UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELISABETH REGINA MARIA GABRIELLE VON PEZOLD, *et al.*,	)	
Petitioners,	)	
v.	)	**Case No. 1:21-cv-02004 (APM)**
THE REPUBLIC OF ZIMBABWE,	)	
Respondent.	)	

MOTION TO DISMISS AND SUPPORTING STATEMENT OF POINTS AND AUTHORITIES

Respondent, the Republic of Zimbabwe ("Zimbabwe"), through undersigned counsel, hereby files its Motion to Dismiss (the "Motion") the Petition to Recognize Arbitration Award Pursuant to 22 U.S.C. § 1650a (the "Petition"), and in support, Zimbabwe states as follows:

INTRODUCTION

After decades of history in Zimbabwe, and as owners of thriving estates, Petitioners chose to bring nearly identical arbitration claims against Zimbabwe pursuant to treaties that provide greater compensation than that available under local law but expressly limit the ability to enforce any award outside Zimbabwe. Once they received their award, Petitioners have continued to seek double recovery while not complying with basic, mandatory rules regarding service of process or showing that they have standing. This is not the court for Petitioners' claims, especially in the way they are presented, and the Court should dismiss the Petition for the following reasons:

- This Court lacks subject matter jurisdiction because Petitioners brought suit under treaties that restrict Zimbabwe's immunity to enforcement within Zimbabwe.

- Venue is improper in the United States because the parties chose to litigate enforcement exclusively in Zimbabwe.

- Petitioners do not state an actionable claim because they are violating the terms of the Award regarding enforcement, while also seeking double recovery. In addition, they have lost their right to enforce part of the arbitration award, choosing to receive full compensation through a separate, private transaction.

- Petitioners failed to properly serve Zimbabwe by attempting service on a long-deceased public official and not sending the proper notice of suit.

- After the death of one of the Award creditors, Rüdiger von Pezold, Petitioners have not shown that they have standing and the right to sue in Rüdiger's name.

Based on the reasons stated above and elaborated herein, Zimbabwe seeks dismissal of the Petition.

BACKGROUND

The Petition arises from an arbitration award between the Petitioners and Zimbabwe regarding land reform in Zimbabwe. Award, ECF 1-2, ¶ 2. There were nine claimants in the arbitration: Elisabeth Regina Maria Gabriele von Pezold ("Elisabeth"), Bernhard Friedrich Arnd Rüdiger von Pezold ("Rüdiger," together with Elisabeth, the parents), Anna Eleonore Elisabeth Webber (née von Pezold), Heinrich Bernd Alexander Josef von Pezold ("Heinrich"), Maria Juliane Andrea Christiane Katharina Batthyàny (née von Pezold), Georg Philipp Marcel Johann Lukas von Pezold, Felix Alard Moritz Hermann Kilian von Pezold, Johann Friedrich Georg Ludwig von Pezold, and Adam Friedrich Carl Leopold Franz Severin von Pezold (collectively, the "von Pezolds"). Award, ECF 1-2, ¶ 9. Rüdiger von Pezold was a German national and only sought relief under the Germany – Zimbabwe Bilateral Investment Treaty (the "German Treaty"). Award, ECF 1-2, ¶ 88, FN 21. The other eight claimants purported to be citizens of both Germany and Switzerland, and they sought relief under the German Treaty and the Switzerland – Zimbabwe Bilateral Investment Treaty (the "Swiss Treaty"). Award, ECF 1-2, ¶10.

On June 11, 2010, the International Center for the Settlement of Investment Disputes ("ICSID") received a Request for Arbitration from the von Pezolds (the "von Pezold Arbitration"). Award, ECF 1-2, ¶ 9. Less than six months later, Border Timbers Limited ("Border"), Timber Products International Private Limited ("Border International"), and Hangani Development Co. (Private) Limited ("Hangani") (collectively, the "Border Claimants") filed a Request for Arbitration before ICSID (the "Border Arbitration"). Award, ¶ 12. At that time, the von Pezolds controlled the Borders Claimants. Award, ECF 1-2, ¶ 12. The claims by the von Pezolds were essentially identical to the claims by the Border Claimants, so much so that the Tribunal used the word "Claimants" to refer to both the von Pezolds and the Border Claimants. Award, ECF 1-2, ¶ 14.

After written submissions and a hearing in November 2013, the Tribunal issued its award in the von Pezold Arbitration (the "von Pezold Award") on July 28, 2015. The von Pezold Award is lengthy, totaling 328 pages with hundreds of pages of annexes. On the same day, the Tribunal issued its award in the Border Arbitration (the "Border Award," collectively, the "Awards"). For the purposes of the Motion, certain findings of fact and law in the von Pezold Award are relevant.

