and (3) the Faustmann Formula (a form of DCF) for the remaining immature trees in rotation (see Cl. PHB, paras. 199-200).

774 The use of the Faustmann Formula, in particular, is contested. Mr. Daugherty, a South African forestry expert, provided expert evidence supportive of the use of the Faustmann Formula in cases such as these. Mr. Kanyekanye criticized reliance on this formula. The Claimants contend that Mr. Kanyekanye's criticisms of the Faustmann Formula are misplaced (see Cl. PHB, paras. 201-203).

775 The Claimants also reject the Respondent's suggestion, by reference to International Accounting Standard 41, that Mr. Levitt has not performed an FMV valuation of Border's standing timber, reasoning as follows (see Cl. PHB, para. 205):

... [T]he Respondent's position is ill-founded as IAS 41 is relevant to financial reporting, and not to a valuation of the whole business for sale or expropriation compensation purposes. IAS 41 is not consistent with the Fair Market Value compensation standard required by the BITs and CIL (see para 175 above). This is because IAS 41 only permits the valuation of the actual realisable value of a property's timber at any point in time, and does not allow for unrealisable profit to be reflected in the balance sheet: in effect, IAS 41 requires a valuation of the standing timber as if the entire forest were to be felled and sold in its then-current state. As such, it ignores the fact that the trees are not intended to be harvested when immature, thereby ignoring the potential future value that immature trees would generate. In order to receive Fair Market Value, an owner upon sale or for expropriation compensation purposes is entitled to recognise and be compensated for that value over the full rotation period and not just immediately prior to harvesting. Valuations using the Faustmann Formula are consistent with this standard. Mr Daugherty's evidence demonstrates the difference between a Faustmann Formula valuation and a valuation in accordance with IAS 41.

776 The Claimants note that Mr. Kanyekanye proposes to value the Border Estate using a market capitalisation method. The Claimants reject the use of such a method for the following reasons (see Cl. PHB, para. 206):

First, it does not produce an accurate indicator of Border's value due to the illiquid nature of Border's shares owing to the vast majority being owned by the von Pezold Claimants. Second, the Zimbabwe Stock Exchange can only be used to derive an "as is" value of the minority interest in Border and is therefore not an indicator of the "but for" Fair Market Value of the Border Estate. Finally, Mr Kanyekanye's Updated Thesis has identified numerous issues with the reliability of the Zimbabwe Stock Exchange and presents no counter-position to that negative account. Although Mr Kanyekanye has asserted that those criticisms are simply his reporting of the literature and that this opinions are in the conclusion section, the conclusions section contains no discussion as to the reliability of the ZSE. Thus, the only mention of the reliability of the ZSE in Mr Kanyekanye's evidence casts doubt on its accuracy, and he has presented nothing to contradict his position.

777 The Claimants observe that the Respondent has criticized Mr. Levitt's application of the above methodologies to value the Border Estate, and in particular as the application of the Faustmann Formula relates to two inputs: (i) Net Standing Value ("NSV") of mature pine sawlogs and (ii) the Border Estate's plantation area and age class profile (see Cl. PHB, para. 207).

778 As regards the NSV of mature pine sawlogs, the Claimants submit that there are two contractual scenarios that can be used to establish NSV, the sale of standing timber (whereby the buyer incurs the cost of harvesting and extracting logs) or the sale of logs at the plantation roadside (whereby the seller incurs the cost of harvesting and extracting logs). Mr. Levitt used the second method to calculate the NSV for mature pine sawlogs based on second and third thinnings quality to produce what the Claimants describe as a conservative estimate of value for the Border timber. The Claimants submit that Mr. Levitt's application of the Faustmann Formula should be preferred to Mr. Kanyekanye's proposed alternative, which is based on eucalyptus sawlogs rather than pine, includes a deduction for transport costs to South Africa, and would amount to "economic suicide" in view of the low NSV attributed to mature pine sawlogs (see Cl. PHB, para. 211).

779 As regards the plantation area and age class distribution, the Claimants reject Mr. Kanyekanye's assertion that the plantation area and age class distribution used by Mr. Levitt are speculative. The Claimants assert that the basis for establishing the Border Estate's plantation area and age class distribution was the actual, "as is" state of Border's forest as recorded in "Microforest". The Claimants rely on Mr. van der Lingen's evidence concerning the use and reliability of data in Microforest, as well as Mr. Levitt's evidence that he relied only upon the inventory function of Microforest and not its simulation function (see Cl. PHB, para. 213; see also Tr. Day 3, pp. 768-769, 779-783, 799, 802 - van der Lingen Direct, Cross and Re-direct examination; Tr. Day 4, pp. 1152-1153 - Levitt Re-direct examination).

780 The Claimants note in regard to Mr. Kanyekanye's market capitalisation valuation of Border that he has failed to provide any documentary support or explanation as to how his figure was ascertained. The Claimants refer the Tribunal to Mr. Levitt's detailed critique on Mr. Kanyekanye's valuation and calculations (see Cl. PHB, para. 215; Levitt II (Corrected), paras. 2.04.1 – 2.04.24). The Claimants also submit that Mr. Kanyekanye lacks credibility as a witness, reasoning principally that he is not independent, being employed by a company owned by the Respondent and which is a competitor of Border, and that he "deliberately misled the Tribunals as to his qualifications", referring to his assertion that he has been awarded a doctoral degree from Calvary University (see Cl. PHB, para. 216-220).

781 The Claimants also submit that Mr. Moyo's purported alternative valuation of Border to that of Dr. Kanyekanye should also be rejected, relying on the same criticism of Mr. Moyo's approach and application of his DRC approach to value Border as discussed above in respect of Makandi and Forrester. Moreover, the Claimants note that Mr. Moyo has failed to include any value for Border's standing timber, Border's most significant asset (see Cl. PHB, para. 221).

c) Forrester and Border Restitution Shortfalls

782 The Claimants note that Mr. Levitt has valued this loss by calculating the properties' restitution value using the same methodology as for his valuation of each Estate, but using the non-adjusted "as is" inputs, then subtracting the "as is" value from the "but for" value (i.e. Heads of Loss 1, 2, 9 and 10). The Claimants note that the Respondent has neither challenged this valuation nor proposed an alternative valuation, aside from challenging the valuation methodologies as related to the Estates, discussed above (see Cl. PHB, para. 223).

d) Zimbabwean Company Shares

783 The Claimants submit that the diminution in share value of the Zimbabwean Companies is equivalent to their lost interest in the expropriated assets. The Claimants assert, on the basis of the

following passage from the Counter-Memorial, that the Respondent has accepted this position (see Cl. PHB, para. 224; CM, para. 151):

The acquisition of the income producing assets of the Forrester companies, the Border companies and the Makandi companies through the Constitutional Amendment inevitably means that the shares are affected but that has been factored into the valuation for compensation.

784 Based on the foregoing, the Claimants note that the Respondent's objections to the valuation of the three Estates apply.

e) Other Heads of Damage

785 Finally, the Claimants note that only Mr. Levitt has undertaken valuations of the following Heads of Damage and that these valuations have not been challenged by the Respondent: the Seized Maize, the Forrester Loans, the Forrester Water Rights, Forrester Tobacco Value Shortfall, Forrester Conversion Amount, Border Liquidation Shortfall, and Border Forex Losses (see Cl. PHB, para. 225). These valuations are described in detail at paras. 166-170 and 179-180 of the Claimants' Skeleton Argument and are set out among the heads of loss in Schedule 2 to the Claimants' Post-Hearing Brief.

(ii) Respondent's Position

786 The Respondent submits that the LRP was not wrongful and therefore compensation as a form of reparation cannot be required. In the event the Tribunal does find a breach, however, the Respondent advances several *quantum*-related arguments.

787 First, the Respondent complains that any inadequacy in its *quantum* calculations resulting from lack of information is due to the access provided to the Respondent, and Mr. Moyo in particular, to the Claimants' records. The Respondent notes that the Tribunal cannot simply assume that the Claimants are correct in their damages calculations. The Respondent refers in particular to Mr. Moyo's third Witness Statement, in which he comments as follows (see Moyo III, para. 7):

A list of assets was provided by Claimants' management. Where the asset is shown as not seen I maintain that is the correct position as Claimants' officers failed to point out the assets. Similarly for assets shown as scrap, Claimants' officers pointed out that it was scrap material. Since all the inspections were carried out in the presence of representatives of the Estates the Claimants cannot turn around and say our inventory is incorrect. If there were items which had gone for repair we were supposed to be told where they were and values would have been put to those assets.

788 The Respondent has used three separate methods to value the Claimants' alleged losses: (1) the share value method (Border); (2) comparable sales method (Forrester and Makandi); and (3) DRC

(Border, Forrester and Makandi). The Respondent states the following as regards share value of Border (see Resp. PHB, paras. 316 and 320):

316. Share valuation is a recognized and regularly used method of determining fair market value of a going concern. It is often preferred to other methods. International law recognises share value as an appropriate method of valuation.

...

320. Respondent's position agreed to by Messrs Moyo and Kanyekanye is that known Border Estate Share value constitutes full value for purposes of these arbitrations. Dr Kanyekanye determined the value of the Border Estate by determination of the value of its shares. The shareholding valuation of Border is the only quoted price value. Dr Kanyekanye established the Border share valuation at \$6 763 044, the quoted price value. Mr Moyo's final Witness Statement concurs with the Kanyekanye opinion that the share valuation figure, \$6 763 044, the quoted price value should prevail.

789 As regards the comparable sales method applied to the Forrester and Makandi Estates, the Respondent asserts as follows (see Resp. PHB, paras. 317-318):

317. The value of the Estates determined by recourse to the comparable sales method by definition includes the value of land and of improvements.

318. As Mr Moyo writes in R-80, Respondent's land values for Forrester and Makandi were arrived at by means of specified comparable sales. In response to the questions posed during Oral Hearings in Washington, D.C., and Mr Stephenson's responses, it appears that Claimants' comparables do not take into account local circumstances outside expropriation and are not "comparable." Mr Moyo used three Zimbabwean farms as comparables for the land values while Respondent maintains that using South African or Zimbabwe's neighbouring countries' values for land would be inappropriate as Zimbabwe and its neighbouring countries have different economic conditions which have an impact on property values. Contrary to Claimants' allegation, the comparable sales used by Respondent are arms' length transactions. The sales for the three comparators were arms' length transactions and records at the Deeds Registry office indicate that the properties were sold. Had the properties been donated the records would have indicated that, thus in the absence of any proof to the contrary, Respondent maintains that these were arms' length transactions and the Arbitral Tribunals should accept them as such, placing a maximum amount on the properties' total value for land and improvements.

790 The Respondent defends its choice of local Zimbabwean comparables and asserts that as the Claimants chose Zimbabwe to host their investment, the Claimants "get Zimbabwe comparables 'as is'" (see Resp. PHB, para. 323).

791 Finally, as regards the DRC method, the Respondent submits as follows (see Resp. PHB, para. 319):

319. Mr Moyo's Valuation R-03 and R-15 and their Schedules cover land, immovable improvements and plant and machinery. Claimants provided inventories. No need to value trees per se, as the Moyo value is for the business as a whole is all-inclusive as Claimants choose to value the business as a whole based only on trees. Moyo's method is an alternate value to Claimants' method.

792 The Respondent submits that the comparable sales method may also be used as an alternate method to value the Border Estate, or in the further alternative, the DRC method. The Respondent submits that Mr. Moyo's alternative valuation of Border is reasonable and analogous to the Claimants' "choice to make the assumption that the value of Border is just plantations". According to the Respondent, the converse assumption is made by Mr. Moyo, "that value is being confined to assets other than trees" (see Resp. PHB, para. 327). The Respondent reasons that the Net Asset Value ("NAV") approaches taken by Mr. Levitt exaggerate values and in reality are not net asset values for a whole estate. Notwithstanding the foregoing, the Respondent acknowledges that the valuation prepared by Mr. Moyo for Border does not cover timber and appears to take the position that this is covered by Mr. Kanye Kanye, therefore it would appear that the Respondent's proposed alternative valuation of Border would or could require a cumulating of values proposed by Messrs. Moyo and Kanye Kanye (see Resp. PHB, para. 328).

793 The Respondent challenges the Claimants' reliance on a "but for" approach to valuation, arguing as follows (see Resp. PHB, paras. 330-332):

330. The questions from the Arbitral Tribunals and Mr Stephenson's response show "but for" is ill defined by Claimants' experts who did not use their individual and independent professional judgment to determine (i) the most appropriate methods of evaluation, but merely followed directions from Claimants' counsel, without passing those directions through their own critical lenses to form a view as to whether the instructed method was well suited to the exercise, (ii) whether or not the instructed method was the only method or whether methods also existed viewed and finally, (iii) whether the method used was the best method for that kind of evaluation. Claimants' experts worked with blinders, for example even (a) evaluating sawmills that have been decommissioned and (b) not taking into account power outages. None of Claimants' experts have been able to clearly define the meaning of "but for" and take the easy but erroneous route of comparing with Natal South Africa, not only failing to take into account the specificities of Zimbabwe since 2000, but more importantly, using as comparables two very different economies, even before Zimbabwe Land Reform as Zimbabwe was not at all at the same economic level as South Africa before beginning its Land Reform. Even comparing sales before Land Reform would have been wrong and biased. Even before throwing in the "but for" there was no legitimate comparison possible.

331. No single forestry professional on Claimants' valuation team formed an overall opinion on the fair market value but each provided morsels of parcelled information for Londonian spread sheet specialists guided by a team of six lawyers none of whom are forestry specialists.

332. Further the numbers used mix various types of data, such as Micro Forest databases, land sales in foreign countries, from varying years. They do not have exact data for compartments at the same single date nor at the expropriation date and have admitted that the data they have have a substantial margin of error.

794 As regards the age class of trees, mix of species, difficulty of access to the trees and quality of the trees on the Border Estate, the Respondent submits that such factors do not support Mr. Levitt's valuation and, in the absence of Land Reform, the only willing buyer of Border's forestry business

would need "asymmetric ignorance", referring to Mr. Kanyekanye's testimony in response to Tribunal questioning (see Resp. PHB, para. 333; Tr. Day 6, p. 1850).

795 The Respondent raises the following two criticisms of the Claimants' price estimate for Border's standing timber (see Resp. PHB, para. 334-335):

334. It is documented fact that the parties agreed to an arm's length value of standing timber at the relevant time. Claimants wrongly assume a Roadside log price of \$41.37/m³ on site in Zimbabwe when that figure is for Rustenburg, South Africa. Claimants' costs-lead-to-price calculations are fundamentally flawed as they wrongly (i) confuse the meaning of Standing Timber and (ii) consider price to be an abstract concept, not taking into account the real market price, which is ultimately in South Africa at the port of embarkation or the point of sale. Claimants erroneously would have these Arbitral Tribunals fix the market price on Claimants' sort-of-cost-plus-basis.

335. Price depends on the size of the logs, but Claimants erroneously give one price for all cuts, including DDDs, first thinnings and pulpwood. Claimants also mistakenly assume that market applications in Zimbabwe are the same as in South Africa, England or Canada. Zimbabwe does not have a market for Christmas trees, forestry recreational activities or small diameters cuts.

796 The Respondent submits that the valuation figures provided by Mr. Daugherty, Mr. Ridley and Mr. van der Lingen and Mr. Bottger are all incorrect for the reasons set out in Mr. Kanyekanye's third Witness Statement (without further specification as to why) (see Resp. PHB, para. 338). The following paragraphs, among others, from Mr. Kanyekanye's third Witness Statement appear to be relevant to this general criticism of the valuation figures proposed by these witnesses (see Kanyekanye III, R-71):

11. As discussed in my second witness statement, hedonistic pricing or use of proxies are generally used when there are no quoted prices. In paragraph 52, George Bottger concedes a log market in Zimbabwe contrary to the infamous Levitt statement that there is no log market in Zimbabwe. Why did Mr. Levitt use these prices that BTL used when buying standing timber? Surely, these would address problems we have now.

12. Paragraphs 53 to 60 are an attempt at explaining a false declaration where the quoted price of felled high quality peeler logs was used to falsify log values. Surely if the best and largest log in Zimbabwe is sold at the log deck (not at roadside) at \$40/m³ (inclusive of harvesting and skidding cost plus overhead) how one can possibly justify the figures for standing timber used in Mr. Levitt's first statement?

To suggest tongue-in-cheek that the price was fair "considering Allied Timbers had previously offered BTL sawlogs from Maswera Section on one of their Northern Estates at \$40/m³ standing" shows my fears on George's submissions. We offered and the contract was not accepted! The price was the issue. The claimants go no to use the same price that they rejected. This is unethical. Paragraph 60 does not add value; it is irrelevant.

13. In paragraph 64, Bottger gives an interesting insight which suggests that the claimants bought logs at \$40/m³ from Mutare Board. A simple calculation using normal extraction costs suggests a quoted standing price of \$19/m³. Even in this worst case scenario, George at least puts the standing price at \$27/m³. We at least have a retreat from theory to quoted price from a technician. The impact of this is

that George is simply saying standing price for pine must be \$27/m³. This is still too high but it's an acknowledgement that Mr. Levitt's original statement was incorrect, subjective and prepared for advocacy purposes.

...

17. Mr. van Der Lingen is quoted as saying BTL logs are 'C' class quality in paragraph 9 but this is neither here nor there. The use of South African log prices as comparator is irrelevant while the claim that mostly juvenile logs cut at BTL are 'C' class is incorrect.

797 The Respondent submits that Mr. Levitt's valuation of Border is or must be "discredited" because it wrongly uses the Faustmann Formula and because the Claimants rely on non-comparable comparators from Natal for timber values, which are only valid for Natal and not even the whole of South Africa. The Respondent also submits that Mr. Levitt ignored quoted sales of standing timber between Border and the Forestry Commission in 2001 and arm's length transactions between Border and Allied Timbers in 2005 shortly before the Constitutional Amendment in 2005 (see Resp. PHB, para. 339).

798 The Respondent expands on this point as follows (see Resp. PHB, para. 349):

349. Claimant Heinrich, a director of Border, wrote in his Fourth Witness Statement that the prices in the February 2005 Agreement between the Forestry Company of Zimbabwe and Border Timbers Limited were "a reasonable price." Heinrich further conceded on this reference that Border purchased and harvested sawlogs from Allied Timbers in 2005. Thinnings in this contract are priced at Z\$250,000/m³ while mature trees were at Z\$450,000/m³ proving that the Levitt approach use of \$40/m³ is defective. Thinnings are in fact 56% of the value of clearfellings whereas Levitt used the same price throughout, including using unutilisable gum firebreaks to artificially and unscrupulously increase utilizable timber volumes. The agreed nearest quoted price for standing trees is given as February 10, 2005. The exchange rate used here came from Claimants and in June 2005 it was about Z\$10,000 to 1US\$. This is the closest, real and largest fair market transaction done in Zimbabwe for standing trees in 2005 that serves as a signature transaction and a reality check to any theoretical extrapolations or valuations!

