

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

IN THE PROCEEDING BETWEEN

**BERNARDUS HENRICUS FUNNEKOTTER AND OTHERS**  
(CLAIMANTS)

AND

**REPUBLIC OF ZIMBABWE**  
(RESPONDENT)

**(ICSID CASE No. ARB/05/6)**

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**AWARD**

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*Members of the Tribunal:*

H.E. Judge Gilbert Guillaume, *President*  
Dean Ronald A. Cass, *Arbitrator*  
H.E. Mr. Mohammad Wasi Zafar, *Arbitrator*

*Secretary of the Tribunal:*

Mr. Ucheora Onwuamaegbu

*Representing the Claimants:*

Mr. Charles Owen Verrill, Jr.  
Wiley Rein LLP  
Washington, D.C., U.S.A.  
and  
Mr. Matthew Coleman  
Steptoe & Johnson LLP  
London, United Kingdom

*Representing the Respondent:*

Mrs. Fatima C. Maxwell,  
Mrs. Virginia Mabiza  
Civil Division  
Attorney General's Office  
Harare, Zimbabwe  
and  
Mr. Philip Kimbrough,  
Mr. Tristan Moreau  
Kimbrough & Associés  
Paris, France

Date of dispatch to the parties: 22 April 2009

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## I. PROCEDURE

1. On 4 June 2003, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received from Bernadus Henricus Funnekotter and others, a request for arbitration, dated 30 May 2003, against the Republic of Zimbabwe (“Zimbabwe” or the “Respondent”). The Claimants, who were said to include natural persons and other entities, were also identified as variously having Dutch and Italian nationalities.
2. On 4 June 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“the Institution Rules”) acknowledged receipt of the request and on the same day transmitted a copy to Zimbabwe and to its Embassy in Washington, D.C.
3. Following exchange of various correspondence between the Centre and counsel for the Claimants, it was determined that the Claimants are the following natural persons, all of whom were said to be Dutch nationals, and a copy of the Dutch passport for each individual Claimant was provided:

<b>Claimants:</b>	<b>Farms:</b>
Mr. Bernardus Henricus <b>Funnekotter</b> : <i>Cadnam Farm (Private) Limited;</i> <i>Kegworth Farm (Private) Limited;</i> <i>Warren Farm (Private) Limited</i>	Remaining Extent of Warren farm [hereinafter R/E Warren farm]; Anwa Farm
Mr. Hermannes <b>van Duren (Junior)</b> : <i>Yangsey Farm (Private) Limited</i>	Bimi Estate farm
Mrs. Margareta <b>van Duren</b> : <i>Yangsey Farm (Private) Limited;</i> <i>Watercombe Enterprises (Private)</i> <i>Limited</i>	Bimi Estate farm; Warren A farm
Mrs. Dicky Roelanda <b>Breytenbach</b> :	Faroe Estate farm

Mrs. Romelia Gwendolyn <b>Fisher:</b> <i>Farways Farm (Private) Limited</i>	Farways Farm
Mr. Max Willem Arthur Graaf <b>van Rechteren Limpurg:</b> <i>Chiripiro Farm (Private) Limited</i>	Chiripiro Farm
Mr. Rolf Jan Philip <b>Walraven:</b> <i>Springdale Farm (Private) Limited</i>	Springdale Farm
Mr. Wessel Johannes <b>Weller:</b> <i>Stratford Properties (Private) Limited;</i> <i>Msonneddi Estate (Private) Limited</i>	Remaining Extent of Ruia Ranche farm [hereinafter R/E Ruia Ranche farm]
Mrs. Loekie <b>Weller:</b> <i>Stratford Properties (Private) Limited;</i> <i>Msonneddi Estate (Private) Limited</i>	R/E Ruia Ranche farm
Mr. Johan Pieter <b>Weller:</b> <i>Stratford Properties (Private) Limited;</i> <i>Msonneddi Estate (Private) Limited</i>	R/E Ruia Ranche farm
Mr. Lion Hellmut <b>Benjamins:</b> <i>Sezlin Investments (Private) Limited</i>	Remaining Extent of Roscommon of Lancaster Park farm; [hereinafter R/E Roscommon farm]  Remaining Extent of Preston Estate farm [hereinafter R/E Preston Estate farm]
Mr. Carel Frederik <b>des Tombe:</b> <i>Millham Enterprises (Private) Limited</i>	Rio Dora farm
Mrs. Erica <b>Hansen:</b> <i>Whindale Ranch (Private) Limited</i>	Whindale Ranch

4. The Request for Arbitration, as supplemented by the Claimants' letters of 23 April 2004, 28 October 2004, 10 November 2004, 10 November 2004, 18 November 2004, 11 February 2005, 22 February 2005, 14 March 2005, 18 March 2005, 8 April 2005, was registered by the Centre on 15 April 2005, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary-General of ICSID, in accordance with Rule 7 of the Institution Rules, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

5. On 7 July 2005, the parties having not agreed on the number of arbitrators and the method of constituting the Tribunal, and sixty days having elapsed since the registration of the Request for Arbitration, the Claimants invoked Article 37(2)(b) of the ICSID Convention, under which the Tribunal shall consist of three arbitrators, one appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties. On 15 November 2005, the Claimants appointed Dean Ronald A. Cass, a U.S. national, as arbitrator and on 20 June 2006, the Respondent appointed the Minister of Justice of Pakistan, H.E. Mr. Mohammad Wasi Zafar.

6. The parties having failed to appoint a presiding arbitrator, and more than 90 days having elapsed since the registration of the request for arbitration, the Claimants, by letter of 27 July 2006, requested the Chairman of the ICSID Administrative Council to appoint the presiding arbitrator, pursuant to Article 38 of the ICSID Convention. On 25 October 2006, the Chairman of the ICSID Administrative Council, in consultation with the Parties, appointed H.E. Judge Gilbert Guillaume of France as the presiding arbitrator.

7. All three arbitrators having accepted their appointments, the Secretary-General of ICSID, by letter of 1 November 2006, informed the Parties of the constitution of the Tribunal, consisting of H.E. Judge Gilbert Guillaume, Dean Ronald A. Cass and H.E. Mr. Mohammed Wasi Zafar, and that the proceeding was deemed to have commenced on that day, pursuant to Rule 6(1) of the ICSID Arbitration Rules.

8. The first session of the Tribunal was, with the agreement of the parties, held on 15 December 2007, at the World Bank's Office in Paris, France. Present at the session were:

Members of the Tribunal:

1. H. E. Judge Gilbert Guillaume, *President of the Tribunal*
2. Dean Ronald A. Cass, *Arbitrator*
3. H.E. Mr. Mohammad Wasi Zafar, *Arbitrator*

ICSID Secretariat:

4. Mr. Ucheora Onwuamaegbu, *Secretary of the Tribunal*

Representing the Claimants:

5. Mr. Charles Owen Verrill, Jr., *Wiley Rein LLP*
6. Mr. Mathew Coleman, *Africa Legal*

Representing the Respondent:

7. Mrs. Virginia Mabiza, *Attorney General's Office, Zimbabwe*
8. Mrs. Mandinika, Deputy Director, *Ministry of Lands, Land Reforms*
9. Mr. Mischeck C. Hove, Minister Counselor, *Embassy of Zimbabwe, Paris*
10. Mr. Cavins N. Mugaviri, Minister Counselor, *Embassy of Zimbabwe, Paris*

9. Various aspects of procedure were determined at the session, including a schedule for the submission of written pleadings.

10. In line with the agreed procedure, the Claimants' Memorial was filed on 16 March 2007, followed by the Respondent's Counter-Memorial on 6 July 2007, followed by the Claimants' Reply on 14 August 2007.

11. On 14 September 2007, the Tribunal held a procedural conference with the parties by telephone.

12. By letter of 11 October 2007, the Respondent notified the Centre that it had appointed Mr. Philip Kimbrough of the law firm of Kimbrough & Associés as counsel.

13. The Respondent's Rejoinder was filed on 24 October 2007.

14. In accordance with a schedule agreed after several exchanges of correspondence between the Tribunal and the Parties, and in consultation with the Centre, an oral hearing of the parties was held at the offices of the World Bank in Paris, on 29–31 October 2007. The Parties were represented by their respective counsel who made presentations to the Tribunal. Present at the hearing were:

Members of the Tribunal:

1. H.E. Judge Gilbert Guillaume, *President of the Tribunal*
2. Dean Ronald A. Cass, *Arbitrator*
3. H.E. Mr. Mohammad Wasi Zafar, *Arbitrator*

ICSID Secretariat:

4. Mr. Ucheora Onwuamaegbu, *Secretary of the Tribunal*

Attending on behalf of the Claimants:

5. Mr. Charles Owen Verill, Jr., *Wiley Rein LLP*
6. Mr. Mathew Coleman, *Steptoe & Johnson LLP*
7. Mr. Bernardus Henricus Funnekotter, *Claimant, Fact Witness*
8. Mr. Lion Benjamins, *Claimant, Fact Witness*
9. Mr. Johan Pieter Weller, *Claimant, Fact Witness*
10. Mr. Graham Mullet, *Valuator, Redfern Mullet, Expert Witness*
11. Mr. Boyd Carr, *Counsel, Coghlan, Welsh & Guest, Fact Witness*
12. Mr. Hermannes van Duren, *Claimant*
13. Mrs. Margareta van Duren, *Claimant*
14. Mr. George Robert Luis Fernandes, *AgricAfrica, Ltd.*
15. Mrs. Deborah Funnekotter, *Spouse of Claimant Funnekotter*
16. Mr. Allan Higgins, *Valuator, Redfern Mullet*
17. Ms. Alexandra Landis, *Legal Assistant, Wiley Rein LLP*
18. Mr. Duncan Owen, *AgricAfrica, Ltd., Fact Witness*
19. Mr. Carel Frederik des Tombe, *Claimant*

Attending on behalf of the Respondent:

20. Mr. Philip Kimbrough, *Kimbrough & Associés*
21. Mr. Tristan Moreau, *Kimbrough & Associés*
22. Cde. Didymus Noel Edwin Mutasa, *Minister of State for National Security, Lands, Land Reform and Resettlement, Fact Witness*
23. Cde. Sobusa Gula-Ndebele, *Attorney General of Zimbabwe, Fact Witness*
24. Mrs. Sophia Christine Tsvakwi, *Secretary for Lands, Fact Witness*
25. Mrs. Fatima C. Maxwell, *Acting Director, Civil Division, Attorney General's Office*
26. Mrs. Virginia Mabiza, *Chief Law Officer, Attorney General's Office*
27. Mrs. Elizabeth Sumowah, *Chief Law Officer, Attorney General's Office*
28. Mr. Tadeous Manyati, *Principal Land Officer, Ministry of Lands*
29. Mr. Sifelani Moyo, *Ministry of Lands, Expert Witness*
30. H.E. Mr. David Hamadzripi, *Embassy of Zimbabwe, Paris*
31. Mr. Cavins Nduna Mugaviri, *Embassy of Zimbabwe, Paris*
32. Mr. Simon Monife, *Ministry of Lands, Zimbabwe*

15. As agreed during the hearing, on 13 November 2007, the Respondent filed a further affidavit of Mr. Sifelani Moyo, and on 29 November 2007, at the invitation of the Tribunal, the Claimants filed comments on the Respondent's submission in the form of a statement by Mr. Graham Mullet. The Tribunal invited the Respondent to comment on the Claimants' submission of 29 November 2007, but the Respondent did not file any comments.