The Tribunal found that, "[t]he Parties' arbitration agreements are contained in the respective BITs," using the acronym "BITs" (Bilateral Investment Treaties) to refer to the German and Swiss Treaties. Award, ECF 1-2, ¶ 86. It further stated that Zimbabwe consented to arbitration through the German and Swiss Treaties. Award, ECF 1-2, ¶ 199. The Tribunal included the entirety of the relevant articles on resolution of disputes, which included the limitations that Zimbabwe addresses below. Award, ECF 1-2, ¶¶ 86-87.

The case centered on three "estates" that contained different amounts of land and activities: Forrester, Border, and Makandi. Through various corporate vehicles, Petitioners owned, directly

or indirectly, 100% of Forrester (ECF 1-2, ¶ 120); 86.49% of Border (ECF 1-2, ¶ 127); and 50% of Makandi (ECF 1-2, ¶ 135). Based on the breaches of the treaties, the share capital of the corporate entities is "said to be worthless." Award, ECF 1-2, ¶¶ 143, 150, and 154. Despite the treaty breaches, all of the estates "are thriving." Award, ECF 1-2, ¶ 159.

Petitioners received an award of compensation (or restitution in lieu of part of the compensation) for both the land and its improvements. The Tribunal cited the 2013 Zimbabwe Constitution, which granted this right only to foreign nationals protected by a bilateral investment treaty. Award, ECF 1-2, ¶ 162. Other non-indigenous Zimbabweans were only owed compensation for improvements on their land. *Ibid*.

After the issuance of the Awards, Petitioners "substantially disposed of their interests" in Border Timbers Ltd. *Heinrich Bernd Alexander Josef von Pezold v. Border Timbers Ltd*., Judgment, ¶ 8 [2020] EWHC 2172 (QB)[1] (known as *Heinrich v. BTL*). Zimbabwe does not know the terms of this transaction, but it appears that the von Pezolds no longer own Border. *Id*.

Zimbabwe sought annulment of the Awards, which the *ad hoc* Committee rejected on November 21, 2018.

Events since the Awards

After the Awards, things changed for the Border Claimants. In Zimbabwe, the Border Claimants sought a form of bankruptcy protection. *See Heinrich v. BTL*, ¶ 6. Heinrich and his family sold their interests in the Border Claimants and purportedly entered into an agreement with the Border Claimants whereby Heinrich financed the Border Claimants' cost of the annulment litigation. *See Heinrich v. BTL*, ¶ 8. In exchange, Heinrich claims to own the right to sign off on

[1] https://www.fountaincourt.co.uk/wp-content/uploads/Von-Pezold-v-Border-Timbers-Ltd-2020-EWHC-2172-QB-00000002.pdf (last visited on Nov. 19, 2021).

any settlement between the Border Claimants and Zimbabwe. *Id*. Litigation between Heinrich and the Border Claimants is ongoing in London.

Rüdiger died after his testimony in the arbitration but before the filing of the Petition. See Petition, ECF 1, ¶ 7. In the annulment proceedings, Zimbabwe received notification of Rüdiger's death and a power of attorney from Elisabeth, purporting to act on behalf of Rüdiger's estate, but it has received nothing further. Petitioners attached nothing as to Elisabeth's purported right when filing their claim before this Court.

ARGUMENT

I. The Petitioners have failed to allege subject matter jurisdiction

A "Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Molock v. Whole Foods Mkt., Inc*., 297 F.Supp.3d 114, 122 (D.D.C. 2018), *aff'd on other grounds sub nom., Molock v. Whole Foods Mkt. Grp., Inc*., 952 F.3d 293 (D.C. Cir. 2020) (citing *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F.Supp.2d 9, 13 (D.D.C. 2001)). Hence, the "factual allegations in the complaint will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Ibid*.

The Foreign Sovereign Immunities Act (the "FSIA") "must be applied by the district courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). The FSIA provides the only basis for piercing the veil of foreign sovereign immunity. *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015), *quoting Argentine Republic v. Amerada Hess Shipping*

Corp., 488 U.S. 428, 434 (1989); *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 86 (D.C. Cir. 2005).

The "basic objective of foreign sovereign immunity is to free a foreign sovereign from suit." *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 584 (D.C. Cir. 2020) (citing *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S.Ct. 1312, 1317 (2017)). Courts must therefore decide on issues of immunity "as near to the outset of the case as is reasonably possible" and "before the sovereign is required to defend on the merits." *Ibid.*; *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983) (holding that questions regarding immunity must be decided "[a]t the threshold of every action."); *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) ("to preserve the full scope of that immunity, the district court must make the critical preliminary determination of its own jurisdiction as early in the litigation as possible; to defer the question is to frustrate the significance and benefit of entitlement to immunity from suit.") (internal quotations omitted).