799 The Respondent also submits that Border's own audited financial statements for 2005, prior to the Constitutional Amendment, value Border on the basis of the DRC method at approximately US\$8.328 million assuming 100% of the value of Border or US\$7.203 million assuming 86.49% of the value of Border (i.e., the Claimants' share) (see Resp. PHB, para. 351). This is offered as the third best alternative value for Border (the first being the estimated value on the share value approach and the second being estimated value on the market capitalisation approach). The further values estimated by the Respondent's experts of Border are set out in paras. 352 to 365 of the Respondent's Post-Hearing Brief.

(iii) The Tribunal's Analysis

a) Introduction

800 The Parties have made submissions on *quantum* for: (i) Forrester Estate; (ii) Makandi Estate; (iii) Border Estate; (iv) Forrester and Border Estates Restitution Shortfalls if restitution is awarded; (v) the Zimbabwean Company Shares; and (vi) the various other Heads of Damage. The Tribunal discusses each of these below.

801 The Claimants have valued the Estates on both "as is" and "but for" bases (apart from the Makandi Estate; see below para. 837). Both are important whether the Respondent complies with restitution or not. If the Respondent fails to provide restitution, then the "but for" valuations are used as the compensation sum. However, even if restitution is provided, the Tribunal must still, for the reasons outlined above at paras. 766-767, calculate the Restitution Shortfalls based on the difference between the "as is" valuation of the Estates, which the Claimants will have returned to them, and the "but for" valuation of the Estates had there been no breaches committed by the Respondent.

b) Respondent's Expert Witnesses

802 Before considering *quantum*, the Tribunal will first express some views on the witnesses whom the Respondent identified as its expert witnesses. For matters of *quantum*, the Respondent primarily relied upon the evidence of Messrs Kanyekanye and Moyo.

803 The Claimants challenged Mr. Kanyekanye's evidence by asserting that, first of all, he was not an independent expert (see Cl. PHB, paras. 216–220). Secondly, the Claimants asserted that Mr. Kanyekanye deliberately misled the Tribunal about his qualifications because his doctorate was awarded by Calvary University, which the Claimants contend is unaccredited to award degrees.

804 The Tribunal accepts the Claimants' criticisms of Mr. Kanyekanye. First, the Tribunal finds that Mr. Kanyekanye is not independent of the Respondent, since Mr. Kanyekanye is the Group CEO of Allied Timbers, which is owned by the Respondent through the Zimbabwean Ministry of Finance (see Tr. Day 6, p. 1709, lines 1–9). This apparent lack of independence became an actual lack of independence during the Hearing when Mr. Kanyekanye, situated between the Zimbabwean team and the Zimbabwean counsel at the Hearing, was seen from that position to direct counsel as to the questions they should ask on re-examination of a fact witness (see Tr. Day 6, pp. 1714–1715). Additionally, as to apparent lack of independence, Mr. Kanyekanye was Chairman of the Respondent's Forest Land Reform Committee (see Tr. Day 6, p. 1870, lines 12–17). Secondly, the Tribunal notes that Mr. Kanyekanye's doctorate comes from Calvary University, which the Respondent argued was both a registered and accredited university (see Tr. Day 6, pp. 1716–1718). However, the Tribunal cannot accept those submissions. As the Claimants have

conclusively shown, Calvary is not officially recognised as a degree-awarding body in the United Kingdom and appears to not be accredited by any recognised university accreditation body.

805 The Tribunal also accepts the Claimants' submission that Mr. Moyo, who was presented as an expert witness for the Respondent (see Tr. Day 6, p. 1594, line 4), was not an independent expert. Mr. Moyo was the Deputy Director of Valuation and Estate Management in the Ministry of Lands and Rural Resettlement in the Republic of Zimbabwe (see Moyo I, para. 1, R-3). Then, in his Second Witness Statement, Mr. Moyo noted his current employer was the Ministry of National Housing and Social Amenities (see Moyo II, para. 1, R-15). Further, Mr. Moyo's conduct during the proceedings was concerning. For example, he refused to answer legitimate questions put to him about aspects of his evidence (see e.g., Tr. Day 6, pp. 1642–1648). In another example, Mr. Moyo mentioned errors made in his calculations that were never corrected (see Tr. Day 6, pp. 1609 to 1610).

806 For all of these reasons, the Tribunal has serious concerns about the evidence provided by Messrs Kanyekanye and Moyo as neither are independent of the Respondent. The Tribunal also has concerns about the reliability of their evidence. For example, it is troubling that Mr. Moyo was uncooperative in cross-examination, refusing to discuss certain relevant parts of his evidence concerning Border Timbers. Although the Tribunal will take some account of the evidence that Messrs Kanyekanye and Moyo have provided, that evidence will be given little weight.

c) Margin of Appreciation

807 The Tribunal's concerns about the Respondent's expert evidence means that it has focussed, by necessity, on the Claimants' expert evidence, especially since in some respects, the Respondent's experts have not addressed the Claimants' expert evidence either at all or in any helpful way.

808 It remains the position that the burden is on the Claimants to prove their damages claims to the required standard. But in a case such as the present one, where there are complex valuations and extensive evidence, absolute certainty is an aspiration unlikely to be achieved.

809 The aforementioned concerns about the Respondent's "expert" evidence, and the lack of assistance from the Respondent, have meant that in several areas the Respondent did not directly address the Claimants' calculations or valuations. Therefore, as will be noted, the Tribunal has, where appropriate, made deductions from the Claimants' valuations. This does not mean that the Claimants have not discharged their burden of proof.

d) Forrester Estate

810 The Forrester Estate has been operated since 1988 (see Mem., para. 189 ff). Covering 22,000 ha, the Forrester Estate is predominantly a tobacco growing and curing operation, although it also has

cattle, citrus, row crops (maize and the like), and peas. The von Pezold Claimants note that the "overall objective of Forrester Estate is to sustainably grow and sell the maximum value of high-quality tobacco, citrus, row crops and vegetables, along-side the breeding, rearing and sale of cattle". The von Pezold Claimants submit that, notwithstanding the seizure of legal title to all ten of the Forrester Estate properties in 2005, the "Forrester Estate continues to operate as a going concern" and is a "thriving business", although the LRP and Invasions have decreased "productivity, standards and work ethic" (see Mem., para. 328). The Tribunal has found, it will be recalled, that in 2005 the Respondent directly expropriated all ten of the properties comprising the Forrester Estate, as well as the Water Permits then attaching to the Forrester Estate, listed in **Table 1** of the Claimants' Reply.

811 The von Pezold Claimants pose two questions in relation to the Forrester Estate: (i) what is the appropriate valuation method; and (ii) has that method been applied in a reasonable way? This general two-stage approach has been adopted by the von Pezold Claimants for the other Estates as well. The Tribunal endorses this approach.

(i) Valuation Method for Forrester Estate

812 The sum of compensation that the Tribunal arrives at should reflect the value of the Estate that would have been received if restitution had been successful; that is, the value at the date of the Award (see Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford University Press, New York, 2009, paras. 2.103 and 3.273–3.277, CLEX-297). Indeed, under the principle in *Chorzów Factory*, the von Pezold Claimants should bear no loss attributable to the Respondent's breaches. Valuation is therefore on a "but for" basis, which is the Estate's valuation unaffected by the Respondent's breaches.

813 The Tribunal accepts the von Pezold Claimants' valuation method, namely a DCF analysis of the Forrester Estate. The Respondent's submission that a DRC analysis is appropriate is legally and commercially unsound. The Tribunal agrees with the von Pezold Claimants' submission that the Respondent has provided no credible justification for a valuation method that does not properly reflect the value of the Forrester Estate as a going concern. The Respondent's purported expert witness, Mr. Moyo, appeared not to have seriously considered valuation methods other than the DRC methodology⁸².

814 In summary, an income-based valuation should be adopted for a going concern. The Forrester Estate's value derives not only from its real property and assets, but also from its financial

⁸² See the questions posed by Arbitrators Hwang and Williams at the Hearing and Mr. Moyo's answers (see Tr. Day 6, pp. 1668 to 1671).

performance (see *ibid.*, *Calculation of Compensation and Damages in International Investment Law*, para. 5.68, CLEX-297). Therefore, the Tribunal accepts that a DCF analysis is appropriate to value the Forrester Estate. This is a commercially sensible approach that is adaptable to the "but for" valuation which needs to be undertaken.

815 The Tribunal also accepts the von Pezold Claimants' submission that a DCF analysis is inappropriate for valuing the Forrester Estate's cattle. It would be inappropriate to allow the losses of cattle to reduce the overall valuation of the Forrester Estate based on a DCF valuation. Therefore, a "but for" market-based approach is suitable to value the cattle.

(ii) *Quantum of Forrester Estate on "But For" Basis*

816 The Tribunal must accordingly evaluate the application of the DCF approach undertaken by the Claimants' expert, Mr. Levitt. This, Mr. Levitt contends, leads to a "but for" valuation for the Forrester Estate (when the cattle value is added) of US\$49,636,837 as at 30 September 2012. Mr. Levitt approached valuation on the basis of the fair market value garnered between a hypothetical willing buyer and willing seller (see Mem., para. 1543), and assessed on a "but for" basis to exclude the consequences of the Respondent's breaches (see Mem., para. 1545). Mr. Levitt focused on production values to establish the "but for" production of the Forrester Estate and the actual selling prices for the "but for" annual revenue (see Cl Skel., para. 163). He then deducted Cost of Goods Sold and Administrative Expenses from the total sales to calculate the Estate's Annual Net Profit. Mr. Levitt then established the present value of the future cash flow by using a Discount Rate calculated from a Capital Asset Pricing Model, which was divided by the Annual Net Profit.

817 First, as to the "but for" basis, Mr. Levitt's approach "assumes that the title deeds were not expropriated and that the damage caused by the Settlers/War Veterans and invasions did not take place, or is re-instated, and that the von Pezold Claimants have full unencumbered use of the entire properties at the valuation date" (see Second Expert Report of Anthony Levitt, para. 2.02.8, CE-7; the Tribunal notes that this "but for" scenario is used for the other Estates as well). Mr. Levitt, responding to challenges about the speculative nature of the "but for" approach, countered that he had "only adjusted for the direct effects of the measures that breach the BITs (the aggressive phases of the Land Reform Programme after 2000, including the Invasions and the Constitutional Amendment) insofar as these events affected the business" (see *ibid.*, para. 2.02.10, references omitted). The Tribunal sees nothing objectionable in this approach. To be clear, the damage caused by the Settlers/War Veterans is not directly attributed to the Respondent. However, as found earlier in the present Award, the Respondent failed to prevent the Invasions and the subsequent damage to the Claimants' Estates, including the Forrester Estate. Therefore, the Respondent is liable for the consequences of those Invasions, which is appropriately reflected in Mr. Levitt's model for valuing the "but for" losses.

818 Mr. Levitt has approached the available statistics reasonably. He has not, for example, relied on the most favourable assumptions available to him. Generally, Mr. Levitt relies on pre-Invasion production achieved in 2000-2001 (which tends to be consistent with production from around 2010–2013 when the effect of the breaches lessened) and prices from 2011–2012. Especially in respect of tobacco production, Mr. Levitt could have increased the assumption of productivity based on the land used to produce those crops (maximum of 1,000 ha) but has instead assumed 770 ha (the use of productive land had been lower in the past but had generated high yields). Mr. Levitt noted that, although the von Pezold Claimants have data on production and price prior to 2000 (which would expand the dataset), the von Pezold Claimants employed a different business strategy then (see Tr. Day 4, p. 1152, lines 5–13). Some concern could be expressed over the narrow data field used to calculate price and also yield (see *ibid.*, *Calculation of Compensation and Damages in International Investment Law*, para. 5.122, CLEX-297). Unfortunately, the Respondent's witnesses failed to provide any detailed critique of Mr. Levitt's calculations. Nevertheless, Mr. Levitt appears to the Tribunal to have been professional in his approach and it would be inappropriate to rely on previous data collected under a discontinued business strategy. Tribunals have given weight to business plans when considering estimated future returns (see e.g., *ADC*, para. 507, CLEX-220). It would be inappropriate to rely on data collected under a different strategy, which would not reflect the practices of the von Pezold Claimants from the turn of the century.

819 Mr. Levitt has taken a prudent approach to calculating the Discount Rate to be used. Mr. Levitt used a Capital Asset Pricing Model, which considers risk free rate, market risk premium and beta. Mr. Levitt did not limit himself to a single source of data for market risk premium and beta, and has relied on reputable sources for his data. He has also decreased the level of risk where appropriate in updating his calculations, attesting to his integrity. Ultimately, the Discount Rate for 2012 was 11.10% (see Second Expert Report of Anthony Levitt, para. 4.09.4, CE-7). This discount rate, in the view of the Tribunal, is a reasonable one (see e.g., *Calculation of Compensation and Damages in International Investment Law*, paras. 5.214–5.215, CLEX-297).

820 Mr. Levitt has, however, conducted his DCF analysis on the understanding that the Forrester Estate continues in perpetuity. This is a problem, as it is often prudent to forecast revenue using several date ranges, for example, one-to-three years, three-to-ten years, or other date range (see e.g., *Calculation of Compensation and Damages in International Investment Law*, paras. 5.115, CLEX-297). Breaking down the forecasts into specific periods allows greater weight to be attached to the more accurately predicted short term. How can prices and productivity be projected for perpetuity with any certainty? Although this is of concern, the Tribunal notes that the von Pezold Claimants' two other valuations of the Forrester Estate were US\$42,660,462 on a market approach, and US\$51,080,087 on an asset approach (see Second Expert Report of Anthony Levitt, p. 92, CE-7).

As such, it is clear that Mr. Levitt's DCF analysis has not produced an over-valuation, since Mr. Levitt's "but for" valuation of Forrester Estate was, as noted earlier, US\$49,636,837.

821 Finally, in respect of the cattle valuation, the Tribunal accepts the evidence of Mr. Ridley (see Ridley II, CE-10). The evidence of Mr. Ridley has been entered into the overall valuation of the Forrester Estate (see Second Expert Report of Anthony Levitt, paras. 4.06.2–4.06.3, CE-7). Mr. Ridley used benchmark markets to determine the "but for" price of the cattle, which essentially involves a comparative market valuation of the cattle considered as a class of assets (or, more accurately, two classes of assets: the beef herd and the pedigree herd). Although criticised by the Respondent for using a comparison with South African markets, the Tribunal is of the view that Mr. Ridley has fairly approached the benchmark comparisons using data from Zimbabwe and South Africa. Even when using a comparison with South Africa (to determine the "but for" price) (see Ridley II, para. 10.2, CE-10), Mr. Ridley has taken a modest approach to valuing the Zimbabwean cattle (see *ibid.*, Table 4, CE-10). However, due to no sales data being present for some of the cattle classes, Mr. Ridley has had to rely on his "experience and discretion". For this reason, it may be appropriate to reduce the overall valuation by a modest percentage to recognise this modest level of uncertainty.

822 As a result, the Tribunal finds that Mr. Levitt's valuation of Forrester Estate as at 30 September 2012 is reasonable and that the von Pezold Claimants have discharged their burden of proof. However, the Tribunal considers that Mr. Levitt's valuation should be reduced by 20%. This reduction accounts for the concerns expressed above about some elements of uncertainty in certain parts of the evidence of Messrs Levitt and Ridley, as well as the Respondent's inability to assist the Tribunal by providing any detailed critiques of Mr. Levitt's calculations.

823 The Tribunal therefore finds that the "but for" value of the Forrester Estate, including the Forrester Water Permits, is US\$39,709,470 (which is 80% of Mr Levitt's valuation of US\$49,636,837).

(iii) Forrester Estate Restitution Shortfall

824 The Tribunal must then consider the Forrester Restitution Shortfall. As the Claimants indicate in their Skeleton Argument (see Cl. Skel., para. 165):

To calculate the Forrester Restitution Shortfall, Mr Levitt repeated the same DCF plus cattle approach used for his "but for" valuation but using the non-adjusted, "as is" inputs. This "as is" valuation was then deducted from the "but for" valuation to establish the Forrester Restitution Shortfall at 30 September 2012: US\$25,453,748.

825 Thus, Mr. Levitt has fixed the Restitution Shortfall of the Forrester Estate at US\$25,453,748 by calculating the difference between the "but for" value of the Forrester Estate he proposed (US\$49,636,837) and his calculation of the Forrester Estate's "as is" value (US\$24,183,089).

826 Having already accepted Mr. Levitt's methodology, the Tribunal need only evaluate the inputs used by Mr Levitt to calculate the Forrester Estate's "as is" value.

827 Mr. Levitt notes that in calculating the Restitution Shortfall for the Forrester Estate, "it is sufficient to simply take the difference between my 2012 valuation ... and the equivalent DCF approach based on current revenues and costs" (see Second Expert Report of Anthony Levitt, para. 7.02.3, Corrected CE-7). Further, Mr. Levitt notes (see *ibid.*, para. 7.03.2):

I use the current production and cost figures for Forrester Estate. Furthermore, I have calculated the cash flows that would arise from the sale of tobacco and other crops, such as maize, wheat, barley, soya, citrus and peas, based on Forrester Estate's current operations on the unsettled land amounting to US\$22,346,598.

828 The Tribunal accepts Mr. Levitt's calculations. There is a far lesser degree of uncertainty in respect of an "as is" valuation, given that the figures relied upon are based on quantifiable, current rates. Therefore, the Tribunal is of the view that Mr. Levitt's "as is" valuation of Forrester Estate of US\$22,346,598 (which does not include the value of the cattle) is appropriate. The Discount Rate of 11.10% is, as mentioned above, reasonable.

829 As to the valuation of the Forrester cattle, the Tribunal accepts Mr. Ridley's evidence that the cattle is worth US\$1,836,491 (see Ridley II, pp. 8–10, CE-10). As noted, despite the comparisons which have been criticised, the Tribunal is content to accept that Mr. Ridley has done his best with, at times, limited comparative data.

830 Accordingly, the Tribunal accepts Mr. Levitt's valuation of the "as is" value of Forrester Estate (again including the Forrester Water Permits), along with Mr. Ridley's cattle valuation⁸³, at US\$24,183,089. As Mr. Levitt notes, the von Pezold Claimants will not be completely compensated for their losses in Forrester Estate without receiving compensation for other Heads of Damage, namely the conversion of the Forrester Water Rights to Water Permits, the Forrester Tobacco Value Shortfall, and the Forrester Conversion Amount (see Second Expert Report of Anthony Levitt, para. 7.03.6, Corrected CE-7). Those, however, are distinct from the value of the Restitution Shortfall and are considered separately.

831 The Restitution Shortfall for the Forrester Estate must be calculated with regard to the Tribunal's adjusted "but for" valuation. Having adjusted Mr. Levitt's calculation at paras. 823-824 above to reach a "but for" figure of US\$39,709,470, the Tribunal finds that the Restitution Shortfall for

⁸³ The "as is" value of Forrester Estate of US\$24,183,089 is not just Mr. Levitt's valuation, but also includes Mr Ridley's cattle valuation.