16. Following the hearing, Members of the Tribunal deliberated by various means of communication, including a meeting for deliberations in Paris on 25 June 2008.

17. On 25 February 2009, the Tribunal declared the proceeding closed pursuant to ICSID Arbitration Rule 38(1).

18. The Tribunal has taken into account all pleadings, documents and testimony in this case.

## II. SUMMARY OF THE PARTIES' SUBMISSIONS

### A. THE CLAIMANTS' MEMORIAL

19. In their Memorial, dated 16 March 2007, the Claimants submit that each of them had direct or indirect investments in large commercial farms in Zimbabwe. They contend that they have been deprived of their property in violation of the bilateral investment treaty (the BIT) concluded on 11 December 1996 between the Netherlands and Zimbabwe.<sup>1</sup> They request the Tribunal to declare Zimbabwe responsible for its unlawful action and to order Zimbabwe to compensate them for all the damages suffered.

20. In this context, they first describe the land acquisition program developed by the Government of Zimbabwe from 1992 and “the political issues that led Respondent to commit the violations of the Dutch investment agreement against” them.<sup>2</sup>

#### *The Land Acquisition Program in Zimbabwe*

21. The Claimants state that, in March 1992, the Land Acquisition Act authorized the Government of Zimbabwe to acquire compulsorily any rural land when the acquisition was

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<sup>1</sup> Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Zimbabwe and the Kingdom of the Netherlands, 11 Dec. 1996 [hereinafter BIT].

<sup>2</sup> Claimants' Memorial, 16 March 2007, p. 34.

deemed reasonably necessary for agricultural settlement purposes. Under section 5 of that Act, the first step for such an acquisition is the issuance for the targeted property of a preliminary notice by the Ministry of Lands and Agriculture. The owner of the land could not dispose of the land, while the notice remained in effect, without the permission of the Acquiring Authority. Originally such notices were to remain in force for two years unless withdrawn or the land acquired under section 8 of the Act. However an amendment to the Act in 2000 suppressed the two-year limit. The amendment was declared unconstitutional by the Supreme Court of Zimbabwe which imposed a one-year limit on the effectiveness of Section 5 notices, but this one-year limitation was later eliminated in 2001 by the Court, this time differently composed.<sup>3</sup>

22. Under Section 8 of the Act, the Acquiring Authority is authorized to issue an acquisition of land order which has the immediate effect of divesting the owner of its interests in the property. Under Section 7 of the Act such orders must be authorized by the Administrative Court. However the Zimbabwe Supreme Court held that “the fact that Section 7 requires the Land Authority to submit Section 8 orders to the Administrative Court for confirmation does not stay the acquisition or limit the exercise of the rights of ownership by the Land Authority during the pendency of the proceedings.”<sup>4</sup> In fact, according to the Claimants, the Administrative Court was unable to handle the large volume of applications filed by the Ministry of Lands.

23. Section 16 of the Act adopted in 2000 requires the Acquiring Authority to pay “fair compensation” to the “owner of any agricultural land required for resettlement purpose and to any other person whose right or interest in land has been acquired in terms of this Act.”<sup>5</sup> A procedure was established to that effect. According to the Claimants, “there were occasional efforts to

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<sup>3</sup> *Ibid.*, para. 112.

<sup>4</sup> *Ibid.*, para. 116.

<sup>5</sup> *Ibid.*, para. 117 (quoting Consolidated Land Acquisition Act § 16, 2002, CAP 20:10 (Zimb.)).

comply with these requirements,” but “such efforts were usually only token gestures. In any event, no Claimant received any compensation whatsoever for his or her investments.”<sup>6</sup>

24. Beginning in 1997, the Ministry of Lands issued Section 5 notices and Section 8 orders to each of the Claimants. These actions had no effect, since all of the notices and orders were withdrawn or suspended after submission of objections by the land owner or judicial review.

25. The Government then proposed a new Constitution which, *inter alia*, provided for the acquisition of land without compensation. This proposal was defeated in a referendum in February 2000.

26. According to the Claimants, “[t]he defeat of this referendum immediately led to illegal invasions of commercial farms by war veterans which the Zimbabwe Courts later found were encouraged and supported by the Respondent.”<sup>7</sup> This was the case for Wellers’ R/E Ruia Ranch farm, Walraven’s Springdale Farm, des Tombe’s Rio Dora Farm, Funnekotter’s R/E Warren Farm, van Durens’ Bimi Estate farm and van Duren’s Warren A Farm. The other Claimants escaped invasion in early 2000, but were “subjected to invasions and harassment in the following two years.”<sup>8</sup> Throughout this period, the “Claimants received little if any protection from the police.” In fact “the invasions were encouraged by politicians of the ruling political party and had the support of the army.”<sup>9</sup>

27. The Commercial Farmers’ Union challenged the occupation of the farms before the Courts. On 17 March 2000, the High Court granted an Order which, according to the Claimants, “was consented to by all the parties after negotiations in which they all participated.”<sup>10</sup> That Order

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<sup>6</sup> *Ibid.*, para. 119.

<sup>7</sup> *Ibid.*, para. 126.

<sup>8</sup> *Ibid.*, para. 134.

<sup>9</sup> *Ibid.*, para. 140.

<sup>10</sup> *Ibid.*, para. 141.

declares the occupation unlawful and provides that the unlawful occupiers must vacate the land. It requires “the Police Commissioner to carry out the terms of the Order and to disregard any contrary instructions or directives by the [G]overnment of Zimbabwe or its Executive.”<sup>11</sup> Some days later, the Court dismissed an application from the Commissioner of Police to remove part of the order. However, according to the Claimants, both war veterans and the police ignored the order of the Court and the invasions continued.

28. Following the defeat of the proposed Constitution in February 2000, an amendment to the existing Constitution was adopted effective 19 April 2000. Section 16A(1)(c) of this text provides that “the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement” and that, if the former colonial power fails to pay, then “the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.”<sup>12</sup> The amendment of the Constitution was followed by adoption of conforming amendments to the Land Acquisition Act which provided in its Section 29C that “compensation shall only be payable for any improvements on or to the land.”<sup>13</sup> An accelerated Land Reform and Resettlement Plan, known as “Fast Track Programme” was then initiated.

29. In the fall of 2000, the Commercial Farmers’ Union sought from the courts a series of declaratory orders relating to the legislation thus enacted. The Supreme Court of Zimbabwe found that the Fast Track Programme could not be considered as meeting the requirement of the Constitution and “that the farm invasions are, have been and continue to be unlawful.” The Court added that the presence of the invaders “must be legalised, or they must be removed.”<sup>14</sup>

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<sup>11</sup> *Ibid.*, para. 145.

<sup>12</sup> *Ibid.*, para. 153 (quoting Constitution of Zimbabwe, § 16A(c)(i), (ii), (2000)).

<sup>13</sup> *Ibid.*, para. 154 (quoting Consolidated Land Acquisition Act § 29C(1), 2002, CAP 20:10 (Zimb.)).

<sup>14</sup> *Ibid.*, para. 159–160 (quoting *CFU v. Minister of Lands*, 2000 (2) ZLR at 486–87).

30. Subsequent to 23 May 2000, Section 5 notices had been published as to each of the farms in this arbitration. In addition, Section 8 orders were issued in most cases. In a number of instances, applications were made by the Ministry of Lands to the Administrative Court for confirming those Section 8 orders. In most cases no decision was taken by the Court. Some applications were withdrawn and in the proceeding involving Claimant van Rechteren Limpurg, the Court eventually entered a consent order vacating Section 8 orders concerning Chiripiro Farm. However this order was not implemented.

31. The Claimants add that the Dutch Embassy in Harare repeatedly advised the Government of Zimbabwe of its obligations under the BIT concluded between the Netherlands and Zimbabwe. In response to these interventions, the Ministry of Foreign Affairs sent to the Embassy a *Note Verbale*, dated 21 November 2000, stating that property protected by investment agreements would be exempt from acquisition. Following that note, a number of the farms were delisted, but those delistings were all followed by relistings. Moreover nothing was done to abate the violence and harassment that most of the Claimants were suffering, in spite of many protests from the Embassy.

32. In June 2001, the Parliament of Zimbabwe enacted the Rural Law Occupiers (Protection from Eviction) Act. Under that Act, any qualified person occupying rural land on 1 March 2001 could not be evicted by Court order. “Such persons were relieved of liability for damages or trespass, and were entitled to continue occupation during the period when Section 5 and Section 8 notices were in effect and up to a year after any denial by the Administrative Court of an order confirming a Section 5 notice or approving a Section 8 notice.”<sup>15</sup>

33. Then, in December 2001, the Zimbabwe Supreme Court, whose composition had been changed, decided that the police could not be held in contempt of Court for refusal to obey the

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<sup>15</sup> *Ibid.*, para. 174.

consent order issued by the Court in March 2000. It held that the Land Reform Programme was constitutional and found that there was no breach of the rule of law concerning actions taken on farms.

34. Finally, on 14 September 2005, the Zimbabwe Constitution was again amended. In implementation of the amended Section 16A of the new text, all the agricultural land owned by the Claimants were “acquired by and vested in the State with full title therein . . . .”<sup>16</sup> In fact however, the Claimants had all effectively been deprived of their properties at a much earlier date, either by Section 8 orders or through the invasion of their farms by war veterans and settlers.

#### ***The Alleged Violations of the BIT***

35. The Claimants then recall that the BIT was concluded between Zimbabwe and the Netherlands on 11 December 1996 and entered into force on 1 May 1998.

36. They stress that the Tribunal should rely on the Vienna Convention on the Law of Treaties in interpreting and applying the BIT and the ICSID Convention. They submit that the Vienna Convention reflects customary international law, in particular in its Articles 26, 27, 31 and 32.

37. According to the Claimants,

[e]ach of the Claimants is, and was at all times relevant to this arbitration, a citizen of the Netherlands, thereby fulfilling the nationality requirements of Article 1(b)(i) and the jurisdiction requirement of Article 9(1) of the Dutch Investment Agreement and Article 25 of the Convention. In some instances, Claimants have been assigned the claims of companies that owned farms. Each of the companies that has assigned claims was controlled by Dutch national(s) and is to be treated as a Dutch national pursuant to Article 1(b)(iii) of the Agreement.<sup>17</sup>

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<sup>16</sup> *Ibid.*, para. 180 (quoting Constitution of Zimbabwe, § 16B(2)(a), (2005)).

<sup>17</sup> *Ibid.*, para. 12; *see also ibid.*, paras. 216–219.