Forrester Estate is US\$15,526,381 (the difference between the adjusted “but for” value of US\$39,709,470 and the “as is” value of US\$24,183,089).

e) Makandi Estate

832 It will be recalled that the Parent Claimants indirectly own 50% of four of the local companies within the Makandi Estate, and 44% of a fifth company (see Mem., para. 485). A Norwegian family owns the remaining portion of the companies. The von Pezold Claimants are thus in a joint venture with the Norwegian family in respect of Makandi Estate (see *ibid.*, para. 493).

833 The Makandi Estate is divided into three sections totalling 8,389 ha, of which 3,625 ha is arable. Those three sections consist of nine properties covered by nine title deeds. The Makandi Estate is a “mixed plantation, growing coffee, bananas, maize, macadamia nuts, avocados – all under irrigation, except for maize – and timber for the production of transmission poles and firewood” (see *ibid.*, para. 518). The von Pezold Claimants submit that the Makandi Estate remains a thriving going concern. However, six of the nine deeds were expropriated and the remaining properties are unable to operate viably on their own as a mixed plantation (see *ibid.*, para. 543). The von Pezold Claimants submit that the remaining assets are worthless without the entire productive assets under their ownership. The Tribunal has also found that the Water Permits attaching to the Makandi Estate, listed in Table 3 of the Claimants’ Reply, were directly expropriated along with the properties.

(iv) Valuation Method for Makandi Estate

834 Again, it is necessary to determine first the valuation method to be adopted and, then, to consider the application of that method to the facts in the record. The von Pezold Claimants advocate a comparative market valuation. Mr. Levitt has relied on the evidence of Mr. Stephenson about prices in South Africa, Zambia and Swaziland. Mr. Levitt is of the view there are no suitable comparators in Zimbabwe; the Respondent, and particularly Mr. Moyo, challenges this conclusion of Mr. Levitt (see Resp. PHB, para. 318). Despite the fact that the Makandi Estate is a going concern, the von Pezold Claimants are pursuing a comparative market valuation rather than a DCF analysis.

835 The difficulty of using local price comparisons is accepted (that is, comparisons within Zimbabwe). The von Pezold Claimants have made compelling submissions impugning the comparator transactions relied on by Mr. Moyo, as well as his analysis of those transactions (see Cl. PHB, para. 194–195). In addition, it is difficult to achieve a “but for” valuation simply by looking at comparative Zimbabwean prices, as those prices are likely to be affected by Zimbabwe’s breaches of the BITs and their long-term consequences. Comparative pricing of land is always a difficult exercise (see *ibid.*, see also *Calculation of Compensation and Damages in International Investment Law*, para. 5.58, CLEX-297), particularly when dealing with a “but for” comparison of land.

(v) *Quantum* of Makandi Estate on "As Is" Basis

836 The von Pezold Claimants value the Makandi Estate at US\$13,930,012 as at 30 September 2012 (see Cl. Skel., para. 183). Although the von Pezold Claimants have sometimes referred to this as a "but for" valuation, it is perhaps more properly considered an "as is" valuation (in essence, the "but for" value of the Makandi Estate is the "as is" value). The von Pezold Claimants have not claimed that the current value of the Makandi Estate should be supplemented on a "but for" basis, and accordingly if restitution of the Makandi Estate is made by the Respondent there is no Restitution Shortfall for the Makandi Estate. However, if restitution of the Makandi Estate is not made, then the von Pezold Claimants will be entitled to compensation for the present value of the Makandi Estate.

837 The Tribunal has some concerns with Mr. Levitt's approach in calculating the present value of the Makandi Estate. In short, these are:

- (a) First, Mr. Stephenson noted in a response to a question by President Fortier that he had not investigated prices of land in Zimbabwe prior to the LRP (see Tr. Day 4, pp. 1055 to 1058). Mr. Stephenson indicated that this was difficult, with detailed information unavailable.
- (b) Secondly, it is sensible to question the degree of similarity between Zimbabwe and Mr. Stephenson's comparator countries, as well as the degree of assistance that can be derived from them. The data pool is reasonably small. For example, there is only one comparator used to value avocado production (see Expert Report of Alan Stephenson, para. 16.3.1.1, CE-4). It is inherently uncertain to take, say, ten properties from a range of neighbouring countries and then simply equate their values with the value of the Makandi Estate. This situation is compounded because in some cases there is no suitable comparator. For example, sugarcane was used by Mr. Stephenson as a comparison to value banana production on the Makandi Estate (see *ibid.*, tables 9–10).
- (c) Thirdly, Mr. Stephenson appears to have made some arbitrary assumptions. For example, the Tribunal notes the following section of Mr. Stephenson's Expert Report (see *ibid.*, paras. 16.2.2.1–16.2.2.3):

The comparable sales transactions above show values for bananas, under microjet irrigation, between R50,000 per hectare and R60,000 per hectare. Bananas under overhead irrigation were valued at R44,000 per hectare and bananas grown on dry land were valued at R45,000 per hectare. These sales are slightly dated and cognisance of this should be taken into account in determining the current value of the plantations.

The banana plantations on the Subject Property are currently grown under microjet and overhead irrigation and are produced for both the export and the local markets. I would increase the rate quite significantly in relation to the Subject Property given the dates of sale.

I conclude at the following values for the irrigated bananas on the Subject Property, as at 30 June 2011:

- R80,000 per hectare for the microjet irrigated land under bananas
- R60,000 per hectare for the overhead irrigated land under bananas

Mr. Stephenson's significant increase appears rather arbitrary. Referencing "slightly dated" sales and different irrigation techniques, Mr. Stephenson makes what can only be an informed guess as to an appropriate price. This is concerning and casts doubt upon Mr. Stephenson's overall conclusions.

- (d) Finally, Mr. Levitt - using Mr. Stephenson's data - divides the overall valuation of Makandi by half to arrive at the value of the Parent Claimants' ownership interest. Yet Mr. Levitt acknowledges that this is overly simplistic because only four of the five Makandi companies are half-owned by the Parent Claimants. The Parent Claimants own 44% of the fifth company. No attempt seems to have been made accurately to arrive at the portion of the Makandi Estate's value actually attributable to the Parent Claimants.

838 In light of all these concerns, the Tribunal has difficulty in accepting the von Pezold Claimants' valuation of the Makandi Estate. But at the same time, the Respondent has not offered a credible alternative. In view of these difficulties, it is appropriate to make an adjustment to the overall sum, although doing so inevitably involves a rough estimate. The Tribunal considers the fairest approach is simply to make a reduction of 20% to mitigate the errors that have inflated the actual value of the Makandi Estate.

839 In summary, the ruling of the Tribunal is that Mr. Levitt's valuation of the Makandi Estate, including the Makandi Water Permits, (US\$13,930,012) will still stand, but be reduced by 20% to US\$11,144,010. As already noted, there is no Restitution Shortfall to be calculated in respect of the Makandi Estate. If restitution of the Makandi Estate is not provided by the Respondent, however, then the Claimants will be entitled to the value of the Makandi Estate as fixed by the Tribunal at US\$11,144,010.

- f) Border Estate
- i) Background

840 The Tribunal has found it necessary to set out the business background for the Border Estate in more detail than for the other Estates, as the valuation methods submitted by the Claimants here

- are more complex than for the Forrester or the Makandi Estate. The Claimants value the Border Estate at US\$136,228,532 as at 30 September 2012 on a "but for" basis (see Cl. Skel., para. 175).
- 841 The von Pezold Claimants own 86.49% of the Border Estate (see above para. 127). The Border Estate comprises five sub-estates covering 47,886 ha, of which 31,845 ha is plantable (see Mem., para. 342). The five sub-estates are further divided into 28 Border Properties covered by 11 title deeds. Forestry operations take place on the 28 Border Properties (see Mem., para. 345). Saw milling takes place on three of the properties (see Mem., para. 348). Connected to the Border Estate are a pole treatment plant and two factories, though they are not actually on the sub-estates' land (see Mem., para. 349). Like the Forrester and Makandi Estates, the Border Estate is said to remain a thriving business and a going concern, although operating at a diminished level due to the Invasions.
- 842 The Claimants describe the Border Estate's business as vertically integrated. The Border Estate grows pine and eucalyptus, and owns three sawmills, two factories and a pole plant, all of which allow the Border Estate to process its trees without external infrastructure or service providers. For this reason, the Claimants suggest that there is a market in Zimbabwe only for products derived from saw logs, and not for saw logs themselves (see Mem., para. 354).
- 843 The business is said to be sustainable as the planting operation is cyclic: trees are planted, felled, and then re-planted (see Mem., para. 357). The Border Estate's business practice is to "sustainably grow as much high-quality timber as possible, and then to realise the value in this timber through process i.e. adding value in its sawmills and factories" (see Mem., para. 359). Since 1992, the main products of the Border Estate have been: (i) sawn timber (lumber or planks); (ii) creosote treated poles; and (iii) "value added products" (such as doors, plywood and the like) (see Mem., para. 360).
- 844 Border Estate's practice is to ensure there are trees of different ages (different "age classes") growing on the plantation at any one time (see Mem., para. 375). Having a diversified age profile of the trees ensures a steady, sustainable revenue flow so long as the age classes are appropriately balanced. This is important as a tree takes between 18 and 25 years to mature "depending on the species" (see Mem., para. 376). However, an investment in a single tree tends not to be realised until it is finally cut down and processed many years later. Such a growing time makes the investment vulnerable to intervening factors, such as fire, which prevent a tree's value from being realised. Again, as the Claimants submit, this means that the value of the Border Estate cannot be determined by the felled value of every tree at a single time (see Mem., para. 377).
- 845 As to its market, the Claimants contend that the Border Estate products are in "high demand" and sell both domestically and globally "as demand dictates" (see Mem., para. 361). Claiming that fires

caused by Settlers/War Veterans have decreased Border Estate's ability to supply markets in the U.K., U.S. and Korea, the Claimants aver that most of their exports are now within Africa (see Mem., paras. 364–370)⁸⁴.

846 The Claimants submit that, due to fires and settler activity, the Border Estate has a disproportionately high number of young trees and a disproportionately low number of older trees. This, the Claimants say, has meant fewer saw logs are being processed. In turn, this has kept the processing infrastructure below capacity.

847 Overall, Mr. Levitt has calculated the Total Potential Plantable Area of the Border Estate at 32,294 ha (discussed below). Of this, 24,367 ha is planted; 3,954 ha is temporarily unplanted; and 3,973 ha is settler-occupied. Mr. Levitt contends that while normally the Border Estate aims to keep 5% of the Total Planted Area as Temporary Unplanted Area, this proportion is currently exceeded as there are 7,927 ha of unplanted area vis-à-vis 24,637 ha of planted area. This unplanted area is said to be made up of land occupied by Settlers/War Veterans and damaged by fire (caused by Settlers/War Veterans). These numbers are based on 2005 data.

848 The structure of the Estate vis-à-vis its tree growing is also relevant. First, the Border Estate's five sub-estates are arranged into Compartments. A Compartment is a group of trees of a similar age class. Next, there is a Stand, which is a sub-Compartment, with trees uniform in species, age, and condition. Finally, there is a working circle, where trees are normally grown for the same purpose (such as pine saw logs). This data is then stored in Microforest. Microforest has a module called Plantation Manager, which stores this data to Compartment level and records metrics such as age, class, species, annual increase in volume, and others. There is also a module called Harvesting Scheduling System, which uses data from Plantation Manager to advise on techniques, such as thinning, for increasing or maximising timber output down to Working Circle level.

849 The Tribunal has found that 21 of the 28 Border Estate properties have been expropriated, as well as the sawmills. It is the Claimants' view that, without all the assets under ownership, the Border Estate is effectively worthless if sold.

ii) Valuation Method for Border Estate

850 The Claimants submit that the Border Estate should be valued in two ways: (i) a comparative market approach for the land; and (ii) a fair market approach for the timber, based on three valuation methods. In respect of the timber, the valuation method depends on the age of the trees being valued: (i) for the least mature trees, an Accumulated Current Actual Cost (ACAC) basis; (ii) for the

⁸⁴ The Border Estate apparently exported 80% of its products in 2008/2009 but has decreased that proportion to 50% today.

overmature trees, an actual felling price; and (iii) for the trees between those two ages, a valuation based on the Faustmann Formula.

851 The Respondent disagrees. Mr. Moyo has again used DRC and comparative market approaches. Mr. Moyo appears to have valued the Border Estate by valuing the land separately from the assets (subsuming timber within the land valuation). Mr. Kanyekanye has instead advocated a market capitalisation valuation based on the listed price of the Border Estate on the Zimbabwean Stock Exchange.

852 The Tribunal is unable to derive any assistance from Mr. Kanyekanye's proposed valuation and accepts the Claimants' criticisms on this aspect (see Cl. PHB, para. 206). The vast majority of the Border Estate shares are owned by the Claimants, leaving a very small, illiquid portion traded on the Zimbabwean Stock Exchange. More fundamentally, the Stock Exchange only offers an "as is", rather than a "but for" valuation. Accordingly, the listed price is inappropriate unless it were subsequently adjusted on a "but for" basis. Finally, market capitalisation poorly captures an investment's future return. Those future returns are important given that the Border Estate relies on trees to mature before realising its investments. Since the Estate currently has a disproportional number of young trees, this expected future return is unlikely to be reflected in a capitalisation valuation.

853 The Tribunal is also unpersuaded by Mr. Moyo's approach. His comparative market approach seems to be lacking in data (three properties are used) and does not seem to have been adjusted to reflect "but for" value. Further, the Claimant has challenged the reliability of those three transactions, claiming they were not arms-length transactions. In respect of the DRC approach, as found earlier by the Tribunal, it is unsuitable for a going concern. The unsuitability of these methods is compounded by Mr. Moyo's decision to value the Border Estate's land and assets separately, without actually considering the trees as a separate class of asset worthy of an industry-specific valuation. Since most of the Border Estate's value derives from the forestry operation, Mr. Moyo's approach is therefore deficient and unhelpful⁸⁵.

854 As a result, the Tribunal is left with the Claimants' approach, with which it agrees in principle. The Claimants have adopted a realistic approach to valuing the Border Estate, particularly regarding the value of the trees.

⁸⁵ A more detailed criticism of the above approaches is outlined in Mr. Levitt's First Expert Report at Sections 14.03.9 – 14.03.12.

iii) *Quantum* of Border Estate on a "But For" Basis

855 The Claimants value the Border Estate at US\$136,228,532 as at 30 September 2012 on a "but for" basis (see Cl. Skel., para. 175). This sum is derived from two separate valuations: forestry (US\$97,771,263), and land and roads (US\$38,457,269) (see Second Expert Report of Anthony Levitt, para. 5.05.27, Corrected CE-7).

856 The Tribunal must accordingly evaluate the appropriateness of the Claimants' valuation methods as applied to the Border Estate. Mr. Levitt undertook his valuation as follows (see First Expert Report of Anthony Levitt, para. 14.04.2, Corrected CE-1):

The value of the trees by reference to a combined Faustmann/ACAC calculation as explained in paragraph 6.08.15 et seq, which is a DCF based approach and not by reference to cost or a valuation prepared for year-end accounting or some other purpose;

the value of the land and roads making up the Border Estate, by reference to a professional valuation specifically for the purposes of this dispute. This value is both:

- a. an input to the Faustmann calculation; and also
- b. added to the value of the plantations.

857 For completeness, the Tribunal sets out a comprehensive explanation of Mr. Levitt's approach, as summarized in the Claimant's Skeleton Argument (see Cl. Skel., paras. 173–175):

173. **Border Issue 2:** By way of summary, the Faustmann Formula employed by Mr Levitt allows a valuer to derive the internal rate of return ("IRR") for a particular working circle (i.e. the Pine Sawlog, Eucalyptus Sawlog and Eucalyptus Pole working circles) using the information that is readily known: specifically, the thinnings income and net standing value at clearfelling, the costs associated with the ownership or operation of the plantation (whether owned or rented), the costs associated with each silvicultural process, the annual overhead costs, and the clearfelling rotation age. The IRR in the case of a specific working circle is the discount rate at which the net present value of the running costs (i.e. the silviculture, annual overhead and "land rental" costs) equals the net present value of the income generated from the full rotation (i.e. from thinnings and clearfelling). Mr Levitt has used the Faustmann Formula to derive the IRR for each working circle and then used these IRRs to calculate the standing value per ha for all the age classes within each of Border's three working circles. These values were then applied to the Estate's "but for" age class distribution to establish the value of the majority of the on-rotation trees.

174. Since the values produced by the Faustmann Formula for the least mature trees are lower than the actual costs that have been incurred growing them, these stands were valued based on their actual growing costs as stated in current cost terms (i.e. an ACAC approach). Since the value in the overmature trees could be realised immediately, Mr Levitt has valued them separately based on their actual current felling values.

175. Mr Levitt's total standing timber value is the sum of the Faustmann Formula-derived values for the majority of the on rotation trees, added to the valuation of

the overmature stands and the ACAC valuation of the least immature stands. This figure was added to the comparable transaction-based value of Border's land and roads to arrive at Mr Levitt's "but for" Fair Market Value valuation of the Border Estate: US\$136,228,532 at 30 September 2012, and US\$104,937,069 at 13 September 2005. [references omitted]

- 858 Mr. Levitt's forestry calculations go to the forestry valuation, which accounts for US\$97,771,263 of Border Estate's value (see Second Expert Report of Anthony Levitt, schedule 10.2, Corrected CE-7).
- 859 The Respondent challenged two main inputs used by Mr. Levitt: (i) the NSV of fully mature pine; and (ii) the Border Estate's plantation area and age class profile (see Resp. PHB, para. 20.1.1 ff). Generally, the Respondent opines that the Claimants have inflated the price at sale, ignored lower timber prices, ignored more comparable timber prices, and oversimplified the pricing by not including unproductive timber used for wind breaks and not varying price to reflect the type of wood (or maturity or size).
- 860 Mr. Levitt responded to these critiques in his Second Report (see Second Expert Report of Anthony Levitt, para. 2.04.87, Corrected CE-7). Mr. Levitt uses a roadside price of \$40/m³ (where the seller takes the cost of harvest and extraction). The costs of harvest and extraction are then subtracted from the roadside price to arrive at the NSV, which Mr. Levitt puts at \$26.3/m³ (in other words, the cost estimate was \$13.7/m³).
- 861 It is not difficult to see some merit in the Respondent's criticism that the roadside price is based on limited evidence. Mr. Levitt, for example, derived the \$40/m³ figure from two sources (see *ibid.*, para. 2.04.88, Corrected CE-7). The first was a quote from another Zimbabwean company from 2010. The second was a single contract between the Border Estate and Mutare Board and Paper Mill from 2012. To then take \$40/m³ as a definitive market price seems questionable to the Tribunal. Inevitably though, as with the land, comparisons are always going to be flawed. The Tribunal notes, however, that Mr. Levitt has decreased the valuation of the timber by approximately \$20 million for his second valuation to reflect contemporary conditions on the Estate. On the whole, the Tribunal considers that Mr. Levitt acted fairly and that his valuation is reasonable.
- 862 Finally, in the view of the Tribunal, Mr. Kanyekanye's proposed NSV, of \$6.67/m³ is indeed tantamount to "economic suicide", as the Claimants suggest. Further, the Claimants contend that if Mr. Kanyekanye's calculation excludes the cost of transport to South Africa, the NSV is actually around \$35/m³, which is not very different from the figure proposed by Mr. Levitt.
- 863 For the foregoing reasons, the Tribunal finds that the Respondent has not seriously challenged the Claimants' NSV, although it acknowledges that there is some doubt as to whether it may be too

generous. Accordingly, the Tribunal will factor in an overall deduction of the valuation to counteract any such "generosity".

864 Secondly, the Respondent attacks Mr. Levitt's plantation area and age class profiles. Mr. Kanyekanye alleges that Mr. Levitt's data is speculative. It seems that these criticisms are based not on the application of the Faustmann Formula but rather on the data entered into the Formula. The experts for the Claimants have confirmed that they have not used Microforest's forecasting or speculation modules. Rather, the data relied on is the data entered into the programme that has been collected from surveying the Border Estate. The only adjustment the Claimants' experts have made was to account for "the effect of the Settlers". Therefore, the Tribunal accepts that the data entered into Microforest, which Mr. Levitt relied upon, is reliable.

865 The Tribunal accepts that overall Mr. Levitt has undertaken a rigorous and reasonable analysis using the Faustmann Formula. The reliability of Mr. Levitt's calculation is supported by the following summation given in the Claimant's Post-Hearing Brief, which the Tribunal finds to be persuasive (see Cl. PHB, para. 214):

Mr. Levitt begins with the actual Estate as recorded in the Microforest database and then adds the area that would have been planted at Sawerombi but for the activities of Settlers, which is the only adjustment to the overall area of the Estate. Mr. Levitt also makes two "but for" age class adjustments (i.e. increasing the number of older trees and making corresponding decreases in the number of younger trees): (1) the first reflects the trees that were burnt by Settler-caused fires and therefore would have been on the Estate "but for" the effects of Settlers; and (2) the second reflects the fact that management would have planted the Temporarily Un-Planted compartments "but for" the effects of Settlers such that there is only 5% of the plantable area unplanted rather than the actual, higher figure. Finally, since baboon damage is not reflected in the Microforest data, Mr. Levitt makes an "as is" age class adjustment to reflect such damage which affects the yield of timber from the Estate. Mr. Kanyekanye's evidence and the Respondent's cross-examination of Mr. Bottger suggests that it did not appreciate that Mr. Levitt has specifically taken baboon damage into account in his valuation; for the avoidance of doubt, Mr. Levitt has taken baboon damage into account and the effect of this adjustment is to reduce his valuation.

866 One concern of the Tribunal relates to Mr. Levitt's adjustment to consider the "but for" planting area. In arriving at this figure, Mr. Levitt has relied on the Claimants' business plan. For example, Sawerombi was to have 5,500 ha planted by 2003 but this was inhibited by settler activity. So Mr. Levitt relied on 5,500 ha as the area that would have been planted "but for" the Respondent's breaches. Further, Mr. Levitt assumes that Settlers/War Veterans caused all the fires between 2002 to 2012, with the exception of an estimated 50 ha of unrelated fires per year and 1,000 ha lost in 2010 from non-settler causes. In arriving at the above figures, Mr. Levitt is obviously making estimates, which involve some degree of speculation. However, as the Tribunal noted earlier, this is the ongoing difficulty that must be faced with the "but for" evaluation. The Tribunal concludes that it is reasonable to accept the estimated 5,500 ha. In the past, the Claimants have operated

these Estates efficiently and the Tribunal does not find that their business plans are unduly optimistic or speculative.

867 Mr. Levitt inserted the value of the underlying lands and roads, which accounts for US\$38,457,269 of Border Estate's value, into his valuation model. The actual valuation of the land and roads was conducted by Mr. Stephenson, who also valued the Makandi Estate's land (see Second Expert Report of Anthony Levitt, para. 5.05.28, Corrected CE-7). The Tribunal finds the general concerns expressed about the valuation of the Makandi Estate's land at para. 839 above also apply here. Namely, Mr. Stephenson's valuation of Border Estate's land suffers from a relatively small number of comparative land transactions, and those transactions mostly involve land in South Africa (see, e.g. Fourth Expert Report of Alan Stephenson, CE-08, paras. 21–25). Nevertheless, any uncertainty is resolved by applying a margin of appreciation to the overall valuation of Border Estate.

The Tribunal finds therefore that the integrity of Mr. Levitt's calculations for the value of the Border Estate has been established. However, as a response to any concerns as to the reliability of some estimated data, the Tribunal will reduce the overall valuation by 20%. Accordingly, the Tribunal finds that the "but for" value of the Border Estate is US\$108,982,826 (which is 80% of US\$136,228,532).

iv) Restitution Shortfall for Border Estate

868 Mr. Levitt determined that there would be no difference between the land and roads of the Border Estate as calculated on a "but for" basis and an "as is" basis. That is because, Mr. Levitt says, "the value of the land and roads is the same as it would have been in the event that the Border Properties had not been expropriated" (see Second Expert Report of Anthony Levitt, para. 7.02.6, Corrected CE-7). Accordingly, the only relevant calculation to determine the Restitution Shortfall for the Border Estate is to calculate the difference between the "but for" value of the Border forestry assets and the "as is" value of those same forestry assets. Mr. Levitt's "but for" value of the Border forestry assets without the land and roads is, as noted above, US\$97,771,263 (now discounted by the Tribunal by 20% to US\$78,217,010). Mr. Levitt calculated the "as is" value of the forestry assets of the Border Estate at US\$64,011,909. Mr. Levitt employed the same valuation methodology to determine the "as is" value of the Border forestry assets as he used to calculate their "but for" value - only the inputs have changed (see Cl. Skel., para. 178).

869 Mr. Levitt's valuation is based on the current state of the Border Estate's trees as quantified in Microforest. The Tribunal accepts that Mr. Levitt has undertaken a reasonable valuation of the Border Estate's forestry assets. As the "but for" value is reduced to account for a margin of appreciation, the overall Restitution Shortfall will also be reduced in any event.

870 The Tribunal therefore finds that the Restitution Shortfall for the Border Estate, deducting the "as is" value of the forestry assets (US\$64,011,909) from the adjusted "but for" value of the forestry assets (US\$78,217,010), to be US\$14,205,101.

g) Tribunal's Conclusion on *Quantum* for the Estates

871 It is useful to summarise the above findings on the value of the Estates.

872 If the Respondent does perform restitution, then the Claimants are entitled to return of legal title to the Zimbabwean Properties, as well as the following Restitution Shortfalls based on the difference between the adjusted "but for" valuations and the "as is" valuations:

- (a) Forrester Estate: US\$15,526,381⁸⁶;
- (b) Makandi Estate: no Restitution Shortfall sought⁸⁷; and
- (c) Border Estate: US\$14,205,101.

873 If the Respondent does not perform restitution, then the Claimants are entitled to compensation based on the following "but for" valuations of the Estates:

- (a) Forrester Estate: US\$39,709,470⁸⁸;
- (b) Makandi Estate: US\$11,144,010⁸⁹; and
- (c) Border Estate: US\$108,982,826.

874 The Tribunal notes that the Claimants have requested that restitution be effected by the Respondent within 45 days of the dispatch of the Tribunal's award (the "**Restitution Window**"). The Tribunal considers that this Restitution Window is too short. Consequently, the Tribunal will grant the Respondent 90 days to effect restitution in full.

875 In addition, if the Respondent does not effect restitution within the Restitution Window, the Claimants request that, in the alternative, compensation be paid by the Respondent within 60 days of the dispatch of the Tribunal's award. In the opinion of the Tribunal, this time line is also too short. In that eventuality, the Tribunal will grant the Respondent 120 days from the date of the dispatch of the Tribunal's award to pay to the Claimants the compensation ordered by the Tribunal.

⁸⁶ This relief relates only to the claims brought by the von Pezold Claimants.

⁸⁷ This relief relates only to the claims brought by the von Pezold Claimants.

⁸⁸ This relief relates only to the claims brought by the von Pezold Claimants.

⁸⁹ This relief relates only to the claims brought by the von Pezold Claimants.

h) Zimbabwean Company Shares

876 The Claimants contend that (see Cl. PHB, para. 224):

[T]he diminution in value of the share capital of the Zimbabwean Companies is equivalent to their lost interest in the expropriated assets; it appears that the Respondent has accepted this position.

877 Indeed, and as noted earlier⁹⁰, the Tribunal observes that the Respondent, in its Counter-Memorial, wrote (see CM, para. 151):

The acquisition of the income producing assets of the Forrester companies, the Border companies and the Makandi companies through the Constitutional Amendment inevitably means that the shares are affected but that has been factored into the valuation for compensation.

878 Accordingly, the Zimbabwean Companies' share capital is directly related to the value of the Estates, which are the Companies' only assets (see Second Expert Report of Anthony Levitt, para. 1.02, Corrected CE-7). This also means that restitution of the Estates and/or compensation will compensate the Claimants for the loss in value of their shares. If restitution of the Estates is made, the Zimbabwean Companies' shares will increase in value. On the other hand, if compensation is paid, the Claimants will benefit as the owners of the Estates. There is therefore no need for the Tribunal to award damages separately under this head of damage. The Tribunal agrees with the Claimants that any challenge by the Respondent in respect of the *quantum* of damages pertaining to the shares will relate to the valuations of the Estates, which has been dealt with above.

i) Other Heads of Damage

879 The Claimants seek remedies for what they characterize as "remaining heads of loss". The Tribunal notes that the Respondent has not addressed the calculation of these remedies in any comprehensive way.

i) Seized Maize

880 The Respondent expropriated 4,500 tonnes of the von Pezold Claimant's maize although, at the time, some money was paid for the maize (see Cl. Skel., para. 111). However, the von Pezold Claimants contend that there was a shortfall of US\$317,405 between the compensation received and the market price at the time (see *ibid.*, para. 166). Mr. Levitt attempts to justify this claim as follows (see First Expert Report of Anthony Levitt, para. 5.04.6, CE-1):

In January 2002, the Grain Marketing Board seized 6,000 tonnes of maize from Forrester. Forrester negotiated with the GMB whereby the GMB would buy 4,500

⁹⁰ See above at para. 784.

tonnes of the seized maize from Forrester for ZIM\$15,000 per tonne. At the time the average market price was ZIM\$37,571. The remaining 1,500 tonnes remained on Forrester Estate and was used to feed the workforce.

881 Mr. Levitt refers to the evidence of Heinrich, who submitted in his Witness Statement that “the market price per tonne was Z\$37,571.004” (see Heinrich I, para. 565, C-18). The Tribunal is not satisfied that the von Pezold Claimants have discharged their burden of proof with this mere statement. This claimed head of damage is therefore dismissed.

ii) Forrester Loans

The Tribunal has found that the failure by the Respondent to allow the Forrester Loans to be repaid to Elisabeth breached the Respondent's FET, non-impairment and FTP obligations. As to *quantum*, Mr. Levitt quantified the damages at US\$7,186,302 for the principal with interest, as at the date of the breach on 31 December 2001 (see Second Expert Report of Anthony Levitt, para. 4.08.6, Corrected CE-7). The Tribunal upholds this claim in favor of Elisabeth. Mr. Levitt's calculated sum shall be awarded as damages.

iii) Forrester Water Rights

882 As noted above, the conversion of the Forrester Water Rights into Water Permits in 2000 represents a distinct head of damage. In this respect, based on the actual water levies charged to the von Pezold Claimants by the Respondent (the former Forrester Water Rights, it will be recalled, did not require payment of levies), the von Pezold Claimants calculate a loss of US\$106,273 between 2009 and 2011 (despite the conversion in 2000, levies were not regularly charged until 2009: see Second Expert Report of Anthony Levitt, para. 4.11.3, Corrected CE-7). To calculate the full and final damages suffered by the von Pezold Claimants in respect of the conversion of the Forrester Water Rights, Mr. Levitt calculated an average annual levy (based on the 2009–2011 data), and then calculated the cost of those levies in perpetuity. The total loss under this head is, according to the von Pezold Claimants, US\$425,412.

883 Although there is minimal data to average the annual levy (only three years) and the sums fluctuate considerably (low of US\$18,904; high of US\$57,834), the Tribunal finds that the von Pezold Claimants have met their burden of proof on the balance of probabilities.

884 The Tribunal has found an FET breach by the Respondent in respect of the Forrester Water Rights, but not an expropriation. Although Mr. Levitt's *quantum* calculations for the Forrester Water Rights are based on expropriation rather than FET breach, the Tribunal has nevertheless determined that it is appropriate to accept Mr. Levitt's calculation of damages. The damage to the von Pezold Claimants is the same in either case: the Respondent failed to compensate the von Pezold

Claimants for their loss when the Water Rights were converted into Water Permits in 2001, affecting both their duration and the Respondent's ability to charge levies. Accordingly, damages of US\$425,412 shall be awarded to the von Pezold Claimants in respect of the Forrester Water Rights.

iv) Forrester Tobacco Value Shortfall

885 The background of this head of damage was explained by the Claimants as follows (see Cl. Skel., paras. 121 and 169):

Between 2004 and 2008, the Respondent priced tobacco sales in US Dollars, but paid the von Pezold Claimants in Zimbabwean Dollars at the Official Rate, which grossly overvalued the Zimbabwean Dollar (see para 100 above). Accordingly the Respondent directly expropriated the von Pezold Claimants' proceeds from the tobacco sales and paid them inadequate compensation based on Official Rates. The loss is the difference between the US Dollar sale price at the Official Rate and the US Dollar sale price at the Unofficial Rate ("the Tobacco Value Shortfall"). Alternatively, through the same process, the Respondent directly expropriated the von Pezold Claimants' tobacco ("the Forrester Tobacco").

...

To calculate the loss, Mr Levitt began by extracting from the tobacco sales sheets the Gross Sale value in Zimbabwean dollars, the Zimbabwean dollar to US dollar conversion rate that was applied to the sale, and the value of any subsidy payment that was made. He used this data to calculate the US dollar price that was paid by the purchaser, which enabled him to calculate the difference between the Zimbabwean dollars that would have been received had the sale been converted at a proper exchange rate (i.e. the Black Market Rate), and the Zimbabwean dollars that were actually received. He then deducted any subsidy paid to Border from this loss and converted the post-subsidy loss back to US dollars using the Black Market Rate applicable on the date of sale. The total loss at 2005 was US\$2,815,253, and at 2009 was US\$10,085,598.

886 The Tribunal has already found that the Respondent's manipulation of its foreign exchange rates amounted to a breach of the FET, non-impairment and FTP standards. The Tribunal recognizes that quantifying these damages is not easy, as there are some quite complex data sets in use including, for example, official and parallel (black market) exchange rates. Nevertheless, having examined the evidence, the Tribunal is satisfied that Mr. Levitt has taken into account the available data on exchange rates and used it in a reasonable way (see First Expert Report of Anthony Levitt, para. 10.05.9, CE-1). The claim is accordingly allowed in favour of the von Pezold Claimants. Therefore, the von Pezold Claimants are entitled to US\$10,085,598 in respect of the Forrester Tobacco Value Shortfall.

v) Forrester Conversion Amount

887 During the 2008 tobacco selling season, the von Pezold Claimants contend that they were required by the Respondent to retain 25% of the sale proceeds of tobacco in a foreign currency account

(see First Expert Report of Anthony Levitt, para. 10.02.1, CE-1). As noted earlier in this Award, the Respondent refused to allow those funds to be withdrawn.

888 The Tribunal has found that the funds were subject to a breach of the FET, non-impairment and FTP standards by the Respondent and the von Pezold Claimants are entitled to recover them. As to the amount, the von Pezold Claimants claim US\$1,409,148 (see *ibid.*, para. 10.02.4), whereas the Respondent has submitted that the von Pezold Claimants' loss amounts to US\$1,331,176.90 (see the evidence at C-154). Mr. Levitt asked the Respondent to explain this deficiency but never received a reply (see First Expert Report of Anthony Levitt, para. 10.02.5, CE-1). Mr. Levitt has provided persuasive evidence to support the amount of US\$1,409,148 and the Tribunal accepts it.

vi) Border Liquidation Shortfall

889 The Border Liquidation Shortfall relates to the Respondent's requirement that between 2004 and 2009 the Claimants sell a percentage of their US Dollar Border Estate export earnings for a purportedly equivalent amount of Zimbabwean Dollars based on Official Rates (see Cl. Skel., para. 123). The Tribunal has found that the Respondent's treatment of exchange rates was a breach of FET, non-impairment and FTP.

890 The von Pezold Claimants contend that the damages for the forced Border Estate export earnings is the "difference between the US Dollar sale price at Official Rates, and the US Dollar sale price at Unofficial Rates" (see Cl. Skel., para. 123). Mr. Levitt notes that from 2003 to 2009, there was an increasing disparity between the official exchange rate and the parallel (black market) exchange rate (see First Expert Report of Anthony Levitt, para. 10.06.1, CE-1). Mr. Levitt has calculated the loss to the von Pezold Claimants at US\$14,957,864 (see Second Expert Report of Anthony Levitt, para. 7.03.11(i), Corrected CE-7). Again, assessing the reasonableness of *quantum* is markedly more complicated for losses tied to exchange rates. However, the Tribunal accepts the reasonable approach taken by Mr. Levitt and awards US\$14,957,864 in respect of the Border Liquidation Shortfall.

vii) Border Forex Losses

891 The Tribunal has found that any direct withdrawals by the Respondent from the Border accounts amounted to direct expropriations. The withdrawals totalled US\$100,533 (see Heinrich I, para. 845, C-18; and Second Expert Report of Anthony Levitt, para. 9.06.5, Corrected CE-7).

892 The Tribunal accepts the evidence of Heinrich von Pezold on this point and awards to the Claimants the sum of US\$100,533.

viii) Conclusion on Heads of Damages

893 It is again useful to summarise the Tribunal's findings on the above Heads of Damage:

- (a) Forrester Loans: US\$7,186,302;⁹¹
- (b) Forrester Water Rights: US\$425,412;⁹²
- (c) Forrester Tobacco Value Shortfall: US\$10,085,598;⁹³
- (d) Forrester Conversion Amount: US\$1,409,148;⁹⁴
- (e) Border Liquidation Shortfall: US\$14,957,864; and
- (f) Border Forex Losses: US\$100,533.