38. Moreover, the Claimants submit that their “interests fall within the definition of ‘investments’ contained in Article 1(a) of the [BIT,] which broadly covers ‘every kind of asset.’”<sup>18</sup>

39. According to the Claimants, Zimbabwe violated the terms of the BIT in several ways. They recall first that under Article 6 of the Treaty:

Neither Contracting Party shall subject nationals of the other Contracting Party to any measures depriving them, directly or indirectly, of their investments unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of the law;
- (b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
- (c) the measures are accompanied by provision for the payment of just compensation.<sup>19</sup>

40. In this respect, the Claimants contend that they “were deprived of their investments by Respondent by actions that were tantamount to expropriation.”<sup>20</sup> They recall that “final Section 8 orders were issued with respect to all of the properties involved in this arbitration except R/E Warren farm (Funnekotter), Bimi Estate farm (van Duren), R/E Preston Estate farm and R/E Roscommmon farm (Benjamins) and Chiripiro Farm (van Rechteren Limpurg). Even before those orders were issued, however, Respondent’s actions effectively deprived nearly all of the Claimants of the use, benefit and reasonably to be expected return from their investments.”<sup>21</sup> “After the defeat of the new Constitution in a February 2000 referendum, Respondent encouraged and supported the invasion of commercial farms including all of those that are investments of Claimants,”<sup>22</sup> as recognized by Zimbabwe Courts. “Even where there was no invasion prior to the issuance of a Section 8 order (which was the case with Claimant Funnekotter’s Anwa Farm and Claimant Breytenbach’s Faroe Estate [farm]), the actions of Respondent after February 2000

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<sup>18</sup> *Ibid.*, para. 13 (quoting BIT Art. 1(a); *see also ibid.*, para. 215).

<sup>19</sup> *Ibid.*, para. 220, (quoting BIT, Art 6).

<sup>20</sup> *Ibid.*, p. 100.

<sup>21</sup> *Ibid.*, para. 223.

<sup>22</sup> *Ibid.*, para. 224.

were responsible for creating a climate of fear and apprehension on the part of all the Claimants.”<sup>23</sup>

41. The Claimants then submit that none of the conditions provided for in subparagraphs (a), (b) and (c) of Article 6 are fulfilled in the present case.

42. They note in this regard that Section 8 orders issued with respect to a number of Claimants deprived them of their investment as covered by the terms of the order, i.e., “land and improvements, such as dams and irrigation systems, houses, farms and other immoveable assets.”<sup>24</sup> They note that “the Ministry of Lands filed a number of petitions with respect to Section 8 orders . . . with respect to Claimants’ investments.” But they state that the Administrative Court which had to consider those petitions “did not reach a final decision with respect to any of them.”<sup>25</sup> They conclude that “the acquisitions under Section 8 of the [Land Acquisition] Act were made by Zimbabwe without following due process of law.”<sup>26</sup> They submit moreover that “it was the presence of war veterans and settlers that forced these Claimants to vacate their farms.”<sup>27</sup> This invasion was *de facto* substitute for the procedures before the Court. In any event, the first requirement of Article 6 of the BIT was not met.

43. The Claimants add that the Ministry of Foreign Affairs of Zimbabwe, in its *Note Verbale* of 21 November 2000 informed the Dutch Embassy that the properties protected by the BIT would not be subject to taking under the Land Acquisition Act. The deprivation of Claimants’ investment was contrary to this undertaking and the second requirement of Article 6 of the BIT is no more met.

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<sup>23</sup> *Ibid.*, para. 239.

<sup>24</sup> *Ibid.*, para. 244.

<sup>25</sup> *Ibid.*, para. 245.

<sup>26</sup> *Ibid.*, p. 110.

<sup>27</sup> *Ibid.*, para. 247.

44. In addition, no compensation was paid to Claimants after the deprivation of their investments contrary to Article 6(c) of the BIT.

45. In sum, they assert that the Respondent's actions did not constitute "legal expropriations" of the Claimants' investments pursuant to Article 6, even where the provisions of the Land Acquisition Act were utilized by the publication of Section 5 notices in the Gazette and the issuance of Section 8 order."<sup>28</sup>

46. Furthermore, the Claimants submit that Zimbabwe denied them the fair and equitable treatment required by Article 3(1) of the BIT. They stress that "fair and equitable treatment in the context of the Agreement and in order to fulfill the object and purpose of the Agreement means treatment in a just and appropriate manner in order to encourage foreign investment."<sup>29</sup> They detail the elements of this fair and equitable treatment in the light of ICSID case law. They contend that "[b]y encouraging the invasion of commercial farms by war veterans and settlers, and then enacting legislation condoning their acts, Zimbabwe failed to meet its obligation. Moreover [it also] failed to provide full security and protection to Claimants and their investments as [required] by Article 3(1)."<sup>30</sup> In this respect, they provide details of the circumstances which forced them to abandon their farms.

47. The Claimants conclude that the responsibility of Zimbabwe is engaged, not only for its own acts, but also for the acts of the ZANU PF Ruling Party and the war veterans and occupiers of Claimants' properties<sup>31</sup> in conformity with Articles 1, 8 and 11 of the Articles on State Responsibility for International Wrongful Acts prepared by the International Law Commission. They recall that under Article 6(c) of the BIT, the compensation for expropriation "shall represent

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<sup>28</sup> *Ibid.*, para. 250.

<sup>29</sup> *Ibid.*, para.264.

<sup>30</sup> *Ibid.*, para. 277.

<sup>31</sup> *Ibid.*, paras.291–294.

the genuine value of the investments affected” which “shall include, but not exclusively, the net asset value” of the investments.<sup>32</sup> They add that this is the standard applicable in case of lawful expropriation, but that, in case of unlawful expropriation, customary international law is applicable. In this respect they stress that actual restitution of the properties would in the present case be neither practicable, nor possible. Thus the compensation due to Claimants “must correspond to what a restitution in kind would yield.”<sup>33</sup>

48. They state that restitution being impracticable, they “undertake to return to Zimbabwe all shares, deeds or other indices of ownership of their investments upon receipt of payment in full in currency of their selection, of damages, plus interest, awarded by the Tribunal.”<sup>34</sup>

49. The Claimants’ land and improvements have been valued by the Valuation Consortium (“Valcom”) under the direction of Mr. Graham Mullet.<sup>35</sup> Under this appraisal:

- a) For Claimant Funnekotter, the value of R/E Warren farm is 1,050,000 Euros and that of Anwa Farm 1,070,000 Euros and the value of moveable assets 568,898 Euros;<sup>36</sup>
- b) For Claimants van Duren, the value of Bimi Estate farm is 940,000 Euros,<sup>37</sup> the value of Warren A farm 780,000 Euros<sup>38</sup> and the value of moveable assets 195,958 Euros;<sup>39</sup>
- c) For Claimant Breytenbach, the value of Faroe Estate farm is 1,030,000 Euros and the value of moveable assets 149,811 Euros;<sup>40</sup>
- d) For Claimant Fisher, the value of Farways Farm is 1,130,000 Euros and the value of moveable assets 31,733 Euros;<sup>41</sup>

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<sup>32</sup> *Ibid.*, para.295 (quoting BIT, Art. 6(c)).

<sup>33</sup> *Ibid.*, p. 137.

<sup>34</sup> *Ibid.*, para. 305.

<sup>35</sup> *Ibid.*, para. 306.

<sup>36</sup> *Ibid.*, para. 28; *ibid.*, Annex A, Tabs A-5-A; A-5-B.

<sup>37</sup> *Ibid.*, para. 36; *ibid.*, Annex B-1, Tab B-1-E.

<sup>38</sup> *Ibid.*, para. 44; *ibid.*, Annex B-1, Tab B-2-D.

<sup>39</sup> *Ibid.*, para. 36; *ibid.*, Annex B-1, Tab B-1-E.

<sup>40</sup> *Ibid.*, para. 50; *ibid.*, Annex C, Tab C-2.

- e) For Claimant van Rechteren Limpurg the value of Chiripiro Farm is 680,000 Euros;<sup>42</sup>
- f) For Claimant Walraven, the value of Springdale Farm is 770,000 Euros;<sup>43</sup>
- g) For Claimants Weller, the value of the remaining extent of R/E Ruia Ranche farm is 640,000 Euros and the value of moveable assets 86,628 Euros;<sup>44</sup>
- h) For Claimant Benjamins, the value of R/E Roscommon farm and R/E Preston Estate farm is 550,000 Euros and the value of moveable assets 246,668 Euros;<sup>45</sup>
- i) For Claimant des Tombe, the value of Rio Dora farm is 910,000 Euros and the value of moveable assets 92,490 Euros;<sup>46</sup>
- j) For Claimant Hansen, the value of Whindale Ranch is 1,410,000 Euros and the value of moveable assets 38,198 Euros.<sup>47</sup>

50. Moreover, according to Valcom, a uniform disturbance claim of USD40,000 is justified.<sup>48</sup>

51. The Claimants also request “interests on their damages determined at the rate of ten (10) percent compounded monthly from February 2000.”<sup>49</sup> They “reserve the right to seek their costs (including the fees and costs registered by counsel and experts) in the event they are successful in this arbitration.”<sup>50</sup>

52. On those bases, they “request the Tribunal to find in their favor and order the Respondent to pay their damages, interest and costs.”<sup>51</sup>

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<sup>41</sup> *Ibid.*, para. 58; *ibid.*, Annex D, Tab D-7.

<sup>42</sup> *Ibid.*, para. 66; *ibid.*, Annex E, Tab E-6.

<sup>43</sup> *Ibid.*, para. 75; *ibid.*, Annex F, Tab F-16.

<sup>44</sup> *Ibid.*, para. 84; *ibid.*, Annex G, Tab G-1-X; Updated Summary Table of Claimants’ Moveable Assets, filed as an attachment to Claimants’ letter of 19 Oct. 2007.

<sup>45</sup> *Ibid.*, para. 92; *ibid.*, Annex H, Tab H-9.

<sup>46</sup> *Ibid.*, para. 99; *ibid.*, Annex I, Tab I-G.

<sup>47</sup> *Ibid.*, para. 109; *ibid.*, Annex J, Tab J-9.

<sup>48</sup> *Ibid.*, paras. 28, 36, 44, 50, 58, 66, 75, 84, 92, 99, 320. The amount of the disturbance claim was restated by the Claimants at the hearing as 37,440 Euros per Claimant. See Hearing Transcripts, Day 1, 29 Oct. 2007, p. 116.

<sup>49</sup> *Ibid.*, para. 321.

<sup>50</sup> *Ibid.*, para. 326.

<sup>51</sup> *Ibid.*, para. 327.

## B. THE RESPONDENT'S COUNTER-MEMORIAL

53. In its Counter-Memorial of 6 July 2007, the Republic of Zimbabwe addresses the issues raised in each paragraph of the Claimants' Memorial.

54. It recalls that "[t]he Lancaster House Agreement that brought about Zimbabwe's independence had an entrenched clause guaranteeing the pattern of land ownership for the next ten years from 1980. During this period land could only be acquired on a willing seller, willing buyer basis. Very little land was acquired through this method as the whites, who owned large tracks of land, clung to their farms."<sup>52</sup>

55. The Respondent adds that "[t]his necessitated the promulgation of laws after the 10 years period . . . to change the unjust land ownership in favour of the masses of Zimbabwe. A Land Reform Resettlement Programme was put in place to guide the acquisition process."<sup>53</sup> In this context, Section 5 notices and Section 8 orders were issued to the Claimants under the Land Acquisition Act. "Where the process was defective, the notices and orders were withdrawn,"<sup>54</sup> as testified by the Funnekotter and Walraven's cases. Moreover, the Claimants were able to seize "the Administrative Court which was fully functional"<sup>55</sup> and continued to function up until 2005. The acquisitions of land were thus "done in accordance with law."<sup>56</sup>

56. The Respondent then submits that the farm invasions which followed the referendum of 2000, "were a spontaneous reaction by the landless people of Zimbabwe. They were not instigated in any way by the Government."<sup>57</sup> "The police did their best with the resources

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<sup>52</sup> Respondent's Counter-Memorial, 6 July 2007, p. 1.

<sup>53</sup> *Id.*

<sup>54</sup> *Ibid.*, p. 7; *see also ibid.*, pp. 11–12.

<sup>55</sup> *Ibid.*, p. 13.

<sup>56</sup> *Ibid.*, p. 8.

<sup>57</sup> *Ibid.*, p.7.

available to them to end the farm invasions. Unfortunately due to insufficiency of manpower, it was not easy to cope with the numerous reports in the circumstances.”<sup>58</sup>

57. In fact the Government responded to those invasions “by putting in place an accelerated land reform program,”<sup>59</sup> which was later amended to conform with Section 16(A) of the Constitution and was finally found lawful by the Supreme Court.

58. However, the Respondent still encountered obstacles in the acquisition of agricultural land and the Constitution was accordingly amended in 2005.

59. With respect to the alleged violations of the BIT concluded between the Netherlands and Zimbabwe, the Respondent first notes that “[t]he Claimants have merely averred that they are Dutch nationals without furnishing any proof to that effect. The Claimants will therefore be put to the strictest proof thereof.”<sup>60</sup>

60. It then submits that Article 9(3) of the BIT “provides for the laws that should be applicable in the event the parties do not agree on which law to apply. Since there is no agreement between the parties as to which law should apply Respondent submits that its laws should apply.”<sup>61</sup>

61. Zimbabwe then contends that the measures it took in depriving Claimants of their properties were taken in conformity with the Land Acquisition Act and the Constitution.

62. Moreover, according to the Respondent, Article 6 of the BIT was not violated. The measures concerning the Claimants were taken “in the public interest and under due process of law. They were not discriminatory.”<sup>62</sup>

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<sup>58</sup> *Ibid.*, p. 8.

<sup>59</sup> *Ibid.*, p. 7.

<sup>60</sup> *Ibid.*, p. 1.

<sup>61</sup> *Ibid.*, p.16.

63. The Respondent adds that its “acquiring authority took heed of the Royal Netherlands Embassy’s concerns and delisted the properties [concerned] . . . . However the high demand for land by the landless resulted in re-listing. The police could not contain the spontaneous invasions due to shortage of manpower.”<sup>63</sup>

64. Zimbabwe, however, “accepts that the deprivation [of property] was not accompanied by . . . payment of compensation” as provided for by Article 6(c) of the BIT. It “submits that this is the only issue for arbitration.”<sup>64</sup>

65. Turning to Article 3(1) of the BIT, the “Respondent denies subjecting the Claimants to treatment that was not fair and equitable.”<sup>65</sup> It recognizes that “Claimants may have encountered some of the experiences they complain of.”<sup>66</sup> But it adds that it was confronted with “an explosion resulting in [a great number] of land occupations.”<sup>67</sup> In the context, it could not do more to ensure the physical security and protection of the Claimants. To arrest the situation, it “reacted by putting in place legal instruments to enable the acquisition of more land for redistribution.”<sup>68</sup>

66. The Respondent illustrates its position by describing the circumstances in which the Claimants were expropriated and concludes that those expropriations were lawful.

67. Zimbabwe, however, “accepts that Article 6(c) of the agreement provides for payment of compensation” and notes that “Respondent’s laws provide for compensation for improvements

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<sup>62</sup> *Ibid.*, p. 16.

<sup>63</sup> *Ibid.*, p. 12.

<sup>64</sup> *Ibid.*, p. 16.

<sup>65</sup> *Ibid.*, p. 24.

<sup>66</sup> *Ibid.*, p. 25.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

only. However, the Respondent intends to fully honour its obligation to pay compensation in terms of the Agreement.”<sup>69</sup>

68. It adds that it “is in position to restore the claimants to their properties and has already restored other owners of bilaterally protected investments to their properties,” and as demonstrated by four cases mentioned in the Counter-Memorial, “restitution is practicable and possible.”<sup>70</sup>

69. The Respondent further submits that “[i]f the Claimants do not accept restitution the property belongs to the State” and “shares, deeds and other indicia” of former ownership cease “to be of value, even to the Respondent.”<sup>71</sup>

70. Zimbabwe finally notes the Claimants’ valuation of immovable and moveable properties. It submits that there is no provision for compensation for disturbance in the Agreement. It contends that “[t]he principle of compound interest has a punitive element which is not justified in Claimants’ case since the acquisition was lawful.”<sup>72</sup>

71. It concludes that it is “aware of its obligations in terms of the Agreement. However, despite Claimants’ misgivings the Respondent is willing and able to make restitution.”<sup>73</sup>

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<sup>69</sup> *Ibid.*, p. 22.

<sup>70</sup> *Ibid.*, p. 27 (listing four cases).

<sup>71</sup> *Ibid.*, p. 28.

<sup>72</sup> *Ibid.*, pp. 28–29.

<sup>73</sup> *Ibid.*, p. 30.

### C. THE CLAIMANTS' REPLY

72. In their Reply dated 14 August 2007, the Claimants first answer an objection raised by the Respondent relating to their nationality in producing relevant documents and information. They observe that Zimbabwe did not raise any other objection with respect to the jurisdiction of the Centre and the competence of the Tribunal.

73. They note that the “Respondent claims that, pursuant to Article 9(3)” of the BIT, “the applicable law is domestic law,” and that “[h]aving made that assertion, however, the Counter-Memorial fails to identify in what contexts or as to what issues domestic law should be applied.”<sup>74</sup> Moreover, “Respondent accepts that ‘generally international law should prevail over domestic law.’”<sup>75</sup> Thus, according to the Claimants, “there is no issue concerning applicable law before the Tribunal.”<sup>76</sup>

74. The Claimants then submit that “the expropriation . . . was not consistent with Article 6 of the Dutch Investment Agreement.”<sup>77</sup> In this respect, they develop the arguments already presented in their memorial. They add that, “[b]y supporting the farm invasions, the Government of Zimbabwe acted contrary to public interest.”<sup>78</sup> They stress that the land acquisition programme was “part of the larger effort to expel white farmers and to allocate their properties to native Zimbabweans”<sup>79</sup> and was thus discriminatory. They submit that “[t]he failure to observe the commitment of the *Note Verbale*” sent to the Dutch Embassy in 2000 “was also a breach of the umbrella clause of Article 3(4) of the Agreement.”<sup>80</sup>

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<sup>74</sup> Claimants’ Reply, 14 Aug. 2007, para. 11.

<sup>75</sup> *Ibid.*, para. 12 (quoting Respondent’s Counter-Memorial, p. 17).

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, para. 13.

<sup>78</sup> *Ibid.*, p. 8.

<sup>79</sup> *Ibid.*, para. 21.

<sup>80</sup> *Ibid.*, para. 24.

75. The Claimants note that, in its Counter-Memorial, the Respondent states that, ““even though [it] had not immediately computed the payment to be paid to claimants, the Respondent has always been willing to pay as and when it is able to do so.””<sup>81</sup> However, Article 6(c) of the BIT specifies that “compensation must ‘be paid and made transferable *without delay*, to the country designated by the claimants concerned . . . .”<sup>82</sup> The Agreement does not define “delay”, but according to the Claimants, “the Tribunal would be justified in finding that ‘*without delay*’ means payment no later than three months after the expropriation.”<sup>83</sup> “To date, the Claimants have waited at least five years [for] compensation.”<sup>84</sup> No effort has ever been made by Zimbabwe to compute the payment to be made. In this respect too, Article 6 has been violated.

76. The Claimants reiterate that “the encouragement of the invasions [by the Executive], the failure to obey Court orders and the enactment of the Land Occupiers Act manifestly demonstrate a denial of physical security and protection”<sup>85</sup> in violation of Article 3(1) of the BIT.

77. They also reaffirm that Zimbabwe did not ensure fair and equitable treatment of their investments. It did not maintain a stable business environment and abused its authority.<sup>86</sup>

78. Furthermore, according to the Claimants the Respondent “is responsible for the acts of its executive, the ZANU-PF ruling Party; the war veterans and the occupiers of Claimants’ property.”<sup>87</sup>

79. The Claimants note that the “Respondent claims [to be] in a position to restore [them] to their property and cites four examples of farms that are currently operated by foreign investors

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<sup>81</sup> *Ibid.*, para. 25 (quoting Respondent’s Counter-Memorial, p. 6).

<sup>82</sup> *Ibid.* (emphasis added in the Claimants’ Reply).

<sup>83</sup> *Ibid.*, para. 26 (emphasis added).

<sup>84</sup> *Ibid.*, para. 27.

<sup>85</sup> *Ibid.*, p. 29.

<sup>86</sup> *Ibid.*, paras. 69–70.

<sup>87</sup> *Ibid.*, p. 34.

‘protected’ by investment agreements.”<sup>88</sup> However, according to the Claimants, two of those farms have in fact been invaded and their owners forced to leave. In any case, the Claimants would not accept restitution for the reasons already set forth in their memorial.

80. They finally contend that compound interest is justified in the circumstances of this arbitration in the light of the most recent case law relating to expropriation.<sup>89</sup>

81. In conclusion, the Claimants “urge the Tribunal to find that the actions of Respondent violated its obligations pursuant to Articles 3 and 6 of the Dutch Investment Agreement for the reasons detailed in the Claimants’ Memorial and this Reply.”<sup>90</sup>

#### **D. THE RESPONDENT’S REJOINDER**

82. In its Rejoinder of 24 October 2007, the Respondent maintains its previous submissions. However, it states that finally it “does not object to the jurisdiction of the Centre” and that it “withdraw[s] the offer for restitution” it previously made.<sup>91</sup>

83. The Respondent contends that it did not violate articles 3, 6 and 7 of the BIT. It first “denies that the farms occupations [sic] were instigated and supported by the Respondent’s Executive and Officials.”<sup>92</sup> It adds that “[t]he situation was riotous and chaotic . . . similar to what is envisaged in Article 7 of the Agreement”<sup>93</sup> and that the police did its best in such situation. According to Respondent’s contention, Article 3(1) of the BIT was not violated.<sup>94</sup>

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<sup>88</sup> *Ibid.*, para. 8 (citing Respondent’s Counter-Memorial, p. 27).

<sup>89</sup> *Ibid.*, paras. 73–80.

<sup>90</sup> *Ibid.*, para. 81.

<sup>91</sup> Respondent’s Rejoinder, 24 Oct. 2007, p. 5.

<sup>92</sup> *Ibid.*, p. 3.

<sup>93</sup> *Ibid.*, p. 13.

<sup>94</sup> *Ibid.*, p. 3.