(5) Moral Damages

(i) Claimants' Position

894 The Claimants acknowledge that moral damages should only be paid in exceptional circumstances for non-material injury to the victim and his or her family where the cause and effect is grave or substantial. The Claimants refer to Heinrich's evidence in particular in regard to the threats and violence that has been "meted out to them and their staff by Settlers", which the Claimants say establish the necessary elements for the award of moral damages. The Claimants also contend that they have established that the acts of the Settlers/War Veterans are attributable to the Respondent. The Claimants submit that, alternatively, even if the acts of the Settlers/War Veterans are not attributable to the Respondent, this does not prevent the acts of Settlers/War Veterans giving rise to a breach of the FET and FPS standards by the Respondent for which moral damages should be awarded (see Cl. PHB, para. 183).

895 Heinrich's Witness Statements provide much of the evidence supporting moral damages. At a general level, Heinrich notes that (see Heinrich I, paras. 591-594):

591. During the Invasions, I along with my staff, were humiliated, threatened with death and assaulted, had firearms put to our heads, and were kidnapped These experiences were terrifying, as we did not know in the heat of the moment whether the War Veterans merely want to harass us, assault us, or kill us. Furthermore, even if the intention was the former, despite being humiliating, things could have gone unintentionally wrong, more so because firearms were often involved, as they were on a number of occasions

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592. The sense of terror was heightened by the fact that the Police in most instances were not willing to protect us – we were left to fend for ourselves against the mobs of Settlers and War Veterans.

593. It was not only the members of staff who were directly assaulted that were left traumatised; those of our staff who witnessed their family members and colleagues being beaten and humiliated by War Veterans during the invasions also suffered trauma.

594. Beyond the actual terror of experiencing an Invasion first-hand, during the Invasions there was a general sense of terror within the farming community; we knew that farmers and farm workers had been killed during Invasions by War Veterans, and that there were a number of instances of rape and threats of rape on the farms by War Veterans. Mr Charles Laurie provides a chilling account of the extent of the rapes ...

896 Heinrich further provides a number of more specific, detailed instances of violence and threatening behaviour. Two particular examples are provided below in order to highlight the treatment suffered by Heinrich personally (see *ibid.*):

616. E Section (Forrester Estate "B" of Umvukwe Estate) - In the afternoon of 13 April 2000, while I toured the farm with a journalist from the German magazine Der Stern, the Settlers stole the journalist's camera, tied me up, and threatened to kill me. Mr Hamilton and my cousin freed me by driving a truck at the Settlers, and the workers chased the Settlers away. On the same day, Settlers kidnapped the seventy-year-old uncle of the E Section assistant manager, tortured him, and then released him the same day. On 29 April 2000, War Veterans, Messrs Maguti and Makaya (who worked for the government body, Agritex), arrived on E Section and started beating the workers. They forced all of the workers to sit in a circle and sing slogans, then asked the Settlers which of the workers were MDC supporters. The Settlers identified a Mr Samson (a Forrester Estate employee at the time) and beat him until he pointed out other supposed MDC supporters. They next forced Mr de Villiers (the E section manager at the time), an Afrikaner (a white African of Dutch descent), to sing derogatory songs about Afrikaners, then beat him, threatened to kill him, and told him they would "share [his] wife" with them. Messrs Maguti and Makaya then stole a car and used it for the invasion of other farms.

...

622. J Section (Frogmore Extension) – Late in October 2002, thirty people arrived on J Section and abducted me, spiriting me away to the local ZANU-PF headquarters in Nzvimbo where I was held for four hours. While I was being transported to the local ZANU-PF headquarters, the abductors tried to hit me, but Mr Chihota (a Forrester Estate employee) bravely interposed himself between me and the assailants, shielding me from their blows. During my detention at ZANU-PF headquarters, the abductors told me to stop relying on the courts and to go back to Britain. When I advised them that I was German, they told me to go back to Germany. I was eventually released on the orders of higher authority.

897 The evidence of the remaining von Pezold Claimants can be found in their respective Witness Statements. For the most part, each witness statement provides similar evidence about the circumstances on which they base their claim for moral damages. For example, George von Pezold's Witness Statement contains the following (at paras. 14-15):

14. During the aggressive phases of the Land Reform and Resettlement Programme, I was aware of the constant dangers faced by Heinrich. I was informed by Heinrich and my parents that he, along with our staff, had been attacked and humiliated on numerous occasions. The dangers faced by Heinrich and our staff made me feel anxious and distressed.

15. My distress was heightened by the fact that the Police - as I understood from Heinrich - were unwilling to protect him and our staff against the invasions and harassment by the Settlers.

898 The evidence of the remaining von Pezold Claimants is largely consistent because, while Heinrich was in Zimbabwe, the other von Pezolds were not. Accordingly, the stress and trauma they experienced was very much based on their concern for Heinrich and their staff. They were not personally exposed to any threats or violence.

899 Heinrich also describes some of the incidents that occurred at the Border Estate. For example, two of the more violent situations are reproduced below (see Heinrich I, paras. 665, 675):

665. Sawerombi Estate – In November 2000, nine Border Estate employees were confronted by approximately thirty-three Settlers. The Settlers proclaimed the area belonged to the Chikukwa tribe and that the Border Estate should not be working in the area. The Settlers proceeded to assault two of the Border Estate's employees, one of whom was Cannais Semwayo. Mr Semwayo was beaten with rocks and sticks, and as a result of his injuries was unable to work for three weeks.

675. On 11 November 2005, a Border security guard, Fungai Nhondera, was assigned to guard a Border Estate truck that had broken down whilst carrying timber from the Charter sawmill. The District Administrator, Smart Chindawande, and five other men, including a uniformed Police officer, arrived at the broken down truck, and questioned Mr Nhondera as to why he was guarding the truck. The District Administrator ordered the men accompanying him to puncture all of the tyres on the Border Estate's truck, and then burn the truck. The men initially protested, but eventually they slashed the truck's tyres. The District Administrator thereafter pulled out a gun and pointed it at Mr Nhondera and ordered him to remain where he was. The men who accompanied the District Administrator told him not to shoot Mr Nhondera but suggested that they beat him to death. The District Administrator took Mr Nhondera's baton and hit him over the head with it. Mr Nhondera passed out, and was unconscious for approximately twenty to thirty minutes. Once Mr Nhondera regained consciousness, he crawled into the nearest bush that he could find for his own safety.

900 The examples provided above simply demonstrate the kind of conduct that the Claimants rely on to justify the award of moral damages.

901 Also relevant to the Border Claimants is the evidence of John Gadzikwa, the former Managing Director of Border Timbers Limited between 2000 and 2009. Mr. Gadzikwa's evidence is not as detailed as that of Heinrich's but provides a general description of the events at Border that are said to justify moral damages (see Gadzikwa I, paras. 11-12):

11. The Settlers also directly interfered with the Border Estate's staff. Road-blocks, manned by Settlers were set up and were used to prevent our staff from entering particular areas of the Border Estate. Settlers confronted and threatened employees who were carrying out operations on the Border Estate.

12. The effect of Settler activity on our staff was that they became reluctant to enter the areas which were illegally occupied by Settlers. This directly affected the planting, pruning and felling of trees in those areas, and indirectly affected the quantity of timber that was readily available for processing in the Border Estate's sawmills.

902 The sums sought for moral damages by the Claimants differ according to the particular claimant: Heinrich seeks US\$5,000,000; the remaining von Pezold Claimants seek US\$1,000,000 each; and the Border Claimants seek US\$5,000,000. Collectively, the Claimants seek US\$17,000,000 in moral damages (of which US\$12,000,000 is attributed to the von Pezold Claimants, and US\$5,000,000 to the Border Claimants).

(ii) Respondent's Position

903 The Respondent denies that the Claimants are entitled to moral damages, and notes that the amount claimed by Heinrich (i.e., US\$5,000,000) is comparable to the loans used to invest in the properties more than a decade ago. Should any moral damages be awarded, the Respondent asks that they be greatly reduced to be symbolic in nature (see Rejoinder, para. 20.1.7).

904 The Respondent asserts that the "the Claimants have presented insufficient proof to justify the claim for moral damages" as the Claimants' rely on "Heinrich's say so" (see CM, para. 165). Further, the Respondent instead seeks to distance its responsibility for the actions of the Settlers/War Veterans said to give rise to moral damages. In its Counter-Memorial, the Respondent (see CM, para. 161):

[D]enies that the actions of the settlers, invaders and war veterans be attributed to it. If the violations complained of did occur at all, Respondent avers that these were not sanctioned by the State but were actions of opportunist criminals who took advantage of the situation.

(iii) The Tribunal's Analysis

a) Legal background

905 A State's obligation to provide reparation for an "injury" may include moral damage, as well as material damage (see *Articles on State Responsibility*, p. 202, CLEX-272). The commentary to the ILC Articles on State Responsibility recognises that moral damages include "such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life" (see *ibid.*). Nevertheless, moral damages will be awarded only in exceptional circumstances.

906 Moral damages are relatively new to investment treaty arbitration although they have been awarded, especially in respect of "pain and suffering and other affronts to personality" (see Sabahi, p. 191, CLEX-306). The ICSID tribunal in *Lemire* outlined the circumstances necessary to award moral damages in an investment treaty dispute. After reviewing authorities on moral damages, the Tribunal concluded that "moral damages can be awarded in exceptional cases, provided that" (see Lemire, para. 333, CLEX-318):

- (a) The State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
- (b) The State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
- (c) Both cause and effect are grave or substantial.

907 The ICSID Tribunal in *Desert Line Projects LLC v. Republic of Yemen* ("**Desert Line**") (see ICSID Case No. ARB/5/17, Award, 6 February 2008, CLEX-232) also outlined principles applicable to the awarding of moral damages. That Tribunal pointed out that although it is difficult to substantiate an appropriate sum for moral damages, the Tribunal indicated that this should not be a deterrent (see Desert Line, para. 289, CLEX-232)⁹⁵.

b) Whether Corporate Claimants may be Awarded Moral Damages

908 This issue arises in relation to the Border Claimants. The Tribunal in *Desert Line* recognised that moral damages were available to natural and legal persons as a result of harm suffered from breaches of an investment treaty (see Desert Line, para. 289, CLEX-232). The Tribunal noted that "[i]t is also generally recognized that a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only" (see *ibid.*).

909 The Claimant in *Desert Line* sought moral damages on the following basis (see *ibid.*, para. 286, CLEX-232):

... [A]s a result of the Respondent's breaches of its obligations under the BIT: the Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes; the

⁹⁵ In this respect, the Tribunal takes some heed from *Castillo-Paez v. Peru* (IACHR) (Reparation and Costs), 27, November 1998, CLEX-180, a decision of the Inter-American Court of Human Rights. The Court recognised that moral damages are difficult, if not impossible, to quantify. As a result, the Court suggested a "prudent assessment" of moral damages, with no absolute rule possible. The ICJ also supports this approach, stating: "In the view of the Court, non-material injury can be established even without specific evidence" (see Diallo, p. 334, CLEX-366). The Court awarded US\$85,000 for non-material injury.

Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent in relation to the Contracts. [emphasis added].

910 The Tribunal ultimately awarded the Claimant US\$1,000,000 given that the Claimant's "prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation" (see *Desert Line*, para. 290, CLEX-232). When considering the paragraph from *Desert Line* cited above, it may be noted that the Tribunal does not only describe loss to the company (credit, reputation and prestige). The Tribunal mentions the harm to the company's executives as central to its finding in favour of moral damages. The Tribunal, therefore, affirmed the principle that a corporation can receive damages based on actions that affected members of its staff.

911 Dr. Sabahi, in his work *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*, touches on this matter when he asks "can corporations seek compensation for moral damage to the personality rights of their employees?" (see Sabahi, p. 139, CLEX-306). He follows by noting that the "Desert Line case seems to answer this question in the affirmative" (see *ibid.*, pp. 139–140). Then, Dr. Sabahi states:

A strict application on the rules of standing should prevent awarding compensation for damage to the executives' personality rights in the latter scenario [referring to *Desert Line*]. Yet, such an approach could cause practical problems, such as leaving these harms unrepaired, as the most relevant forum for bringing such a suit would be Yemeni courts, which, among other things, may not be able to handle the case with the desired level of independence.

To remedy this legal shortcoming, then, it is submitted that, by analogy to the doctrine of state espousal, which revolves around the Vattelian fiction that injury to an individual is equal to the injury to the home state of individual, one could think of a doctrine of 'corporate espousal', whereby damage to an employee of a corporation would be considered as damage to the corporation itself. This is the assumption underlying the *Desert Line* case and would solve the problem of standing.

912 The conceptual difficulty of awarding a company moral damages based on the consequences to its employees was also discussed in an article by Dr. Dumberry, who considered that *Desert Line* was "sensible" and "likely to be followed by other tribunals in the future" (see Patrick Dumberry "Compensation for Moral Damages in Investor-State Arbitration Disputes" (2010) 27 J Int'l Arb 247, CLEX-302). Nevertheless, Dr. Dumberry points out that the company's executives, not the company, suffered the harm justifying moral damages. On a strict legal approach, a tribunal would not have jurisdiction to make an award to the physical persons as their claim would not concern an "investment". In the Tribunal's view, Dr. Dumberry's analysis is accurate: the harm suffered by the executives is not the harm to the company. Nevertheless, on that approach, the physical staff of the company would only ever be able to get relief through domestic courts, which as Dr. Sabahi notes, may be unable to provide justice. In light of these shortcomings, both Drs. Sabahi and

Dumberry concluded that the decision in *Desert Line* offers a pragmatic solution to an unappealing situation.

913 In view of the above discussion, this Tribunal finds that it is appropriate that staff members of a company have recourse to competent, fair tribunals that can reflect the consequences of their poor treatment in an award of moral damages in favour of their employer. In some sense, this serves not only the function of repairing intangible harm, but also of condemning the actions of the offending State.

Accepting that all claims for moral damages are soundly based, the Tribunal now turns to whether the Claimants are entitled to moral damages and, if so, in what amounts. The Tribunal considers it appropriate to consider Heinrich, the other von Pezold Claimants, and the Border Claimants separately.

c) Heinrich von Pezold

914 Heinrich's evidence offers a disturbing account of his treatment, and the treatment of his staff, during the LRP. The Tribunal finds that Heinrich's summary of his plight is genuine and honest when he says: "During the invasions, I along with my staff, were humiliated, threatened with death and assaulted, had firearms put to our heads, and were kidnapped".

915 The Respondent made a brief challenge to the evidence provided by Heinrich, suggesting that the Tribunal only had Heinrich's word to justify moral damages. However, Heinrich's evidence about events was never seriously challenged. Particularly in respect of Heinrich's own moral damages claim, it seems difficult to think of evidence more appropriate than his own account of his experiences. Accordingly, the Tribunal accepts Heinrich's detailed and comprehensive account of his treatment and the treatment of his staff.

916 The Tribunal is of the view that Heinrich's treatment warrants moral damages based on the principles outlined by the tribunal in *Lemire* (see para. 909 above). First, the threats of, and actual, physical violence and detainment that Heinrich reported clearly contravene the conduct expected of states. Even if the Respondent did not directly perpetrate these actions, the failure of the police to protect Heinrich von Pezold from the Settlers/War Veterans over so many years falls short of the conduct expected of states. Heinrich was entitled to expect the full protection of the law. He did not receive it. Secondly, the events caused Heinrich considerable stress and anxiety. Heinrich not only worried about his own safety but the safety of his staff. It must be remembered that the events contributing to this stress stretched over a number of years. The Tribunal does not doubt the personal toll this took on Heinrich. Finally, the actions perpetrated against Heinrich and his suffering are grave and substantial. Awarding Heinrich moral damages would reflect the harm he specifically suffered. Simply awarding compensation for unlawful expropriation would not be sufficient.

As to *quantum*, the Tribunal finds that US\$5,000,000 is excessive in light of the decision in *Desert Line*. The Claimant there was exposed to conduct analogous with that evidenced here. As in *Desert Line*, Heinrich is seeking moral damages within the context of recovering substantial sums of damages for unlawful expropriation. Acknowledging that quantification is difficult for non-material harm, the Tribunal considers it should aim for some consistency with other ICSID decisions. Because of the similarities with *Desert Line*, a sum of \$1,000,000 would be appropriate. Although Tribunal in *Desert Line* was awarding moral damages for the corporation's loss of reputation and the harm to a number of executives, the sum of US\$1,000,000 remains appropriate especially given the number of years that Heinrich was exposed to these stresses.

d) Other von Pezold Claimants

917 As to the remaining von Pezold Claimants, they do not reside in Zimbabwe. Their claim for moral damages is based upon their fears for Heinrich and their staff. Undoubtedly these events must have caused them great worry, but the Tribunal is not convinced that this entitles them to moral damages. For example, in another ICSID decision, the Tribunal refused to award moral damages when there was an absence of physical duress (see *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, CLEX-246). Additionally, the *Lemire* decision requires that the State's actions "imply physical threats, illegal detention or other analogous situations". The von Pezolds, other than Heinrich, were outside Zimbabwe and so, for that reason, the Tribunal finds that they cannot recover moral damages.

e) Border Claimants

918 For the reasons set out above, and following the precedent set in *Desert Line*, the Tribunal is of the view that the Border Claimants are able to claim and recover moral damages. Following *Desert Line*, the Tribunal is of the view that moral damages should be awarded. However, the sum should only be modest. As such, US\$1,000,000 - the same sum awarded to Heinrich - is appropriate. In the context of the overall claim, it is not a significant amount but it appropriately reflects the wrongfulness of the actions that occurred in respect of the Border Claimants' staff.

(6) Conclusion on Compensation in relation to the von Pezold Claimants

(i) Summary

919 The full compensation to be awarded to the von Pezold Claimants under the various Heads of Damage is summarised in the following chart:

Head of Damage	Valuation Type	Claimants' Calculation	Deduction %	Final Sum (without interest)
Forrester Estate	"But for"	US\$49,636,837	20%	US\$39,709,470
	"As is"	US\$24,183,089	—	US\$24,183,089
	Restitution Shortfall	US\$25,453,748	—	US\$15,526,381
Makandi Estate	"But for" ⁹⁶	—	—	—
	"As is"	US\$13,930,012	20%	US\$11,144,010
	Restitution Shortfall	—	—	—
Border Estate	"But for"	US\$136,228,532	20%	US\$108,982,826
	"But for" (forestry only) ⁹⁷	US\$97,771,263	20%	US\$78,217,010
	"As is" (forestry only)	US\$64,011,909		US\$64,011,909
	Restitution Shortfall (forestry only)	US\$33,759,354	—	US\$14,205,101
Zimbabwe Shares		Compensated through restitution/damages for other heads	—	—
Forrester Loans		US\$7,186,302	—	US\$7,186,302
Forrester Water Rights		US\$425,412	—	US\$425,412
Forrester Tobacco Value Shortfall		US\$10,085,598	—	US\$10,085,598
Forrester Conversion Amount		US\$1,409,148	—	US\$1,409,148

⁹⁶ See above para. 837.

⁹⁷ See above para. 856.