84. With respect to Article 6, the Respondent submits that the conditions set out in paragraphs (a) and (b) are met. In this respect, it stresses that it “acquired land to address the need of the landless and Liberation War veterans. The acquisition affected all holders of land and thus was not discriminatory.”<sup>95</sup> Moreover the undertaking vis-à-vis the Dutch Embassy “did not preclude the Government of Zimbabwe from acquiring land at any time as long as it was in the public interest.”<sup>96</sup>

85. With respect to article 6(c) the Respondent contends that “[n]on-payment of compensation by the Respondent is due to the fact Claimants never instituted the Zimbabwe law valuation and certification procedures pursuant to Zimbabwean publications . . . .”<sup>97</sup> It takes note of the evaluation of the damages provided for by the Claimants, and it furnishes its own valuation.<sup>98</sup> However, it submits that under its construction of Article 6, the net value of the Claimants’ property must be “certified by an independent firm of auditors”<sup>99</sup> and adds that “until a date of valuation is determined, Respondent is not in a position to complete its submission on valuation.”<sup>100</sup> It adds that “Domestic Zimbabwean law should apply in the interpretation of the Agreement and the calculation of compensation . . . .”<sup>101</sup> It requests the Arbitral Tribunal to designate an independent auditor as provided in the BIT to assess the genuine value of the investments.<sup>102</sup>

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<sup>95</sup> *Ibid.*, p. 8.

<sup>96</sup> *Ibid.*, p. 7.

<sup>97</sup> *Ibid.*, p. 3.

<sup>98</sup> *Ibid.*, p. 4; *ibid.*, Annexure J-2: Affidavit Statement of Mr. Sifelani Moyo, 24 Oct. 2007, and its annexes 2–14.

<sup>99</sup> *Ibid.* (quoting BIT, Art. 6(c) (emphasis omitted)); *ibid.* pp. 13–14.

<sup>100</sup> *Ibid.*, p. 6.

<sup>101</sup> *Ibid.*, p. 4.

<sup>102</sup> *Ibid.*, p. 7.

## E. THE HEARING

86. At the hearing, held on 29 to 31 October 2007, the Claimants confirmed their submissions and arguments.

87. In relation to quantum of damages, they stressed that they did not have to submit valuations according to Zimbabwean legislation to be entitled to compensation under the BIT. Moreover, the parties could finalize their expert valuation evidence before determination by the Tribunal of the date of valuation. The Claimants added that this valuation has to be made in most instances at the date of Section 8 notices.

88. The Claimants then stressed that, in case of lawful expropriation, the compensation must correspond to the genuine value of the investment expropriated as provided for in Article 6(c) of the BIT. This genuine value, in the present case, does not correspond to the net asset value of the investment as certified by auditors, but to the market value. The Claimants further noted that other BITs concluded by Zimbabwe do not impose certification by auditors. Thus and in any case, no obligation of certification could be imposed on the Claimants who benefit from the most favored nation clause. Moreover in case of unlawful expropriation, an additional sum of 37,440 Euros must be paid for disturbance of each Claimant, as requested in the Memorial and re-stated at the hearing,<sup>103</sup> and for moral damages (evaluated at 100,000 Euros for each Claimant), as requested for the first time at the hearing.<sup>104</sup>

89. At the hearing, the Respondent also maintained its previous submissions and arguments. It recalled the history of British colonization in Zimbabwe and in particular the conditions in which, in “1930, the Land Apportionment Act . . . set aside 51% of the fertile arable land for the white minority.”<sup>105</sup> It contended that the *Note Verbale* sent by the Ministry of Foreign affairs to the

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<sup>103</sup> Hearing Transcripts, Day 1, 29 Oct. 2007, p. 116.

<sup>104</sup> *Ibid.*, Day 1, 29 Oct. 29, 2007, pp. 96–97, 109, 115–116; *ibid.*, Day 3, 31 Oct. 2007, pp. 20, 38.

<sup>105</sup> *Ibid.*, Day 2, 30 Oct. 2007, p. 159.

Dutch Embassy cannot be considered as an undertaking of the Government of Zimbabwe.<sup>106</sup> It added that compensation must, in the present case, be calculated on the basis of the market value in 1999.<sup>107</sup> However account must be taken of the investment initially made, of the date of such an investment and of the profit resulting in the past of investment. Account must also be taken of the fact that discounting from the market value is to be made in case of large scale nationalization.

### **III. THE DECISION OF THE TRIBUNAL**

90. The Claimants are Dutch nationals who directly or indirectly owned large commercial farms in Zimbabwe. It is not disputed that they were deprived of their properties sometime between 2001 and 2003 through invasion of their farms by settlers and veterans of the 1980 war for Zimbabwean independence and/or through various orders taken by the Government of Zimbabwe under the Land Acquisition Act of 1992. Finally an amendment to the Zimbabwe Constitution in 2005 formalized the expropriation of their farms. They received no compensation.

#### **A. JURISDICTION**

91. The Claimants submit that Zimbabwe, in acting the way it did, breached its obligations under Articles 3 and 6 of the BIT and request the Tribunal to order the Respondent to pay them damages, plus interest and costs. They invoke the Tribunal's jurisdiction over these claims under the terms of the Article 9(1) of the BIT and Article 25 of the ICSID Convention.<sup>108</sup> Article 9(1) states that "[a]ny legal dispute between a Contracting Party and a national of the other Contracting Party arising directly out of an investment of that national in the territory of the former Contracting Party . . . [if not] settled within six months of the date when it is raised by one of the parties to the dispute, . . . shall, at the request of the national concerned, be submitted for

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<sup>106</sup> *Ibid.*, p. 231.

<sup>107</sup> *Ibid.*, Day 3, 31 Oct. 2007, pp. 64–65.

<sup>108</sup> Claimants' Memorial, 16 March 2007, para. 12.

settlement by conciliation or arbitration.”<sup>109</sup> Article 25 of the ICSID Convention extends ICSID jurisdiction to “any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State.”<sup>110</sup>

92. The Claimants have asserted all of the elements to bring themselves within the jurisdictional provisions of these agreements. As noted earlier, the Claimants assert that they are all Dutch nationals or entities controlled by Dutch nationals and that their interests in Zimbabwe that are at issue in this dispute qualify as “investments” within the meaning of the BIT.<sup>111</sup> They also assert that there has been no settlement of the matter within the relevant time frame specified in the BIT. Thus, the Claimants state, their claims fulfill the jurisdictional requirements of these accords.

93. The Respondent, however, initially contested one basis for this Tribunal’s jurisdiction. The Respondent’s Counter-Memorial states that the Claimants did not furnish proof of Dutch nationality, a factor essential to this Tribunal’s jurisdiction.<sup>112</sup> The Claimants, having previously supplied the necessary documentation in their request for arbitration, reproduced that documentation in their Reply and included additional information respecting the Claimants’ nationality.<sup>113</sup> In its Rejoinder, the Respondent declared that it “does not object to the jurisdiction of the Centre.”<sup>114</sup> And in his opening statement for Respondent at the hearing on the merits, Respondent’s counsel Mr. Kimbrough confirmed that position.<sup>115</sup>

94. In light of the importance of jurisdiction as a foundation for arbitral decisions and the special competence granted to arbitral tribunals to determine their jurisdiction, the Tribunal considers it important to address, albeit briefly, the question of jurisdiction despite the current agreement

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<sup>109</sup> BIT, Art. 9(1).

<sup>110</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter ICSID Convention], Art. 25(1).

<sup>111</sup> Memorial, paras. 12–13.

<sup>112</sup> Respondent’s Counter-Memorial, 6 July 2007, p. 1.

<sup>113</sup> Claimants’ Reply, 14 Aug. 2007, paras. 9–10; *ibid.*, Annex 4.

<sup>114</sup> Respondent’s Rejoinder, 24 Oct. 2007, p. 5.

<sup>115</sup> Hearing Transcripts, Day 2, 30 Oct. 2007, p. 34.

between the parties. It is the Tribunal's judgment that jurisdiction under the BIT and ICSID Convention has been established: all three requisites for jurisdiction have been met.

95. First, the Claimants have established that they are Dutch nationals and, thus, are within the provisions of both the BIT and ICSID Convention as nationals of a Contracting Party (BIT) or Contracting State (ICSID). It is also not alleged, nor does the Tribunal have any reason to believe, that the Claimants were also nationals of Zimbabwe. Second, the subject matter of the dispute before this Tribunal clearly arises directly out of an investment by the Claimants in the territory of the Respondent. As the Claimants note, the BIT uses a very broad definition of investment to include property of all kinds, rights derived from shares in firms, and title to assets, among other things.<sup>116</sup> The physical properties, shares in companies, and other assets at issue in this dispute plainly are within that definition. Although the Respondent suggested during the hearing on the merits that a different valuation might be required for investments that were the products of monies brought into Zimbabwe some years ago, Respondent also acknowledged that the investments nonetheless fall within the BIT's scope.<sup>117</sup> Finally, the Claimants have brought claims within the appropriate time frame. Their claims are for deprivations that occurred well after the BIT entered into effect, eliminating any question whether the BIT's terms are applicable to the dispute over these investments. Further, the BIT applies to investments made before the date at which the treaty entered into force.<sup>118</sup> For all of these reasons, the Tribunal concludes that it has jurisdiction over the Claims before it.

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<sup>116</sup> BIT, Art. 1(a); Claimants' Memorial, 16 March 2007, paras. 215–219.

<sup>117</sup> Hearing Transcripts, Day 2, pp. 186–189.

<sup>118</sup> BIT, Art. 10.

## **B. ALLEGED BREACHES OF THE BIT**

96. Turning to the substance of the case, the Tribunal will first consider the submissions of the Claimants based on Article 6 of the BIT. Under that Article,

[n]either Contracting Party shall subject nationals of the other Contracting Party to any measures depriving them, directly or indirectly, of their investments unless the following conditions are complied with:

- a) the measures are taken in the public interest and under due process of law;
- b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
- c) the measures are accompanied by provision of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any free convertible currency accepted by the claimants. The genuine value of the investments shall include, but not exclusively, the net asset value thereof as certified by an independent firm of auditors.<sup>119</sup>

The Claimants submit that the expropriations of their properties were in violation of subparagraphs (a), (b) and (c) of Article 6.

97. Zimbabwe, although it denies any responsibility in the farm occupation by settlers and war veterans “concede[s] that compulsory acquisition . . . done in terms of the Land Acquisition Act and the Constitution of Zimbabwe . . . is tantamount to expropriation.”<sup>120</sup> It contends however that the measures it then took did not violate Article 6.

98. The Tribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6. The Tribunal will first examine whether or not subparagraph (c) relating to the provisions of a just compensation has been breached. If it arrives to the conclusion that it has, it will not be necessary for it to consider whether, as alleged by the Claimants, the other conditions provided for in that Article or the provisions of Article 3 have also been breached.

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<sup>119</sup> BIT, Art. 6.

<sup>120</sup> Respondent’s Counter-Memorial, 6 July 2007, p. 20.

99. With respect to subparagraph (c), Zimbabwe in its Counter-Memorial does not deny that the deprivation of properties complained of was not accompanied by the provision of payment of compensation as contemplated by that subparagraph.<sup>121</sup> However, in its Rejoinder and at the hearing it justifies this lack of compensation on three following grounds.

100. Zimbabwe contends first that “Non-payment of compensation by the Respondent is due to the fact that Claimants never instituted the Zimbabwe law valuation and certification procedures pursuant to Zimbabwean [law].”<sup>122</sup> The Tribunal will observe that Zimbabwe Law provided only for compensation for the fixed improvements on or to the land expropriated. The Claimants were not ready to accept such compensation and, in conformity with article 9(1) of the BIT, they requested full compensation from the Government of Zimbabwe before going to arbitration. There was no obligation on them to exhaust local remedies before doing so, and the argument of Zimbabwe on this point cannot be upheld by the Tribunal.

101. Second, Zimbabwe submits that the delay in payment is due to the fact that “the net asset value of the Claimants’ properties has not been certified by an independent firm of auditors as provided in Article 6(c) of the Agreement.”<sup>123</sup> The Tribunal will note that, before the present proceedings, the Government of Zimbabwe never considered paying full compensation for the damage suffered by the Claimants in the terms of Article 6(c) and never asked for the certification contemplated by that Article. It is only before the Tribunal<sup>124</sup> that the Respondent declared that it “intends to fully honour its obligation to pay compensation in the terms of the agreement.” Thus the Respondent cannot claim that the delay in payment was justified by the absence of the certification contemplated by Article 6(c).

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<sup>121</sup> Counter-Memorial, p. 16.

<sup>122</sup> Respondent’s Rejoinder, 24 Oct. 2007, p. 3.

<sup>123</sup> *Id.*, p.3.

<sup>124</sup> Counter-Memorial, p.22

102. Zimbabwe then invokes the defense that a state of necessity or emergency existed, which, in its submission, relieved Respondent of responsibility for complying with otherwise applicable provisions of the BIT. It submits that such state “began on 20 March 2000 and continued until 13 September 2005,” and that “[t]his rightfully suspended Respondent’s obligation to evaluate compensation at the date of such evaluation until 14 September 2005.”<sup>125</sup> In this respect, it invokes Zimbabwe domestic law, Article 7 of the BIT and customary International Law.

103. The Tribunal observes that, Zimbabwe domestic law may in this respect provide the Tribunal useful information on the situation which prevailed in Zimbabwe from 2002 to 2005. However, the Tribunal also notes that during that period there had been no state of emergency declared in that country. In any event, it is on the basis of the applicable rules of International Law that, in conformity with Article 9(3) of the BIT, the Tribunal must decide whether or not there was at the time a state of necessity which could have made lawful deprivation of property without compensation. In other words, ultimately international law, not the domestic law of Zimbabwe, must determine the effect any state of emergency would have on the dispute before the Tribunal.

104. The Tribunal recalls that Article 7 of the BIT provides that “[n]ationals of the one Contracting Party who suffer losses in respect of their investment in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own nationals or nationals of any third State, whichever is more favourable to the nationals concerned.”<sup>126</sup> Thus, and contrary to what the Respondent submits, Article 7 does not exonerate Contracting Parties from their obligation under Article 6 in

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<sup>125</sup> Rejoinder, p. 4.

<sup>126</sup> BIT, Art. 7.

case of national emergency or riot. It only provides in such a case for a further guarantee of equal treatment with nationals of the Contracting Party or nationals of Third Parties.

105. By contrast, according to the International Court of Justice, “the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.”<sup>127</sup> However “the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.”<sup>128</sup>

106. In the present case, Zimbabwe is invoking state of necessity, first, to explain its difficulties to face the situation resulting from the invasion of commercial farms by settlers and war veterans; second, to justify the measures of expropriation it took in the public interest. However, it never explains why such a state of necessity prevented it from calculating and paying the compensation due to the farmers in conformity with the BIT. The argument drawn on that point by the Respondent from the alleged state of necessity, therefore, cannot be upheld.

107. As a consequence, the Tribunal concludes that Zimbabwe breached its obligation under Article 6(c) of the BIT to pay just compensation to the Claimants. Accordingly, as stated in paragraph 98 above, the Tribunal does not need to consider whether other provisions of the BIT have been violated.

108. It remains for the Tribunal to fix the damages due to the Claimants. In this respect Zimbabwe submits that the damages must be calculated as specified in Article 6(c). For their part, the Claimants contend that the standard of compensation provided for in Article 6(c) is the standard applicable in case of lawful expropriation. By contrast, compensation due in case of

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<sup>127</sup> Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgement of 25 Sept. 1997, I.C.J. Reports 1997, para. 51, p. 37.

<sup>128</sup> *Ibid.*

unlawful expropriation must be calculated according to customary international law as decided by the Permanent Court of International Justice in the *Chorzow Factory* case.<sup>129</sup>

109. In that case, the Permanent Court made a distinction between lawful and unlawful expropriation. It held that, in case of lawful expropriation, the damages suffered must be repaired through the “payment of fair compensation” or “the just price of what was expropriated” at the time of the expropriation.<sup>130</sup> By contrast, it decided that, in case of unlawful expropriation, international law provides for *restitutio in integrum* or, if impossible, its monetary equivalent at the time of the judgment.

110. In recent years, there has been some debate on that distinction. The Iran-United States Claims Tribunal in the *Amoco* case observed in 1987 that, in spite of the fact that the *Chorzow Factory* case “is nearly sixty years old, this judgment is widely regarded as the most authoritative exposé of the principles applicable in this field and is still valid to day.”<sup>131</sup> More recently an ICSID Tribunal similarly held that the BIT’s standards of compensation apply only to lawful expropriations and that those standards “cannot be used to determine the issue of damages payable in the case of an unlawful expropriation.”<sup>132</sup> However, the contrary opinion has also been advanced<sup>133</sup> and case law is not perfectly clear in this respect,<sup>134</sup> in particular in case of lack of compensation.

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<sup>129</sup> Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17 (13 Sept.) [hereinafter Chorzow Factory].

<sup>130</sup> *Id.*, para. 47.

<sup>131</sup> *Amoco Inter’l Fin. Corp. v. Iran*, Partial Award, Iran-U.S. Cl. Trib., No. 310-56-3 (14 July 1987).

<sup>132</sup> *ADC Affiliate Ltd and ADC & ADMC Mgmt Ltd v. Hungary* (ICSID Case No. ARB/03/16), Award of 2 Oct. 2006, para. 481.

<sup>133</sup> See e.g., Michael W. Reisman and Robert D. Sloane, *Indirect expropriation and its valuation in the BIT Convention*, 2004 British Y.B. Int’l L., p. 133; Audley Sheppard, *The distinction between Lawful and Unlawful Expropriation, in the Investment Arbitratory and the Energy Charter Treaty*, 2006, p. 172.

<sup>134</sup> See, e.g., *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, 14 March 2003; *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award of 8 December 2000; *Metalclad Corp. v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award of 30 Aug. 2000; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002.

111. As the Iran-United States Claims Tribunal rightly observed in the *Amoco* case, “Obviously, the value of an expropriated enterprise does not vary according to the lawfulness or the unlawfulness of the taking . . . . The difference is that, if the taking is lawful the value of the undertaking at the time of the dispossession is the measure and the limit of the compensation, while if it is unlawful, this value is or may be, only a part of the reparation to be paid.”<sup>135</sup> In general, as the same Tribunal stated in the *Phillips Petroleum* case, “the lawful/unlawful taking distinction . . . is relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for increase of the value of the property between the date of the taking and the date of the judicial or arbitral decision awarding compensation.”<sup>136</sup>

112. In the present case, both Parties finally exclude restitution of the farms expropriated.<sup>137</sup> Moreover, it is not alleged that there was some increase of the value of those farms between the date of the taking and the date of the present award. Therefore, the major points of difference that distinguish computation of damages for lawful expropriation from computation of damages for unlawful expropriation are not here in issue.

113. However, the Parties diverge on the date of the evaluation of the damages suffered and on the method to be applied for such an evaluation.

114. On the first point, the Claimants submitted in their memorials that the damages must be evaluated at the date the investment was lost, i.e., the date of invasion of their farm by settlers and war veterans. However, at the hearing, they amended those submissions and accepted that when

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<sup>135</sup> *Amoco Inter'l Fin. Corp.*, para. 197.

<sup>136</sup> *Phillips Petroleum Co. Iran v. Iran*, Partial Award, Iran-U.S. Cl. Trib., No. 425-39-2 (28 June 1989), para 122.

<sup>137</sup> Claimants' Memorial, 16 March 2007, paras. 298–301; Respondent's Rejoinder, 24 Oct. 2007, p. 5.

Section 8 orders were issued, the dates of such orders be retained as the date of dispossession.<sup>138</sup> The Respondent, for its part, contends that, due to the state of necessity or emergency which prevailed from 2000 to 2005, there is no taking attributable to the State before 14 September 2005, date of the Constitution amendment.<sup>139</sup> However, it adds that “there was no market for land after 2000”<sup>140</sup> in Zimbabwe and that, as a consequence, the date of valuation must be 1999.

115. The Tribunal is of the opinion that the damages suffered by the Claimants must be evaluated at the date of dispossession. This is the rule both under general international law and under Article 6(c) of the BIT and the Respondent has not established that there was at the time any state of necessity precluding the application of such a rule (see paragraph 106, above). The identity of calculation under the BIT and general international law reinforces the Tribunal’s conclusion that arguments respecting the treatment of a violation of Article 6(c) as a lawful or unlawful expropriation need not be reached. The Tribunal is, however, called upon to fix the dates of dispossession which are in dispute.

116. In most cases, the Zimbabwe authorities issued in 2001 or 2002 orders under Section 8 of the Land Acquisition Act divesting the Claimants of their interest in their property. The Claimants ask the Tribunal to fix the date of evaluation of the damages at the date of those Orders, even when they had previously been forced to abandon their farms due to its invasion by settlers and war veterans. In these cases, accordingly, the Tribunal does not have to decide on the impact of those invasions. In all cases where Section 8 orders had been issued, it will retain the date of issuance of those orders in 2001 or 2002 as the date at which the damages are to be valued.

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<sup>138</sup> Hearing Transcripts, Day 1, 29 Oct. 2007, pp. 101–103.

<sup>139</sup> Hearing Transcripts, Day 2, 30 Oct. 2007, pp. 177–178.

<sup>140</sup> Examination of Mr. Sifelani Moyo, *ibid.*, p. 87.

117. However, in the case of Mr. van Duren (for Bimi Estate farm) and Mr. Benjamins (for R/E Preston Estate and R/E Roscommon farms), no Section 8 orders were issued. For Mr. Funnekotter (for R/E Warren farm), a Section 8 order was issued, but later withdrawn. Those Claimants, accordingly, submit that they were deprived of their property at the date of invasion of their property by settlers and war veterans in 2001 or 2002 and they contend that the Government of Zimbabwe is responsible for those events. The Respondent denies its responsibility for those invasions and maintains that the interests of those farmers were expropriated only in 2005 as the result of the amendment of the Constitution.

118. The Tribunal observes that, in those three cases, the Claimants were not deprived of their property or were only temporarily deprived of those properties by Section 8 orders taken under the Land Acquisition Act of 1992. However they were dispossessed of their farms under the Rural Land Occupiers (Protection from Eviction) Act of 2001. That Act qualified rural land occupiers as “Protected Occupiers.” It specified in its Article 3(2) that “[n]otwithstanding anything to the contrary in any other law, but subject to this Act, no Court shall issue any order for the recovery of possession from a protected occupier . . . .”<sup>141</sup> Under the same Article, ejection therefrom of a protected occupier and payment of damages by such occupier was also excluded. Those provisions were applicable to any rural land for which a Preliminary Section 5 notice had been issued. Similar provisions applied in case of issuance of Section 5 notices after June 2001.