Head of Damage	Valuation Type	Claimants' Calculation	Deduction %	Final Sum (without interest)
Border Liquidation Shortfall		US\$14,957,864	—	US\$14,957,864
Border Forex Losses		US\$100,533	—	US\$100,533

920 The Tribunal's task does not end there, however, for the Claimants' Request for Relief requires the Tribunal to award compensation as between the various von Pezold Claimants in proportion to their entitlement as regards each of the Estates. The Tribunal must also distinguish between the total compensation to be awarded in the event that restitution is performed by the Respondent, and in the event that it is not. It is therefore useful first to summarise the total compensation awarded by the Tribunal in respect of each of the Estates (under both the "restitution performed" and "restitution not performed" scenarios):

Forrester Estate

- (a) If restitution of the Zimbabwean Properties of the Forrester Estate is performed: Forrester Estate Restitution Shortfall (US\$15,526,381); Forrester Water Rights (US\$425,412); Forrester Tobacco Value Shortfall (US\$10,085,598); and Forrester Conversion Amount (US\$1,409,148). This comes to a total sum of **US\$27,446,539**.
- (b) If restitution of the Zimbabwean Properties of the Forrester Estate is not performed: Forrester Estate "but for" value (including Forrester Water Permits) (US\$39,709,470); Forrester Water Rights (US\$425,412); Forrester Tobacco Value Shortfall (US\$10,085,598); and Forrester Conversion Amount (US\$1,409,148). This comes to a total sum of **US\$51,629,628**.

Makandi Estate

- (a) If restitution of the Zimbabwean Properties of the Makandi Estate is performed: no Restitution Shortfall has been sought in respect of the Makandi Estate.
- (b) If restitution of the Zimbabwean Properties of the Makandi Estate is not performed: Makandi Estate present value (including Makandi Water Permits) **US\$11,144,010**.

Border Estate

- (a) If restitution of the Zimbabwean Properties of the Border Estate is performed: Border Estate Restitution Shortfall (US\$14,205,101); Border Liquidation Shortfall (US\$14,957,864); and Border Forex Losses (US\$100,533). This comes to a total of **US\$29,263,498**.
- (b) If restitution of the Zimbabwean Properties of the Border Estate is not performed: Border Estate "but for" value (US\$108,982,826); Border Liquidation Shortfall (US\$14,957,864); and Border Forex Losses (US\$100,533). This comes to a total of **US\$124,041,223**.

Other Compensation

- (a) Forrester Loans **US\$7,186,302**.
- (b) Moral damages **US\$1,000,000**.

(ii) Apportionment among the von Pezold Claimants

921 It remains for the Tribunal to determine how the above sums should be apportioned among the von Pezold Claimants.

922 For each Estate, the von Pezold Claimants have submitted in what proportion the compensation awarded by the Tribunal should be apportioned among them. The Tribunal sees no reason not to accept the von Pezold Claimants' submission.

Forrester Estate

923 In respect of the Forrester Estate, the von Pezold Claimants have submitted that the total sum of compensation should be divided equally between the Parent Claimants. Accordingly the Tribunal will order:

- (a) If restitution of the Zimbabwean Properties of the Forrester Estate is performed, the sum of **US\$27,446,539** will be divided equally between the two Parent Claimants, or in such other manner of allocation that they may prefer; and
- (b) If restitution of the Zimbabwean Properties of the Forrester Estate is not performed, the sum of **US\$51,629,628** will be divided equally between the two Parent Claimants, or in such other manner of allocation that they may prefer.

Makandi Estate

924 In respect of the Makandi Estate, the von Pezold Claimants have submitted that the total sum of compensation should be divided equally between the Parent Claimants. Accordingly the Tribunal will order:

- (a) If restitution of the Zimbabwean Properties of the Makandi Estate is performed, there is no additional compensation required in respect of the Makandi Estate; and
- (b) If restitution of the Zimbabwean Properties of the Makandi Estate is not performed, the sum of **US\$11,144,010** will be divided equally between the two Parent Claimants, or in such other manner of allocation that they may prefer.

Border Estate

925 In respect of the Border Estate, the von Pezold Claimants have submitted that the total sum of compensation should be divided 44% to each of the Parent Claimants and the remaining 12% divided equally between the six Adult Children Claimants (that is, Anna Eleonore Elisabeth Webber (née von Pezold), Heinrich Bernd Alexander Josef von Pezold, Maria Juliane Andrea Christiane Katharina Batthány (née von Pezold), Georg Philipp Marcel Johann Lukas von Pezold, Felix Alard Mortiz Hermann Kilian von Pezold and Johann Friedrich Georg Ludwig von Pezold). Accordingly the Tribunal will order:

- (a) If restitution of the Zimbabwean Properties of the Border Estate is performed, the sum of **US\$29,263,498** will be divided 44% to each of the Parent Claimants and the remaining 12% divided equally between the six Adult Children Claimants.
- (b) If restitution of the Zimbabwean Properties of the Border Estate is not performed, the sum of **US\$124,041,223** will be divided 44% to each of the Parent Claimants and the remaining 12% divided equally between the six Adult Children Claimants.

Other Compensation

926 The Forrester Loans were made to the Forrester Estate by Elisabeth. Therefore the sum of **US\$7,186,302** will be awarded directly to Elisabeth.

927 Moral damages have been awarded specifically in respect of the Respondent's treatment of Heinrich. Therefore the sum of **US\$1,000,000** will be awarded directly to Heinrich.

(7) Conclusion on Compensation in relation to the Border Claimants

928 In summary, the Tribunal has found that the Border Claimants are entitled to recover under three Heads of Damage in respect of the Border Estate. The exact figure of compensation to be awarded, however, will depend on whether or not restitution of the Zimbabwean Properties comprising the Border Estate is provided by the Respondent:

(a) If restitution of the Zimbabwean Properties of the Border Estate is performed: Border Estate Restitution Shortfall (US\$14,205,101); Border Liquidation Shortfall (US\$14,957,864); and Border Forex Losses (US\$100,533). This comes to a total of **US\$29,263,498**.

(b) If restitution of the Zimbabwean Properties of the Border Estate is not performed: Border Estate "but for" value (US\$108,982,826); Border Liquidation Shortfall (US\$14,957,864); and Border Forex Losses (US\$100,533). This comes to a total of **US\$124,041,223**.

929 The Tribunal has found that the Border Claimants are also entitled to moral damages in the amount of **US\$1,000,000**. The Border Claimants have requested that moral damages be paid to Border in that amount. The Tribunal sees no reason not to accept the Border Claimants' request and will accordingly so order.

930 In terms of apportionment of the remaining compensation between the respective Border Claimants, the Border Claimants have requested that the Tribunal allocate damages to Border, or in other such manner of allocation as the Border Claimants may prefer. The Tribunal will accordingly so order.

(8) Material impossibility and double recovery

931 One final word needs to be said about the Tribunal's *quantum* findings. As noted at the outset of this Award, the present proceeding in fact comprises one part of a pair of arbitrations, heard together but with separate outcomes (see para. 5 above). There is significant overlap between these Awards, however, because both the von Pezold Claimants in this proceeding and the Border Claimants in the other proceeding have made claims in respect of the same loss as concerns the Border Estate. Both the von Pezold Claimants and Border Claimants have sought – and shall be awarded – the same rights to restitution and compensation, or compensation in the alternative, in respect of the losses relating to the Border Estate.

932 This situation might be considered somewhat unorthodox. Nevertheless, the Tribunal does not consider that the existence of two separate but related arbitrations can act as a bar to recovery. For the Tribunal to refuse to grant relief in either arbitration simply because two sets of Claimants share overlapping rights under international law would render an injustice to both sets of Claimants.

This fact has been recognised by past tribunals. In *Lauder v. Czech Republic*, para. 174, CLEX-190, it was said in respect of multiple claims brought by both company and shareholder that:

Finally, there is no abuse of process in the multiplicity of proceedings initiated by Mr Lauder and the entities he controls. Even assuming the doctrine of abuse of process could find application here, the Arbitral Tribunal is the only forum with jurisdiction to hear Mr Lauder's claims based on the Treaty. The existence of numerous parallel proceedings does in no way affect the Arbitral Tribunal's authority and effectiveness, and does not undermine the Parties' rights. On the contrary, the present proceedings are the only place where the Parties' rights under the Treaty can be protected.

933 Although, formally, each tribunal has been constituted separately, and has adjudicated the von Pezold Claimants' and Border Claimants' respective claims separately, it would be artificial to pretend that this Tribunal is unaware of its counterpart Award, or the consequences of it. The Tribunal therefore wishes to make clear that, although the von Pezold Claimants and the Border Claimants have each been granted the same relief in respect of the Border Estate, these rights cannot both be jointly enforceable. To the extent that one set of Claimants (von Pezold or Border) enforces its right to restitution of the expropriated Border Properties, restitution will, become legally and materially impossible for the other set of Claimants. Similarly, to the extent that the von Pezold Claimants enforce their right to compensation in respect of the Border Properties (or, for that matter, the Border Liquidation Shortfall and Border Forex Losses), the right to compensation of that amount in the name of the Border Claimants will become unenforceable as an impermissible double recovery (given that, ultimately, it is the von Pezold Claimants who control the Border Claimants: see paras. 320-326 above) (see also *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 270–272)⁹⁸. Such an outcome would, undoubtedly, be the case if the two sets of Claimants had brought proceedings consecutively rather than concurrently.

(9) Interest

(i) Claimants' Position

934 The Claimants note that Article 4(2) of the German BIT and Article 6(1) of the Swiss BIT expressly provide for the payment of commercial rates of interest on compensation for lawful expropriation. In regard to all other breaches, the Claimants submit that it is a principle of customary international law that interest must be paid on the damages awarded in order to ensure full reparation (see Cl. Skel., para. 200, citing ILC Article 38; *Vivendi*; *Continental Casualty*). The Claimants submit that compound interest should be awarded, and they claim interest at the rate of 21.5%, or alternatively

⁹⁸ This excludes moral damages in the name of the Border Claimants, which are, of course, recoverable only by the Border Claimants.

at the rate of 9.2%, both compounded every six months. These figures represent, respectively, the rates of return the von Pezold Claimants have earned on their African investments and their London investment fund. The Claimants aver that the rate of LIBOR plus 2%, as proposed by the Respondent, has no relationship to the Claimants' lost returns on compensation and therefore must be rejected.

935 The Claimants submit that interest is due from the date of breach until the date of payment, save on a current date valuation, and for moral damages, interest is due from the date of the award until the date of payment. The Claimants note that, as all profits from the Estates have been reinvested back into the Estates, there is no concern of double compensation in awarding interest from an earlier date (see Cl. Skel., para. 201).

(ii) Respondent's Position

936 The Respondent denies that the Claimants have any right to compound interest, especially because they have continued to enjoy "annual benefits" on their investments in the Zimbabwean Companies. The Respondent submits that any interest which may be granted by the Tribunal should not exceed LIBOR plus 2% (see Rejoinder, para. 20.1.8).

(iii) The Tribunal's Analysis

937 The Tribunal has determined that Pre-Award interest should be awarded in the present case only in respect of the Heads of Damage not pertaining directly to the Zimbabwean or Residual Properties as outlined at para. 896 above. Pre-Award interest will not apply either to the moral damages awarded by the Tribunal. Post-Award interest, however, will apply in respect of all damages awarded.

938 It is well known that Pre- and Post-Award interest serve separate functions. Pre-Award interest is granted in order to ensure full reparation (see *Articles on State Responsibility*, p. 235, CLEX-274). It acts as a proxy to compensate the successful party for being kept out of his or her money from the time of breach up until the date of the Award (see *Siemens*, Award, 6 February 2007, para. 396, CLEX-223; see also *Compania Del Desarrollo De Santa Elena, S.A. v Republic of Costa Rica* ("*Santa Elena*"), ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 104, CLEX-183). Pre-Award interest thus serves as "a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances" (see *Santa Elena*, para. 104, CLEX-183). Post-Award interest serves a different purpose, namely "to serve as an effective incentive to comply with the terms of the judgment or award as expediently as possible" (see *Calculation of Compensation and Damages in International Investment Law*, para. 6.246).

Pre-Award Interest

939 Understood in this light, it is not necessary or appropriate to apply Pre-Award interest to the compensatory sums awarded to the Claimants in respect of the expropriated Zimbabwean and Residual Properties (those sums being either (a) the Residual Shortfalls in the event that restitution is provided by the Respondent;⁹⁹ or (b) the full value of the properties calculated above in the event that restitution is not provided by the Respondent¹⁰⁰). The Claimants, having remained in occupation of the Estates, have retained the benefit of creating value from their investments, which value they have subsequently reinvested. Thus, the "lost opportunity" of investing their money, for which Pre-Award interest is intended to compensate, has not truly occurred. The benefit of the Claimants' investments will be enjoyed by whoever retains the properties. If legal title to the Zimbabwean Properties is restored to the Claimants by way of restitution, the Claimants will take the benefit of their past investment. If the Respondent does not provide restitution, then the Claimants will receive the value of those properties as at the time of the Award through compensation, with the value of their prior investment accounted for in the value of the properties. This was the position taken by the Tribunal in *ADC v. Hungary*, which noted that "[s]ince the calculation is based on the value of the expropriated investments as of the date of the award, no pre-award interest has accrued" (see *ibid.*, *ADC Affiliate Ltd v. Hungary*, para. 520, CLEX-220). The Tribunal finds the same approach should apply here.

940 However, the Claimants have also sought Pre-Award interest for the compensation awarded to them under those Heads of Damage not pertaining directly to the Zimbabwean or Residual Properties (see Corrected Request for Relief, Annex 1 and paras. 881-896 above). Those Heads of Damage comprise:

- a) The Forrester Loans – US\$7,186,302;
- b) The Forrester Water Rights – US\$425,412;
- c) The Forrester Tobacco Value Shortfall – US\$10,085,598;
- d) The Forrester Conversion Amount – US\$1,409,148;
- e) The Border Liquidation Shortfall – US\$14,957,864; and
- f) The Border Forex Losses – US\$100,533.

⁹⁹ See above paras. 832, 840 and 872.

¹⁰⁰ See above paras. 824, 840 and 869.

941 Pre-Award interest is appropriate in respect of these other Heads of Damage to achieve full reparation for the Claimants, reflecting the Claimants' lost opportunity to enjoy access to this money between the time of breach and the date of this Award. Accordingly, the Tribunal finds that Pre-Award interest should be awarded from the relevant date of breach in respect of each of the above-listed Heads of Damage. It will be noted that this list excludes the Tribunal's award of moral damages – the Tribunal considers that the "lost opportunity" function of Pre-Award interest is similarly inapposite in respect of moral damages.

942 The Claimants have proposed a number of interest rates for Pre-Award interest, the higher two (21.5% and 9.8%) based on returns from two of their investments: the von Pezold's African investments and their London investment fund, respectively (see Cl. Skeleton, para. 200). It is relevant to take into account the returns the Claimants might have earned on these investments because, had they been immediately compensated for the wrongs they suffered, this is where the Claimants contend they would have invested their wealth (see ILC Articles, Article 38. For a fuller discussion on interest, see *Continental Casualty Company v. Argentine Republic*, paras. 304–316, CLEX-236). Even taking these circumstances into account, however, the Tribunal does not find 21.5% or even 9.8% to be an appropriate rate of interest. Those rates would be anomalously high compared with the rates of interest granted by other ICSID Tribunal Awards (see, e.g., *Continental Casualty Company v. Argentine Republic*, para. 314, CLEX-236; and *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, para. 661, CLEX-248; *Occidental Petroleum v. Ecuador*, para. 841, CLEX-414). For this reason, the Tribunal finds the six-month USD LIBOR rate plus 2% to be appropriate.

943 The Tribunal will therefore order Pre-Award interest at the six-month USD LIBOR rate plus 2% in respect of the Heads of Damage listed above at para. 896, as calculated from the dates listed below until the date of this Award.

944 Pre-Award interest should generally run from the date on which the breach occurred. Those dates are, respectively (see paras. 511-521 and 552-561 above):

- (a) The Forrester Loans – 31 December 2011;
- (b) The Forrester Water Rights – 1 January 2000;
- (c) The Forrester Tobacco Value Shortfall – 1 January 2004;
- (d) The Forrester Conversion Amount – 31 December 2008;
- (e) The Border Liquidation Shortfall – 1 January 2004; and

(f) The Border Forex Losses – 5 September 2008.

Post-Award Interest

945 Unfortunately, there is little guidance on the appropriate Post-Award rate of interest (see e.g., *Articles on State Responsibility*, p. 269), which is largely left to the discretion of the Tribunal. In the present case, and with a view to incentivizing Zimbabwe to comply with the Award, the Tribunal considers it appropriate to fix a rate of Post-Award interest at the six-month USD LIBOR rate plus 2% and it is so ordered.

946 As the Tribunal has decided to grant to the Respondent a delay of 90 days from the date of the dispatch of the Tribunal's Award to pay the Restitution Shortfalls if restitution in full is effected within that timeline and, alternatively, to pay compensation in the event restitution in full is not effected within a delay of 120 days from that date, and with the view of incentivizing Zimbabwe to comply with the Award, the Tribunal will order that Pre-Award compound interest only become due and Post-Award compound interest only start to run on any outstanding amount 90 or 120 days from the date of dispatch of the Award, as the case may be. In respect of damages to be paid forthwith (the Forrester Loans and moral damages), pre-Award interest will be due immediately (for the Forrester Loans) and post-Award interest will run from the date of this Award.

Compounding of Interest

947 Finally, while public international law traditionally awards simple interest, investment treaty arbitration has developed a practice of awarding compound interest if the circumstances so warrant. The decision of the tribunal in *Santa Elena* distinguished cases relating to the valuation of property or property rights from simple breaches of contract, finding that the former cases warranted compound interest in order to award the full present value of the compensation that the investor should have received at the time of the taking (see *Santa Elena*, CLEX-183). The tribunals in *CMS* (see Award, 12 May 2005, CLEX-316) and *Azurix Corp. v. Argentine Republic* (see ICSID Case No. ARB/01/12, Award, 14 July 2006, CLEX-219) also granted compound interest.

948 As this is a clear expropriation case, the Tribunal finds that the Claimants should be awarded compound interest. In order to reflect business and economic reality, the Tribunal finds that it is appropriate for both Pre- and Post-Award interest to be compounded at six-month intervals.

(10) Declaratory Relief

(i) Claimants' Position

949 In addition to restitution and/or damages, the Claimants also seek declaratory relief. The declarations sought by the Claimants are set out at Section II (i) to (viii) and Section III (i) to (viii) of the Claimants' Corrected Request for Relief, dated 10 May 2013.

950 The Claimants, in their Memorial, submitted that "Declarations in respect of wrongful conduct as a form of relief are common practice in institutional arbitral tribunals including those constituted pursuant to the ICSID Convention¹⁰¹.

(ii) Respondent's Position

951 As stated above, the Respondent opposes all of the relief sought by the Claimants, including the declarations set out in the Claimants' Corrected Request for Relief,¹⁰² although it does not dispute the Tribunal's power to order declaratory relief. The Respondent has also sought what it has framed as declaratory relief: see Respondent's Corrected Request for Relief.

(iii) The Tribunal's Analysis

952 The Tribunal agrees with the Claimants. As Article 48(3) of the ICSID Convention requires the tribunal to "deal with every question submitted to" it, the Tribunal has the power to issue declaratory relief and so finds. The award of declaratory relief in relation to the declarations sought by the Claimants in the Claimants' Corrected Request for Relief turns on the Tribunal's determinations with respect to the merits. In respect of the Respondent's requests for declaratory relief, which, in effect, amount to no more than a refutation of the Claimants' claims, it is appropriate that these be denied in their entirety.

VII Costs

(i) Claimants' Position

953 The Claimants' primary submission is that "if they broadly succeed overall then costs should follow the event, i.e. the Respondent is ordered to pay all of the Claimants' legal costs, all of the arbitration

¹⁰¹ Counter-Memorial, para. 1582. Claimants refer to *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB (AF)/07/02, Award, 13 August 2009, para. 148 (CLEX-246).

¹⁰² See the Respondent's Corrected Request for Relief of 9 September 2013, which is reproduced above at para. 90 of the present Award.

costs (whether advanced by the Claimants or the Respondent to date) and bear its own legal costs” (see Cl. Submission on Costs, para. 2).

954 The Claimants aver that “[t]his is the usual course in international arbitration, and there is no reason under this scenario to depart from it in these proceedings, especially given the Respondent’s conduct” (see *ibid.*).

955 Referring to Article 61(2) of the ICSID Convention, ICSID Arbitration Rule 28(2) and the decisions of some ICSID tribunals, the Claimants submit that the Tribunal should assess the legal costs and apportion the legal and arbitration costs between the parties “in a manner it deems appropriate” (see *ibid.*, para. 4).

956 With respect to the legal costs incurred, the Claimants write that they “must have been necessary for the purpose of the arbitration (i.e. reasonably incurred or borne) and be reasonable in amount” (see *ibid.*, para. 6)

957 The Claimants argue that Article 61(2) of the ICSID Convention confers ICSID tribunals with “broad discretion” as to how they award and apportion costs.

958 The Claimants contend that the Tribunal should take account of the costs implications of procedural motions raised by one or the other party in order to ensure the need for full reparation (see *ibid.*, paras. 7-9, 11).

959 The Claimants spend more than nine pages detailing what they refer to as “the Respondent’s poor conduct before and during the arbitration” which, they plead, in addition to the need to ensure full reparation, is a reason for an order for costs to follow the event (see *ibid.*, para. 12). The instances of the Respondent’s “poor conduct” include, according to the Claimants, the following:

- (a) The egregious nature of the Respondent’s breaches;
- (b) The failure of the Respondent to produce land audit documents;
- (c) The poor presentation of the Respondent’s pleadings which were “convoluted, incoherent, repetitive and prolix”;
- (d) The vast amount of irrelevant material set out in the Respondent’s pleadings;
- (e) The Respondent’s attacks on the character of the Claimants without supporting evidence;
- (f) The late filing by the Respondent of objections to jurisdiction, admissibility and defences;

- (g) The inclusion by the Respondent of inadmissible material in the Hearing transcripts and Post-Hearing Briefs; and
- (h) The choice and conduct of the Respondent's valuation witnesses, Messrs. Moyo and Kanye Kanye.

960 The Claimants presented a detailed summary of the costs they have incurred in connection with these arbitrations as follows:

Table 5: Steptoe and Wiley Rein - Total Legal Fees Billed (2008 to 2014)

Timekeeper	Total Hours Billed	Steptoe Fees	Wiley Rein Fees
Partners			
Coleman, Matthew (Steptoe)	7,057.96	£2,776,507.45	
Verrill, Charles (Wiley Rein)	1,361.50		US\$827,877.45
Associates			
Williams, Kevin (Steptoe)	4,171.46	£1,111,761.40	
Rapa, Anthony (Steptoe)	423.20	£115,957.50	
Aldridge, Helen (Steptoe)	4,990.67	£765,403.80	
Innes, Thomas (Steptoe)	1,141.50	£129,420.00	
Other Associates (Steptoe)	109.06	£19,759.40	
Others			
Electronic database support / DC library (Steptoe)	6.80	£841.64	
Paralegals (Steptoe)	116.43	£10,758.03	
Paralegals (Wiley Rein)	66.75		US\$16,735.00
Summer Interns (Steptoe)	1,843.69	£55,310.70	
Total:	21,289.02	£4,985,719.92	US\$844,612.45

Table 6: ICSID Lodging Fees and Advance Payments (paid by the Claimants)

(The below table has been updated to reflect the payments made by the Claimants following their submission on costs.)

Date of Deposit	Amount
10 June 2010	US\$25,000
3 December 2010	US\$25,000
10 January 2011	US\$50,000
8 February 2011	US\$50,000
16 March 2012	US\$100,000
19 March 2013	US\$150,000
27 December 2013	US\$210,000
[2 March 2015	US\$40,000]
[20 July 2015	US\$95,000]
Total:	[US\$745,000]

Table 7: Claimants' Disbursements

Description		Steptoe	Wiley Rein	Claimants
Courier / Delivery Charges		£18,804.47	US\$346.82	
External Photocopying Charges		£12,576.00	US\$35.70	
Online Legal Research / Library Charges		£2,425.63	US\$1,055.42	
Office Supplies (mainly trial bundles)		£11,753.59		
Long Distance / Conference Calls		£242.66	US\$1,133.51	
Air Fares, Hotel and Incidentals	To Harare	£19,177.23	US\$13,998.27	
Air Fares	To Washington DC	£4,503.06		US\$21,935.74
Hotel / Incidentals	In Washington DC	£23,887.67		
Air / Train Fares	To London		US\$45,145.76	US\$3,718.00
Hotel / Incidentals	In London		US\$42,213.77	£1,375.00
Visas – Travel to Zimbabwe		£160.00	US\$80.00	
Translation Fees		£88.00		
Foreign Legal Fees		£4,160.27		
Total:		£97,778.58	US\$104,009.25	US\$25,653.74 £1,375

Table 8: Claimants' Experts' Fees and Disbursements

Name	Fees	Disbursements
Legal Experts		
Mr. Adrian de Bourbon SC	£1,152.51	
Professor Stephen Chan	£22,000.00	Airfare to Washington DC: US\$4,300
		Hotel/Incidentals in Washington DC: £1,984
Mr. Paul Paul	US\$39,033.00	Airfare to Washington DC: US\$3,512
		Hotel/Incidentals in Washington DC: £1,569
Professor Daniel Sarooshi	£35,351.00	

Quantum Experts		
Mr. Tony Levitt (RGL Forensics)	£2,569,979.08	Airfare/Incidentals to Harare: £29,407.09
		Airfare to Washington DC: £13,840.45
		Hotel/Incidentals in Washington DC: £9,085
Mr. Alan Stephenson (Mills Fitchet)	ZAR 456,900	Airfare to London: \$1,198
		Hotel/Incidentals in London: £375
		Airfare to Washington DC: US\$1,980
		Hotel/Incidentals in Washington DC: £1,456
Mr. Jason Ridley	US\$61,124.60	Airfare to London: \$1,080
Mr. Arthur Daugherty	ZAR 16,000.00	
Professor Tony Stubbings (Crickmay & Associates)	ZAR 189,493.62	

[references omitted]

961 With respect to their legal costs, the Claimants submit that they were "reasonably incurred or borne and reasonable in amount" (see *ibid.*, para. 48) for the following reasons:

- (a) The importance of the matter to the individual Claimants and the value of the money or property involved;
- (b) The amount and extent of factual and expert evidence (26 witness statements of fact and 20 witness statements of expert evidence);
- (c) The conduct of the Respondent during the proceedings which increased the costs of the proceedings;
- (d) The circumstances in which the work was undertaken, involving travel by lawyers and experts to Zimbabwe and liaising with witnesses in multiple jurisdictions; and
- (e) The time spent and the complexity of the cases, including having to respond to ten objections to jurisdiction and two objections to admissibility and the fact that there were four rounds of pleadings and multiple procedural applications.

962 Recalling that these two arbitrations were prepared and argued as if they were a single case and that, in their view, "the von Pezold Claimants have benefitted more from the legal work undertaken

by the Claimants' lawyers and experts than have the Border Claimants," the Claimants propose that any award of costs to the Claimants be split "92% to the von Pezold Claimants and 8% to the Border Claimants".

963 Finally, the Claimants request that interest be ordered on costs from the date of the awards until the date of payment (see *ibid.*, para. 68).

964 In reply to the Respondent's costs submissions, the Claimants submit that the Respondent "in a number of instances goes beyond merely making submission on costs" and that "it seeks (once again) to reiterate and re-plead its case (in many instances beyond the parameters as established by the Procedural Orders)" (see Cl. Reply Costs Submission, para. 4).

965 The Respondent's submissions, say the Claimants, "are based on misrepresentations of the facts, assumptions that have been proven to be untrue, and assertions that conflict with the Procedural Orders" (see *ibid.*, para. 3).

966 With respect to the Respondent's extensive allegations concerning the Claimants' "poor conduct", the Claimants assert "that their conduct was reasonable at all relevant times [and that] there is no basis for a costs sanction in regard to their conduct" (see *ibid.*, para. 10). The Claimants deny, in some detail, the Respondent's many allegations asserting, in turn, that they were "untrue" (para. 12) "unsubstantiated" (paras. 13-15), "wholly incorrect" (paras. 18; 29), "unjustified" (paras. 22-46), "completely false and unjustifiable" (para. 26) and "unfounded" (para. 43).

967 In concluding their Comments and in reply to some of the Respondent's critique, the Claimants assert (see *ibid.*, para. 63):

[...] the manner in which the Respondent's counsel have conducted this case has caused an enormous amount of disruption to these proceedings, done very little to define the issues, and required the Claimants' counsel to undertake a significant amount of work at very unsociable hours. Disruptive conduct is relevant to an award of costs. The Claimants' counsel have responded to the Respondent's conduct in the best way they can; they have not sought to obtain a procedural advantage, but have simply insisted that the ICSID Arbitration Rules and Procedural Orders are followed.

968 With respect to the Respondent's legal costs, the Claimants say (see *ibid.*, para. 64):

The amounts claimed are not large in the context of a very significant international arbitration. However, it is not possible to determine if they are reasonable as there is no indication of the hourly rates charged or hours incurred. Furthermore, it is noted that the Respondent's valuation expert (Mr Kanyekanye) did not charge any fees, nor did the members of the Respondent's civil service who were witnesses, counsel and experts for the Respondent. Therefore a comparison with the Claimants' costs is not possible.

(ii) Respondent's Position

969 The Respondent's primary submission is that, irrespective of the outcome of these arbitrations, the Claimants should bear all of their own legal costs, pay the Respondent's legal costs and pay all of the arbitration costs (see Resp. Costs Submission, paras. 4, 28, 29, 43 and 64).

970 In support of this primary submission, the Respondent pleads the "insidious conduct" of the Claimants "from the inception of their covert acquisitions in the Host State through their conduct in these arbitrations" (see *ibid.*, para. 2).

971 The allegations of the Respondent concerning "the procedural conduct" of the Claimants which, it says, justifies that they should bear all the costs of the present proceedings include (see *ibid.*, pp. 1-6):

1.1.1 Claimants are responsible for needlessly initiating two Arbitrations (subsequently merged), enlarging costs, risks and difficulty and unfairly burdening Respondent.

1.1.2 Claimants' teeming November 2012 damages submissions were received by Respondent only three weeks before submission of the Rejoinder, unfairly complicating Respondent's work at a critical time.

1.1.3 Claimants' "Muzite Party" Urgent Application for Provisional Measures was received two and a half business days after Respondent's receipt of the Surrejoinder, consuming time allotted for its analysis and for preparation of the Rebutter, unfairly hindering and burdening Respondent.

1.1.4 Claimants' "Don't Kill Heinrich" Urgent Application for Provisional Measures was received one week after Respondent's receipt of the Surrejoinder, consuming time allotted for its analysis and for preparation of the Rebutter, unfairly hindering and burdening Respondent.

1.1.5 Claimants' voluminous May 2013 updated damages submissions were unsolicited and received by Respondent only three weeks before the scheduled June 2014 Oral Hearings in Singapore, unfairly complicating Respondent's work at a critical time.

1.1.6 Claimants' Urgent Application re Thornton Farm that demanded respect of the status quo that Claimants have not themselves respected spanned two months, unfairly hindering and burdening Respondent.

1.1.7 Claimants insidious weakening of Respondent's Small Arbitration Team by reducing physical rest and capacity.

1.1.7.1 Claimants insisted on and obtained unusual "London" time deadline for exchanging Respondent's Hearing Exhibits.

1.1.7.2 Claimants' insisted that documents used during oral proceedings be limited to and use TB reference numbers yet the cross-examination witness packs Claimants distributed during Oral Examination of Respondent's witnesses bore no Trial Bundle references, unfairly hindering and burdening Respondent.

In contrast to Claimants' damages experts who had the luxury of open access and unlimited time, Respondent's damages experts had limited access to and time on the Properties and equipment, unfairly hindering and burdening Respondent.

972 The allegations of the Respondent concerning the Claimants' choice of insidious tactics throughout these arbitrations which, it submits, justifies that they should bear all the costs of these arbitrations include (see *ibid.*, pp. 6-8):

1.2.1 Claimants are responsible, from the onset, for obstructing and delaying Respondent's audit of the claim and parties holding assets by means of unduly long, obscure and nebulous submissions, unfairly hindering and burdening Respondent.

1.2.2 Claimants are responsible for obstructing Respondent's understanding of entity-specific foreign ownership of their confidential acquisitions, unfairly hindering and burdening Respondent.

1.2.2.1 Claimants concealed specifics of Claimants' acquisition of Forrester

1.2.2.2 Claimants concealed specifics of Claimants' acquisition of Border

1.2.3 Claimants concealed specifics of Claimants' acquisition of Makandi.

973 The Respondent also avers that the Claimants' "ill-founded procedural attempts to conceal lack of approval" added significant costs to the proceedings. In this connection, the Respondent refers to (see *ibid.*, pp. 8-11):

1.3.1 Claimants' Urgent Application to remove Respondent's Rejoinder, unduly complicated and delayed proceedings.

1.3.2 Claimants' Application at the end of the 21 May 2013 telephone conference to remove Respondent's Rebutter, also unduly delayed Claimants' disclosure in these proceedings and complicated Respondent's work and defence.

1.3.3 Claimants are responsible for avoiding and deferring their ultimately simple response to Respondent's question as to what BIT-access-condition-approvals any specific foreign Claimant entity might have, unfairly hindering and burdening Respondent's work and defence.

974 The Respondent contends that the Claimant's "decision to bring these arbitrations without meeting Article 9b) German BIT specific approval requirement and Article 2 Swiss BIT/Article 9a German BIT is reason for Claimants to bear costs" (see *ibid.*, para. 1.4).

975 Also, in support of its central argument that the Claimants should be responsible for all the costs of these proceeding, the Respondent invokes Zimbabwe's "limited resources" as well as its counsel's "lack of competence or fatigue after sleepless nights" (see *ibid.*, para. 1.4).

976 The Respondent then refers to ICSID precedents which, it avers, are precedents "for having Claimants bear all of their costs and expenses in these arbitrations" as "costs beyond their own costs and expenses" (*see ibid.*, para. 84).

977 Prior to detailing their costs, the Respondent acknowledges that its request for relief in regard to costs today is different to that it requested in its pleadings because of "the evolution of its understanding today of facts previously dissimulated or concealed" (*see ibid.*, pp. 19 and 20).

978 In closing, the Respondent presents a summary of the costs it has incurred in connection with these arbitrations as follows:

Table of Costs and Expenses incurred by Government of Zimbabwe - Case Numbers ARB10/15 & 10/25

Document Date	Amount in local currency	Currency	Text
Fees paid to Kimbrough and Associates			
22/11/2012	49 960	USD	Consultancy fees to an International lawyer
29/11/2012	2 840	USD	Consultancy fees balance due to exchange
06/06/2013	237 634	USD	Legal fees for international lawyer
23/03/2014	5 262	USD	Bank charges on payment of legal fees ICSID
21/03/2014	200 000	USD	Part payment of legal fees ICSID case arb/10/15 & arb/10/25
07/05/2014	207 000	USD	legal fees for representing case ICSID arb/10/15
19/06/2014	1 640	USD	Bank charges on part payment of ICSID case arb/10/15 & arb/10/25
13/10/2014	50 000	USD	Part payment of legal fees
27/10/2014	133 500	USD	Legal services part payment
	290 000	USD	Outstanding legal fees on work done but not yet paid (230,244.90 Euros) translated to USD
Sub total	1 177 836		
Fees paid to ICSID			
26/04/2011	50 000	USD	Session fees
26/04/2011	50 000	USD	Prepayment for legal fees/arbitration costs
31/07/2012	50 000	USD	Prepayment for legal fees/arbitration costs

31/07/2012	50 000	USD	Prepayment for legal fees/arbitration costs
23/03/2013	150 000	USD	Fees for using ICSID facilities case Number arb/10/15
26/06/2014	50 000	USD	Part payment for using icsid facilities
07/07/2014	160 000	USD	Final pymnt for using icsid facilities
[04/08/2015	40 000	USD	Pymnt for using icsid facilities]
[07/24/2015	95 000	USD	Pymnt for using icsid facilities]
Sub total	[695 000]	USD	

(The above table has been updated to reflect the payments made by the Respodnent following its submission on costs.)