119. In the case of R/E Warren farm, Section 5 notices were issued in June 2000 and June 2001. The first notice concerning that farm was withdrawn in November 2001 and a new notice was issued in March 2002. For Bimi Estate farm, a notice was issued in October 2000 and withdrawn in September 2002, at a date at which Mr. Van Duren and his family had already left their property. Notices concerning R/E Preston Estate and R/E Roscommon farms were issued in September 2001. It thus appears that the settlers and war veterans who occupied those three

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<sup>141</sup> Rural Land Occupiers (Protection from Eviction) Act, s. 3(2) (2001).

estates in 2001 were “protected occupiers” within the meaning of the Land Occupiers Act of 2001. Under that Act, the Claimants were unable to recover the possession of their land. In those circumstances, the Tribunal does not have to pronounce itself on the responsibility of Zimbabwe in the initial occupation of the farms. It is enough for the Tribunal to note that, under the Act, the Claimants have in fact lost the possession of their property in 2001. The Respondent is responsible for such a dispossession. The damage resulting from appropriation of these lands must be evaluated as of the date of entry into force of the Act, i.e. 5 June 2001.

120. In addition to their disagreement on the period over which the loss is to be calculated, the parties also disagree on the method of calculation of the damages. In this respect, the Claimants urge the Tribunal “to apply the standard of compensation set out in the *Chorzow Factory* case and use a measure of damages that ‘wipes out all the consequences of the illegal acts’” of Zimbabwe.<sup>142</sup> For that purpose, they produce valuations of their property on the basis of market value at the date of dispossession.

121. The Respondent recalls that, under Article 6(c) of the BIT, the compensation to be paid in case of expropriation “shall represent the genuine value of the investments affected.” Article 6(c) further declares that this value “shall include, but not exclusively, the net asset value thereof as certified by an independent firm of auditors.”<sup>143</sup> Zimbabwe requests the appointment of an independent firm of auditors to certify the net asset value of the farms, before determination by the Tribunal of the damages according to Article 6(c). However, Zimbabwe also provides the Tribunal with a valuation based on the market value of the lands expropriated and of the permanent improvements made to those lands.

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<sup>142</sup> Memorial, para. 296 (quoting *Chorzow Factory*).

<sup>143</sup> BIT, Art. 6(c).

122. The Tribunal first notes that compensation under Article 6(c) must represent the “genuine value of the investment [].” In certain cases, the net asset value, i.e., the value as recorded in the accounts, will not correspond to the genuine value. If the net asset value is lower than the genuine value, compensation will be higher than the net asset value.

123. In the present case, the Claimants assume that the net asset value of the investments is lower than the market value as they evaluate it.<sup>144</sup> The Respondent does not challenge this position and the Tribunal equally agrees with it. Thus, even if, as contended by Zimbabwe, Article 6(c) of the BIT was applicable to the calculation of the damages, it would not be necessary to obtain the certificate contemplated by that article before making that calculation. Whatever may be the basis of evaluation – general international law or Article 6 – the damages must correspond to the genuine value of the properties at the time of expropriation. The Tribunal, therefore does not have to consider whether, as submitted by the Claimants, the corresponding provisions of Article 6(c) could be put aside under the most favoured nation clause incorporated in the BIT.

124. At the hearing, the Respondent, however, contended that, in this calculation, account must be taken of the investment initially made, of the date of that investment and of the profit resulting in the past from the investment. It also submitted that discounting from the market value must be made in case of large scale nationalizations. The Tribunal observes that, under general international law as well as under the BIT, investors have a right to indemnities corresponding to the value of their investment, independently of the origin and past success of their investment,<sup>145</sup> as well as of the number and aim of the expropriations done.<sup>146</sup> It will accordingly proceed to the evaluation of the damages suffered in each case at the date of dispossession on the basis of the market value at that date.

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<sup>144</sup> Hearing Transcripts, Day 1, 29 Oct. 2007, pp. 136–37.

<sup>145</sup> See *Tokios Tokelès v. Ukraine* (ICSID Case No. ARB/02/18), Award of 26 July 2007.

<sup>146</sup> See *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award of 9 March 1998.

**C. EVALUATION OF THE DAMAGES**

125. In order to proceed to those evaluations, the Tribunal has at its disposal experts’ reports from both parties.

126. The Claimants have produced a report from Mr. Graham Charles Mullett, Managing Director of Redfern, Mullett & Company and Chairman of the Valuation Consortium, which recorded details of farms expropriated in terms of the current action. Mr. Mullett, in his report, gives information on the development and agricultural characteristics of Zimbabwe, as well as its economics history. He then summarizes the international and local practices for valuation of land. Using a data basis developed by the Consortium, he finally proceeds to an evaluation of each estate along the following lines:<sup>147</sup>

<b>OWNER</b>	<b>FARM DESCRIPTION</b>	<b>VALUATION (in Euros)</b>
B. H. Funnekotter	R/E Warren farm	1,050,000
B. H. Funnekotter	Anwa Farm	1,070,000
H. van Duren	Bimi Estate farm	940,000
M. van Duren	Warren A farm	780,000
D. R. Beytenbach	Faroe Estate farm	1,030,000
R. G. Fisher	Farways Farm	1,130,000
M. W. A. G. van Rechteren Limpurg	Chiripiro Farm	680,000
R. J. P. Walraven	Springdale Farm	770,000
W. J. Weller, L. Weller and J. P. Weller	R/E Ruia Ranch farm	640,000
L. H. Benjamins	R/E Roscommon farm and R/E Preston farm	550,000

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<sup>147</sup> See *supra* notes 36–47.

C. F. des Tombe	Rio Dora farm	910,000
E. Hansen	Whindale Ranch	1,140,000
	<b>TOTAL</b>	<b>10,690,000</b>

127. The Respondent produces an affidavit statement signed by Mr. Sifelani Moyo, Acting Deputy Director Valuation and Estate Management for the Ministry of Lands, Land Reform and Resettlement in which he explains the methods used by the Zimbabwe Authorities for valuation of rural lands and permanent improvements to those lands. On those basis, he evaluates the expropriated properties, as follows:<sup>148</sup>

<b>OWNER</b>	<b>FARM DESCRIPTION</b>	<b>VALUATION (in Euros)</b>
B. H. Funnekotter	R/E Warren farm	261,964
B. H. Funnekotter	Anwa Farm	51,507
H. van Duren	Bimi Estate farm	99,168
M. van Duren	Warren A farm	109,329
D. R. Breytenbach	Faroe Estate farm	52,819
R. G. Fisher	Farways Farm	20,157
M. W. A. G. van Rechteren Limpurg	Chiripiro Farm	36,917
R. J. P. Walraven	Springdale Farm	52,819
W. J. Weller, L. Weller and J. P. Weller	R/E Ruia Ranch farm	45,000
L. H. Benjamins	R/E Roscommon farm and R/E Preston farm	45,716
C. F. des Tombe	Rio Dora farm	51,000

<sup>148</sup> Respondent's Rejoinder, 24 Oct. 2007, Affidavit Statement of Mr. Sifelani Moyo, 24 Oct. 2007, and its annexes 2-14.

E. Hansen	Whindale Ranch	46,551
	<b>TOTAL</b>	<b>872,947</b>

128. Although the valuations advanced by the parties are very different, the Tribunal does not deem it necessary to have recourse to further expertise, which, in the circumstances of the case, would most probably not provide more useful information.

129. The difference appearing in the valuations results first of all from the fact that the experts of the parties do not use the same method. Mr. Mullett values each farm as a production unit at its market value in 2001/2002. Mr. Moyo evaluates first the arable land as such and then the permanent improvements made to the land, such as homestead, compound housing, other farm buildings, plantations, fencing, cattle, handling facilities, greenhouses or roads. He proceeds to this last valuation in calculating the Current Replacement Costs of those installations in 1999/2000 and in applying to those costs a depreciation rate. At the hearing, he justified this approach by reference to Zimbabwe domestic law. He recognized that “if the values had been combined, the amount was going to be more.”<sup>149</sup>

130. Tribunal observes that the genuine value of the properties does not correspond to the value of the arable land plus the estimated value of the various buildings and equipments which are necessary for the operation of the farms. Genuine value must be determined on the basis of the market value of the whole farm at the time of expropriation. Thus the figures advanced by Mr. Moyo are not computed properly according to law and arrive at computations of value that are obviously too low.

131. For his part, the Claimants’ expert based his computations on a correct starting point in respect of the valuation of a market value for the properties as a whole. There are, however, questions raised about his computations as well. Claimants’ expert, Mr. Mullett, submits that

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<sup>149</sup> Hearing Transcripts, Day 2, 30 Oct. 2007, pp. 96–97.

there was still in 2001/2002 a market for rural properties in Zimbabwe and that the price of those properties on that market had increased by around 15% from 1999 to 2002.<sup>150</sup> The Respondent denies it. The Tribunal observes that Mr. Mullett is basing his appreciation of the evolution of the prices in rural areas on the evolution of the prices in urban areas and in particular in Harare during those years. The Tribunal, however, is not convinced that, in the situation of Zimbabwe at that time, such a comparison is valid.

132. The Tribunal has carefully examined the various elements at its disposal for the evaluation of the properties concerned. For each of them, it considered the natural region in which it falls and the quality of the soils (dry arable land, good or rough grazing, irrigated land). It also took into account the production of the farms (tobacco, maize, wheat, flowers, vegetables, fruits, cattle, etc). It finally considered the equipments, their importance and their state (homestead, farm buildings, roads, fencing, irrigation systems, water and electricity facilities, greenhouses, etc.). It concludes that the damages suffered by the Claimants for loss of their immovable property is to be fixed as follows in Euros (currency of the nationality of the Claimants, as required in the present case by Article 6(c) of the BIT):

<b>OWNER</b>	<b>FARM DESCRIPTION</b>	<b>DAMAGES (in Euros)</b>
B. H. Funnekotter	R/E Warren farm	690,000
B. H. Funnekotter	Anwa Farm	700,000
H. van Duren	Bimi Estate farm	620,000
M. van Duren	Warren A farm	510,000
D. R. Breytenbach	Faroe Estate farm	680,000
R. G. Fisher	Farways Farm	740,000
M. W. A. G. van Rechteren Limpurg	Chiripiro Farm	450,000

<sup>150</sup> *Ibid.*, Day 1, 29 Oct. 2007, p. 145.

R. J. P. Walraven	Springdale Farm	500,000
W. J. Weller, L. Weller and J. P. Weller	R/E Ruia Ranche farm	420,000
L. H. Benjamins	R/E Roscommon farm and R/E Preston farm	360,000
C. F. des Tombe	Rio Dora farm	600,000
E. Hansen	Whindale Ranch	930,000
	<b>TOTAL</b>	<b>7,200,000</b>

133. Some of the Claimants also request compensation for moveable assets left behind when their farm was abandoned. They produce certificates emanating from the Valuation Consortium evaluating those assets as follows:<sup>151</sup>

<b>OWNER</b>	<b>FARM DESCRIPTION</b>	<b>DAMAGES (in Euros)</b>
B. H. Funnekotter	R/E Warren farm	568,898
H. and M. van Duren	Bimi Estate farm	195,958
D. R. Breytenbach	Faroe Estate farm	149,811
R. G. Fisher	Farways Farm	31,733
W. J. Weller, L. Weller and J. P. Weller	R/E Ruia Ranche farm	86,628
L. H. Benjamins	R/E Roscommon farm and R/E Preston farm	246,668
C. F. des Tombe	Rio Dora farm	92,490
E. Hansen	Whindale Ranch	38,198
	<b>TOTAL</b>	<b>1,410,384</b>

<sup>151</sup> See *supra* notes 36–41, 44–47.

134. The Respondent’s expert, Mr. Moyo considers that those “figures substantially overstate actual value of such moveables in Zimbabwe.” Accordingly, he “divid[ed] Claimants’ figures by 3 to arrive at a realistic value.”<sup>152</sup>

135. The Tribunal carefully considered the elements provided by the parties. It notes that some of the figures advanced by the Claimants seem too high, taking into account the economic situation prevailing in Zimbabwe in 2001/2002. It also observes that, in the valuation of the Consortium submitted on behalf of the Claimants in connection with Mr. Mullett’s report, no indication is given on the age and state of a number of moveables (such as tractors or vehicles). Finally, the Tribunal notes that some of the equipment mentioned as moveable assets must be considered as immovable assets<sup>153</sup> and that their loss already has been compensated on that ground.

136. In the light of those considerations the Tribunal evaluates the damages of the Claimants for loss of moveable assets as follows:

<b>OWNER</b>	<b>FARM DESCRIPTION</b>	<b>DAMAGES (in Euros)</b>
B. H. Funnekotter	R/E Warren farm	358,000
H. and M. van Duren	Bimi Estate farm	100,000
D. R. Breytenbach	Faroe Estate farm	100,000
R. G. Fisher	Farways Farm	17,000
W. J. Weller, L. Weller and J. P. Weller	R/E Ruia Ranch farm	58,000
L. H. Benjamins	R/E Roscommon farm and R/E Preston farm	167,000

<sup>152</sup> Respondent’s Rejoinder, 24 Oct. 2007, Tab 3: Affidavit Statement of Sifelani Moyo, Annex 18A; *see also ibid.*, Annex 18B for the figures of “Zimbabwean Valuation” of moveable assets.

<sup>153</sup> *See* statement by Mr. Mullett, Hearing Transcripts, Day 1, 29 Oct. 2007, p. 148.

C. F. des Tombe	Rio Dora farm	Nil
E. Hansen	Whindale Ranch	Nil
	<b>TOTAL</b>	<b>800,000</b>

137. In their Memorial, the Claimants finally submit that they must be compensated for the disturbance to them and their family from the decisions taken by Zimbabwe Authorities. They produce an analysis of those damages made by Mr. Mullett and each of them asks, on that basis, for USD40,000. The Respondent for its part, submits that “[t]he Claimants’ claims for disturbances . . . are not justified.”<sup>154</sup>

138. The Tribunal considers that the Claimants must obtain reparation for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country. It evaluates the damages suffered in this respect for each Claimant at 20,000 Euros.

139. At the hearing, the Claimants for the first time asked for 100,000 Euros for moral damages.<sup>155</sup> The Respondent contends that those claims are not justified.<sup>156</sup>

140. The Tribunal considers that those new claims partially concern damages already compensated by the allocation of a disturbances indemnity. In any event, those claims were formulated briefly and only at a very late stage of the proceedings and are, therefore, for that reason inadmissible.<sup>157</sup>

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<sup>154</sup> Hearing Transcripts, Day 3, 31 Oct. 2007, p. 62.

<sup>155</sup> *Ibid.*, Day 1, 20 Oct. 2007, pp. 96–97, 109, 115–116; *ibid.*, Day 3, 31 Oct., 2007, pp. 20, 38.

<sup>156</sup> *Ibid.*, Day 3, 31 Oct. 2007, p. 62.

<sup>157</sup> See Case Concerning the Legality of Use of Force (Serbia and Montenegro v. Netherlands), Order of 2 June 1999, I.C.J. Reports 1999, para. 43, p. 556.

#### D. INTERESTS AND COSTS

141. The parties agree that interest must be awarded on the sums granted by the Tribunal. They diverge on the date of departure of the interest and on their rate. Moreover, the Claimants are contending that compound interest is required in the circumstances of this arbitration, which is denied by the Respondent.

142. The point of departure of the interest is not February 2000 as submitted by the Claimants,<sup>158</sup> nor 2005 as contended by the Respondent. It is the date at which the Claimants have been dispossessed of their property, determined in each case calculated as decided in paragraphs 116 and 119, above.

143. The Claimants produce a witness statement from a Chartered Accountant, Mr. Duncan Owen, determining “the interest rate that the claimants could expect to earn on their foreign invested money if they had invested it in Zimbabwe over the period that their farms and other property were taken by the Respondent.”<sup>159</sup> Mr. Owen considers that a fair return on that money would be at minimum 16.87%. He confirmed this appreciation at the hearing without this figure being then contested by the Respondent.<sup>160</sup> The Claimants however are only asking for a 10% rate of interest “based on the LIBOR rate plus a political risk.”<sup>161</sup> The Respondent did not mention any rate. It only briefly stated that “[t]he interest to be applied should be the legally recognized interest rate applicable to the currency of payment,”<sup>162</sup> which was denied by Mr. Owen.<sup>163</sup>

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<sup>158</sup> Claimants’ Memorial, 16 March 2007, para. 303.

<sup>159</sup> Witness Statement of Duncan Owen, 23 Oct. 2007, para. 3.

<sup>160</sup> Hearing Transcripts, Day 2, 30 Oct. 2007, pp. 20–27.

<sup>161</sup> *Ibid.*, Day 1, 29 Oct. 2007, p. 115 (referring to London Interbank Offered Rate (LIBOR), “the rate of interest at which . . . international banks borrow funds from each other.” Mr. Duncan Owen’s Witness Statement, 23 Oct. 2007).

<sup>162</sup> *Ibid.*, Day 3, 31 Oct. 2007, p. 62.

<sup>163</sup> *Ibid.*, Day 2, 30 Oct. 2007, p. 29.

144. The Tribunal observes that, if Zimbabwe had in due time paid to the Claimants the indemnity due to them, they would have been able to invest that sum in the currency of their choice. But this is not the case: compensation was not paid promptly at the time of dispossession, and the Claimants were therefore not able to make any investment outside of Zimbabwe. Thus, the Tribunal must use a rate of interest taking into account the situation in that country. A 10% rate seems in this respect reasonable.

145. The Claimants are requesting compound interest on a monthly basis.<sup>164</sup> The Respondent contends that “the principle of compound interest has a punitive element” which is not justified in the present case.<sup>165</sup>

146. The Tribunal does not share that appreciation. As stated rightly by an ICSID Tribunal, “[i]t is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that compensation awarded to the Claimant is appropriate in the circumstances.”<sup>166</sup> This explains why, in many ICSID cases, such compound interests have been granted.<sup>167</sup> In the present case, it seems to the Tribunal appropriate to decide that the 10% interest will be compounded every six months.

147. In different circumstances, the Tribunal would be minded to follow the general practice in international arbitration that, as submitted by the Claimants, successful party under an award should recover its legal costs. However, such an approach would not be completely appropriate, in the present case, taking into account the situation in Zimbabwe in 2001/2002. In the exercise

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<sup>164</sup> *Ibid.*, Day 3, 31 Oct. 2007, p. 22.

<sup>165</sup> Respondent’s Counter-Memorial, 6 July 2007, p. 29.

<sup>166</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica (ICSID Case No. ARB/96/1)*, Award of 17 February 2000, para. 104.

<sup>167</sup> *See, e.g., Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/99/6)*, Award of 12 April 2002, para. 175.

of its discretion, the Tribunal therefore decides that:

- (a) the costs of the parties' own representation before the Tribunal will remain at their charge;
- (b) the fees and expenses of the Tribunal and charges of ICSID will be borne by the Respondent, who will reimburse the Claimants of the sums advanced by them in this respect.

#### **IV. DISPOSITIVE PART OF THE AWARD**

148. For the reasons set out earlier in this award, the Tribunal decides that :

1. The Respondent has breached its obligations under Article 6(c) of the BIT;
2. The Respondent shall pay the Claimants within three months of the date of dispatch of this Award the following amounts, in Euros:

<b>OWNER</b>	<b>FARM DESCRIPTION</b>	<b>DAMAGES (in Euros)</b>
B. H. Funnekotter	R/E Warren farm	1,058,000 <sup>168</sup>
B. H. Funnekotter	Anwa Farm	710,000
H. van Duren	Bimi Estate farm (immoveable property and disturbance)	640,000
M. van Duren	Warren A farm (immoveable property and disturbance)	530,000
H. and M. van Duren	Bimi Estate farm and Warren A (moveable assets)	100,000
D. R. Breytenbach	Faroe Estate farm	800,000
R. G. Fisher	Farways Farm	777,000

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<sup>168</sup> The indemnity of 20,000 Euros for disturbance has been split equally between the two farms owned by Mr. Funnekotter.

M. W. A. G. van Rechteren Limpurg	Chiripiro Farm	470,000
R. J. P. Walraven	Springdale Farm	520,000
W. J. Weller, L. Weller and J. P. Weller	R/E Ruia Ranche farm	498,000
L. H. Benjamins	R/E Roscommon farm and R/E Preston Estate farm	547,000
C. F. des Tombe	Rio Dora farm	620,000
E. Hansen	Whindale Ranch	950,000
	<b>TOTAL</b>	<b>8,220,000</b>

3. The Respondent shall pay 10% interest compounded every six month on such amounts from the following dates, until full payment of those amounts.

B. H. Funnekotter (for R/E Warren farm)	5 June 2001
B. H. Funnekotter (for Anwa Farm)	16 September 2002
H. and M. van Duren (for Bimi Estate farm and moveable assets)	5 June 2001
M. van Duren (for Warren A farm)	12 December 2001
D. R. Breytenbach (for Faroe Estate farm)	26 April 2002
R. G. Fisher (for Farways Farm)	14 May 2002
M. W. A. G. van Rechteren Limpurg (for Chiripiro Farm)	18 January 2002
R. J. P. Walraven (for Springdale Farm)	30 October 2002
W. J. Weller, L. Weller and J. P. Weller (for R/E Ruia Ranche farm)	31 December 2002

L. H. Benjamins (for R/E Roscommon farm and R/E Preston Estate farm)	5 June 2001
C. F. des Tombe (for Rio Dora farm)	26 November 2001
E. Hansen (for Whindale Ranch)	31 July 2002

4. The parties shall bear all their respective expenses and fees related to this proceeding.
5. The Respondent shall bear the fees and expenses of the Tribunal and the charges of ICSID. It will therefore reimburse the Claimants the sum of USD225,000 advanced by them, in this respect.

**H.E. JUDGE GILBERT GUILLAUME**

DATE: *Gilbert Guillaume*  
7 April 2009

*Ronald A. Cass*  
**DEAN RONALD A. CASS**

DATE: 15 April 2009

*Mohammad Wasi Zafar*  
**H.E. MR. MOHAMMAD WASI ZAFAR**

DATE: 01-04-09