**Table of Costs and Expenses incurred by Government of Zimbabwe - Case Numbers
ARB10/15 & 10/25**

Staff/Accomodation & Conferencing			
23/01/2013	1 008	USD	conference facilities for Legal team
17/05/2013	1 100	USD	being payment for hotel conference for legal team
07/06/2013	1 904	USD	conference fees for legal team 10/06 to 29/06/13
04/07/2013	780	USD	hotel facilities for legal team
06/08/2012	1 658	USD	Pymnt for legal officers accommodation
Sub total	6 450		
Foreign Travel expenses for France Trip			
15/05/2013	10 951	USD	Foreign allowance for Tsvakwi
15/05/2013	10 071	USD	Foreign allowance for Sumowah
06/06/2013	(4 636)	USD	Change acquitted after trip partially cancelled
06/06/2013	(4 171)	USD	Change acquitted after trip partially cancelled
06/06/2013	6 090	USD	Foreign allowance and fares for Chimbaru
06/06/2013	6 148	USD	Foreign allowance and fares for Maxwell
06/06/2013	18 966	USD	Foreign allowance and fares for Machaya
15/15/2013	8 309	USD	External fares for Perm Sec Mrs Tsvakwi
15/05/2013	2 089	USD	External fares for Sumowah
Sub total	53 817		

**Table of Costs and Expenses incurred by Government of Zimbabwe - Case Numbers
ARB10/15 & 10/25**

Foreign Travel expenses for Washington Inc			
10/11/2013	9 614	USD	Foreign allowance for Tsvakwi
10/11/2013	7 390	USD	Foreign allowance for Sumowah
10/11/2013	7 344	USD	Foreign allowance for Hon Mombeshora
10/11/2013	6 862	USD	Foreign allowance for Kanyekanye
10/11/2013	6 311	USD	Foreign allowance for Moyo S
10/11/2013	4 590	USD	Foreign allowance for Mvura
10/11/2013	10 565	USD	Foreign allowance and fares for Chimbaru
10/11/2013	11 551	USD	Foreign allowance and fares for Maxwell
10/11/2013	17 316	USD	Foreign allowance and fares for Machaya
10/11/2013	11 050	USD	Foreign allowance and fares for Nyaguse
10/11/2013	11 050	USD	Foreign allowance and fares for Masiwa
10/11/2013	2 161	USD	External fares for Sumowah
10/11/2013	9 573	USD	External fares for Hon Mombeshora
10/11/2013	9 896	USD	External fares for Dr Kanyekanye
10/11/2013	3 694	USD	External fares for Moyo
10/11/2013	2 461	USD	External fares for Mvura
Sub total	131 428		
Grand total	1 929 531		

979 In its Reply, the Respondent takes issue with the Claimants' submission on costs which it says "is based on false premises" and "cannot serve to support Claimants' Cost Statement" (see Resp. Reply Costs Submission, para. 1.1).

980 The Respondent, essentially, submits that the Claimants' conduct constitutes "over litigation", including "excessive and needless procedural motions" (see *ibid.*, para. 22) and reiterates that they should bear the entire costs of these arbitrations" (see *ibid.*, para. 41).

(iii) The Tribunal's Analysis

981 The Tribunal notes that the Claimants and the Respondent have each requested that the opposing party be ordered to pay the full costs of the arbitration.

982 The Tribunal observes that neither the German BIT nor the Swiss BIT contain provisions on the allocation of the costs of arbitration in the case of a dispute between an Investor and a Contracting Party.

983 However, the ICSID Convention and the ICSID Arbitration Rules do provide the Tribunal with some limited guidance with respect to the allocation of costs in an ICSID arbitration.

984 Article 61(2) of the Convention 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.

985 Arbitration Rule 28(2) provides:

Promptly after the closure of the proceedings, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

986 Arbitration Rule 47 provides:

The award shall be in writing and shall contain:

[...]

(j) any decision of the Tribunal regarding the cost of the proceeding.

987 The Parties deposited with ICSID a total of US\$1,389,625 to cover the costs of these two arbitrations: US\$695,000 by the Claimants and US\$694,625 by the Respondent. In addition, the Claimants had paid twice a US\$25,000 lodging fee when filing their Requests for Arbitration.

988 The fees of Mr. David A.R. Williams, the arbitrator appointed by the Claimants, amount to US\$213,726.75. Mr. Williams' expenses amount to US\$23,653.25.

989 The fees of Prof. Mutharika, the arbitrator initially appointed by the Respondent amount to US\$15,000. Prof. Mutharika's expenses amount to US\$11,009.22. The fees of Prof. Chen, the arbitrator appointed by the Respondent after the resignation of Prof. Mutharika, amount to US\$92,060. Prof. Chen's expenses amount to US\$NIL. The fees of Mr. Michael Hwang, the arbitrator appointed by the Respondent following the resignation of Prof. Chen, amount to US\$113,309.29. Mr. Hwang's expenses amount to US\$17,542.88.

990 The fees of The Hon. L. Yves Fortier, the President, amount to US\$244,575 and his expenses amount to US\$11,903.91.

991 The fees of Ms. Alison FitzGerald, the Tribunals' Assistant, amount to US\$160,550 and her expenses amount to US\$8,353.09. The fees of Ms. Renée Thériault, the Tribunal's Assistant before Ms. FitzGerald, amount to US\$3,250.

992 The administrative fees of ICSID amount to US\$284,000.

993 Other costs, including court reporters, hearing rooms, meetings facilities and all other ICSID expenses relating to these two arbitration proceedings amount to US\$112,519.31¹⁰³.

994 Accordingly, the costs of the arbitrations, including all items set out above in paras. 988–993, amount to US\$1,311,452.70.

995 The Tribunal recalls that the ICSID Convention and the ICSID Arbitration Rules provide minimal guidance to tribunals with respect to the allocation of the costs of an arbitration and the legal costs of the parties. Article 61(2) of the ICSID Convention is quoted again for reference:

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.

996 While the guidance may be minimal, it is crystal clear from the wording of the Article that it confers on ICSID tribunals broad and unfettered discretion in assessing and allocating the costs of an arbitration proceeding. This has been recognized by numerous ICSID tribunals¹⁰⁴.

997 The Tribunal also notes that in a number of ICSID precedents, the tribunal, in the exercise of its discretion, has ruled that the starting point in an award of costs is that it should reflect the relative success of parties in the proceeding and that, if a party has clearly prevailed, there is no reason in principle why that party should not be paid his costs by the unsuccessful party¹⁰⁵.

998 In the present proceedings, it is clear to the Tribunal that the Claimants have prevailed and have been successful in respect of both jurisdiction and merits. The Tribunal can see no reason why the

¹⁰³ This amount consists of the arbitration costs at the time of the Award, and estimated charges of app. US\$993.13 for the costs to be incurred in connection with the dispatch of the Award (e.g., costs related to courier services, binding, and photocopying). The ICSID Secretariat will provide the parties with a detailed Financial Statement as soon all invoices are received and the account is final. The balance remaining in the case account will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

¹⁰⁴ See, e.g. *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award 31 March 2011, para 362; *Libananco Holdings Co Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para 560; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, para 316.

¹⁰⁵ See e.g., *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB03/26, Award, August 2, 2006, para 338; *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, April 15, 2009, para. 152; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, para. 542; *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award, March 3, 2010, para. 692.

Respondent, the unsuccessful party, should not bear the costs of the arbitrations, i.e., US\$1,311,452.70 and it is so ordered.

- 999 Accordingly, the Respondent will bear its own costs and will reimburse to the Claimants the lodging fees and pay the Claimants' share of the arbitration costs, i.e., one half of the total arbitration costs, amounting to US\$655,726.35.
- 1000 As regards the costs of legal representation and other costs, as mentioned above, the Tribunal has the unfettered discretion to fix and decide in what proportions these costs shall be borne by the parties.
- 1001 In the present case, the Tribunal has formed the view that, taking into consideration all the circumstances of the case, the Respondent should bear its own costs of legal representation and assistance and the Claimants should be awarded their full costs of legal representation and assistance.
- 1002 Among the circumstances that the Tribunal finds relevant are the egregious nature of the Respondent's breaches and the fact that the Claimants have been successful in having the Respondent's many objections to jurisdiction and admissibility dismissed and have prevailed on the merits of many important claims.
- 1003 The Tribunal also finds as relevant to its decision the fact that some of the Respondent's conduct in these arbitrations resulted in an unnecessary escalation of the costs of the proceedings. In this connection, the Tribunal notes, in particular, the convoluted and repetitive presentation of the Respondent's pleadings, the inclusion of irrelevant material set out in the Respondent's pleadings, the late elaboration by the Respondent of certain objections to jurisdiction, admissibility and defences as well as the inclusion by the Respondent of inadmissible material in the Hearing transcripts and Post-Hearing Briefs¹⁰⁶.
- 1004 Having scrutinized the costs for legal representation and assistance of the Claimants, the Tribunal finds that they were reasonably incurred and reasonable in amount.
- 1005 Accordingly, the Respondent will reimburse to the Claimants the following costs, £7,771,072.63, US\$1,792,229.39 (consisting of (a) US\$705,726.35, which comprises the Claimants' share of the arbitration costs (US\$655,726.35) and lodging fees paid (US\$50,000) and (b) US\$1,086,503.04 in legal fees) and ZAR662,393.62 to be apportioned as the Claimants have proposed¹⁰⁷, as follows:

¹⁰⁶ See *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. ARB/00/1), Award, 24 January 2003, para. 420 *et seq.* *Generation Ukraine v. Ukraine*, Award, 16 September 2003, paras. 24.4-24.8.

¹⁰⁷ See above para. 967.

92% to the von Pezold Claimants in ICSID Case No. ARB/10/15, i.e., £7,149,386.82, US\$1,648,851.04 and ZAR609,402.13, and 8% to the Border Claimants in ICSID Case No. ARB/10/25, i.e., £621,685.81, US\$143,378.35 and ZAR52,991.49, and it is so ordered.

1006 These sums will bear interest at the rate of LIBOR plus 2% from the date of the Award until the date of payment.

VIII Operative Part

For all of the foregoing reasons, and rejecting all claims and submissions to the contrary, the Tribunal HEREBY FINDS, DECLARES AND AWARDS as follows:

(i) Declaratory Relief

1007 The Tribunal finds and declares, in relation to the Border Claimants:

Jurisdiction

1008 The Tribunal has jurisdiction over the claims of Border Timbers Limited ("**Border**"), Timber Products International (Private) Limited ("**Border International**") and Hangani Development Co. (Private) Limited ("**Hangani**") (collectively, the "**Border Claimants**").

Claims of Breach

1009 In relation to the **Border Claimants**, the Respondent has breached the following Articles of the Swiss BIT:

- 1009.1 Article 6(1), by unlawfully expropriating the Border Claimants' investments and returns, namely those Zimbabwean Properties, Residual Properties and income-generating assets belonging to the Border Estate, as well as the Border Forex Losses;
- 1009.2 Article 4(1), by failing to accord fair and equitable treatment in relation to the Border Claimants' investments and returns, namely those Zimbabwean Properties, Residual Properties and income-generating assets belonging to the Border Estate, as well as the Border Liquidation Shortfall;
- 1009.3 Article 4(1), by taking unreasonable and discriminatory measures that impaired the management, maintenance, use, enjoyment, extension and disposal of the Border Claimants' investments;
- 1009.4 Article 4(1), by failing to accord full protection and security to the Border Claimants and their investments; and
- 1009.5 Article 5, by failing to allow the free transfer of payments relating to the Border Claimants' investments.

Respondent's Defences

1010 All of the Respondent's defences in relation to the claims of the **Border Claimants** are denied and dismissed.

1011 All other requests for declaratory relief by the Border Claimants and the Respondent are dismissed.

(ii) Restitution and Compensatory Relief

1012 The Tribunal orders the Respondent:

1012.1 To reinstate to **Border** and **Hangani**, within 90 days of the dispatch of the Tribunal's award ("**the Restitution Window**"), full (unencumbered) legal title to, and exclusive control of, each of the properties that they **respectively** owned (as listed in **Table 6** of the Memorial (as amended), hereto annexed and forming part of the present Dispositif) before they were expropriated by the Respondent pursuant to the Constitutional Amendment (this relief is hereafter referred to as "**the Restitution**").

1012.2 In addition, to pay within 90 days of the dispatch of the Tribunal's award to the **Border Claimants** compensation of **US\$29,263,498**, allocated to **Border** or in such other manner of allocation as the Border Claimants may prefer.

1012.3 In the alternative to 1 and 2 above, if the Restitution is not made in full within the Restitution Window, to pay to the **Border Claimants**, within 120 days of the dispatch of the Tribunal's Award, compensation of **US\$124,041,223**, allocated to **Border** or in such other manner of allocation as the Border Claimants may prefer.

1012.4 In any event, to pay forthwith to the **Border Claimants** moral damages of **US\$1,000,000**, allocated to **Border** or in such other manner of allocation as the Border Claimants may prefer.

1013 All other requests for restitutionary or compensatory relief by the Border Claimants are dismissed.

(iii) Interest

1014 The Tribunal orders the Respondent:

1014.1 To pay to the **Border Claimants** Pre-Award compound interest on the compensation awarded by the Tribunal in respect of the Border Liquidation Shortfall and the Border Forex Losses only, from the respective dates of breach in relation to each of these Heads of Damage until the date of this Award, at the six-month USD LIBOR rate plus 2%, compounded every six months. Pre-Award interest on the sums identified in para. 1012 above shall be paid in accordance with the dates set out at paras. 1012.1, 1012.2 and 1012.3 above.

1014.2 To pay to the **Border Claimants** Post-Award compound interest on all compensation above, at the six-month USD LIBOR rate plus 2%, compounded every six months, until the date of full payment. Post-Award interest will be

calculated from the date of this Award in respect of moral damages, and in all other cases after the expiry of the deadline set at paras. 1012.1, 1012.2, 1012.3 above.

(iv) **Costs**

1015 The Tribunal orders the Respondent to pay forthwith to the **Border Claimants** (in the currency incurred) 8% of all the costs and expenses of this arbitration, namely:

- (a) The Claimants' share of the arbitration costs and lodging fees paid, i.e., US\$705,726.35.
- (b) The Claimants' reasonable costs and expenses incurred in connection with this arbitration, including the cost of their legal representation, expert evidence, and their other reasonable costs and disbursements associated with this proceeding (US\$1,086,503.04, £7,771,072.63 and ZAR 662,393.62).

1016 In summary, the Tribunal orders the Respondent to pay forthwith to the **Border Claimants** (in the currency incurred) £621,685.81, US\$143,378.35 and ZAR52,991.49, being 8% of the respective sums of £7,771,072.63, US\$1,792,229.39, and ZAR662,393.62, plus interest thereon, at the six-month USD LIBOR rate plus 2%, compounded every six months, until the date of full payment. Post-Award interest on costs shall be calculated from the date of this Award.

ANNEX A TO THE OPERATIVE PART OF THE AWARD:**(Memorial - Table 6 and Reply Annex 2 (Updated Table 6 of the Memorial))****(The Border Properties, Factories & Pole Plant)**

	Property	Sub-estate	Date Acquired	Title Deed No	Area (ha)
Land properties directly owned by Border Timbers Limited					
1	Farm Dunstan* (Title Deed, C-83)	Tilbury	25.06.1947	1729/47	3,515.3559
2	Farm Tilbury (Title Deed, C-84)	Tilbury (Tilbury Estate Sawmill)	25.06.1947	1729/47	5,124.0027
3	Welgelegen (Title Deed, C-95)	Tilbury	21.05.1980	2572/80	2,623.5762
4	Imbeza Estate (Title Deed, C-90)	Imbeza	21.05.1980	2572/80	1,844.0120
5	Penhalonga Tree Plot (Title Deed, C-91)	Imbeza	21.05.1980	2572/80	86.3255
6	Stand 45 Penhalonga Township* (Title Deed, C-92)	Imbeza	21.05.1980	2572/80	1.6207
7	Tunnes Rus (Title Deed, C-93)	Imbeza	21.05.1980	2572/80	241.1384
8	Tyrconnel East of Tyrconnel (Title Deed, C-94)	Imbeza	21.05.1980	2572/80	301.5158
9	Imbeza Valley Lot 8 (Title Deed, C-96)	Imbeza	28.08.1985	4711/85	92.5039
10	Remainder of Nyaronga Manor (Title Deed, C-98)	Imbeza	28.08.1986	5126/86	222.8975
11	Greater Zingeni* (Title Deed, C-99)	Imbeza	28.08.1986	5126/86	90.2547
12	Harris Ville* (Title Deed, C-81)	Sheba (Sheba Estate Sawmill)	22.08.1946	2035/46	1,388.4786

	Property	Sub-estate	Date Acquired	Title Deed No	Area (ha)
13	Subdivision B Portion of Epsom* (Title Deed, C-80)	Sheba	22.08.1946	2035/46	5.5411
14	Farm Lambton* (Title Deed, C-82)	Sheba	24.04.1947	CO 2390	1,285
15	Remainder of Sheba (Title Deed, C-85)	Sheba	23.11.1949	DG 12891/49	1,280.4833
16	Remainder of Walmer (Title Deed, C-86)	Sheba	23.11.1949	DG 12892	635.7329
17	Mahugara of Epsom (Title Deed, C-87)	Sheba	18.07.1958	4151/58	660.6095
18	Pioneer Farm* (Title Deed, C-97)	Sheba	18.07.1958	4151/58	144.3602
19	Remainder of Epsom (Title Deed, C-88)	Sheba	18.07.1958	4151/58	748.583
20	Cambridge Estate ¹ (Title Deed, C-89)	Charter (Charter Estate Sawmill)	21.05.1980	2572/80	18,241.2954
21	Stand 2528 Umtali Township of Stand 1959 Umtali Township (Title Deed, C-522) ²	Pole Treatment Plant & BTI Factory ³	21.05.1980	2572/80	28.2640
22	Stand 5041 Umtali Township (Title Deed, C-523) ⁴ and Stand 739A Umtali Township (Title Deed, C-687)	Paulington Factory	23.10.1980 23.10.1980	5991/80 5466/80	2.9911 2,8412
Land properties directly owned by Hangani Development Co. (Private) Limited					
23	Glacier of Weltevreden (Title Deed, C-100)	Sawerombi	01.04.1995	2820/96	856.5180
24	Groenkop Extension (Title Deed, C-101)	Sawerombi	01.04.1995	2820/96	1,178.4583
25	Middelpunt of Jantia (Title Deed, C-102)	Sawerombi	01.04.1995	2820/96	1,121.4276
26	Remaining Extent of Sawerombi (Title Deed, C-103)	Sawerombi	01.04.1995	8501/99	1,922.3886

	Property	Sub-estate	Date Acquired	Title Deed No	Area (ha)
27	Sawerombi West of Sawerombi (Title Deed, C-104)	Sawerombi	01.04.1995	2820/96	836.8380
28	Verlos of Weltevreden (Title Deed, C-105)	Sawerombi	01.04.1995	2820/96	533.9802
29	Welgegund Estate (Title Deed, C-106)	Sawerombi	01.04.1995	2820/96	1,737.7694
30	Weltevreden Estate (Title Deed, C-107)	Sawerombi	01.04.1995	2820/96	1,067.9585

- 1 The Cambridge title deed is an amalgamation of 23 old title deeds.
 - 2 This is not included within the definition of "Border Properties" as it does not contain a plantation.
 - 3 The BTI factory is operated by Border International.
 - 4 This is not included within the definition of "Border Properties" as it does not contain a plantation.
- * Denotes properties not listed in Schedule 7 of the Constitution (see Mem., para. 824 (file 1)).

IX Annexes

- 1017 Attached to the present Award, as Annexes 1 to 13, are the Procedural Orders issued by the Tribunal as discussed above in Section E (1).



Mr. Michael Hwang, S.C.

Arbitrator

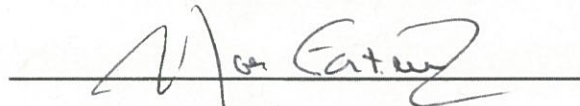


Professor David A.R. Williams, Q.C.

Arbitrator

Date: 24 July 2015

Date: 21 July 2015



The Hon. L. Yves Fortier, P.C., C.C., Q.C.

President

Date: 28 July 2015