In deciding a motion under Rule 12(b)(1), the court may "consider materials outside of the pleadings." *Gordon v. Office of the Architect of the Capitol*, 750 F.Supp.2d 82, 87 (D.D.C. 2010) (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)); *see also Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (holding that if the defendant "contest[s] a jurisdictional fact alleged by the plaintiff" or "raise[s] a mixed question of law and fact," the court "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss."). Because sovereigns are presumably immune, the burden of proof falls squarely on the plaintiff to prove that one of the FSIA statutory exemptions applies. *See Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013) ("FSIA begins with a presumption of immunity, which the

plaintiff bears the initial burden to overcome by producing evidence that an exception applies."); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002). If Petitioners fail to establish subject matter jurisdiction, the Court must dismiss the claim. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Gordon v. Off. of the Architect of the Capitol*, 750 F.Supp.2d 82, 86-87 (D.D.C. 2010).

To plead subject matter jurisdiction, Petitioners cite, in passing, 28 U.S.C. § 1605(a)(1), which provides for jurisdiction where a foreign state has explicitly or implicitly waived its immunity, and the arbitration exception under 28 U.S.C. § 1605(a)(6), which requires an "agreement to arbitrate" followed by a number of exceptions to immunity. *See* Petition, ECF 1, ¶ 6.[2] But they have not alleged any facts or legal basis underlying their assertion of a waiver of sovereign immunity. On its own, this is a fundamental error that falls far short of the burden required by courts in this Circuit.

Zimbabwe must instead guess at Petitioners' basis for subject matter jurisdiction. It appears that Petitioners are looking for either a waiver of, or exception to, sovereign immunity in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") or the German or Swiss Treaties. There are no other signed writings that could constitute a waiver of Zimbabwe's immunity. To interpret these treaties, Zimbabwe turns to the dictates of the Supreme Court, which has provided the applicable legal standard.

[2] Petitioners also cite 28 U.S.C. § 1610(a)(1) and (6), but these provisions apply to proceedings following a judgment, not before the judgment. *See* Petition, ¶ 5. The first provision, 1610(a)(1), is inapplicable since the ICSID Convention expressly preserves immunity from attachment in Article 55. The second provision, 1610(a)(6) contains precisely the limitation identified by Zimbabwe since the "arbitration agreement" between Petitioners and Zimbabwe includes a limitation on enforcement.

"As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *BG Group v. Argentina*, 572 U.S. 25, 37 (2014) (citing *Air France v. Saks*, 470 U.S. 392, 399 (1985) (courts must give "the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.") (further citations omitted)). Courts begin "with the text of the treaty and the context in which the written words are used," applying all "general rules of construction." *United States v. Park*, 938 F.3d 354, 365 (D.C. Cir. 2019) (quoting *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991)); *see also Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty . . . begins with its text."); *Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 862 (D.C. Cir. 2015) ("Interpretation of a contract, like statutory and treaty interpretation, must begin with the plain meaning of the language.") (citations and quotations omitted).

As Zimbabwe will show, none of the three treaties in question defeats the presumption of immunity.

A. Any implicit waiver of immunity under 1605(a)(1) requires the foreign state to indicate its "amenability to suit," which is not found in the ICSID Convention or the German or Swiss Treaties

Starting with Petitioners' first citation, 1605(a)(1) provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States" when the "foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." 28 U.S.C. § 1605(a)(1). An implicit waiver is said to exist where a foreign sovereign "at some point indicated its amenability to suit." *See Turan Petroleum, Inc. v. Ministry of Oil and Gas of Kazakhstan*, 406 F.Supp.3d 1, 11 (D.D.C. 2019), (citing *Strange v. Islamic Republic of Iran*, 320 F.Supp.3d 92, 98 (D.D.C. 2018)). The D.C. Circuit has found an implicit waiver under Section

1605(a)(1) where: "(1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that the law of a particular country governs a contract; or (3) a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." *Tatneft v. Ukraine*, 301 F.Supp.3d 175, 191–92 (D.D.C. 2018) (citing *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990)); *Turan Petroleum*, 406 F.Supp.3d at 11, *quoting Odhiambo v. Republic of Kenya*, 930 F.Supp.2d 17, 24 (D.D.C. 2013) (holding that these examples "demonstrate that the theory of implied waiver contains an intentionality requirement.").

1. Without the existence of a separate consent in writing, the ICSID Convention is no implicit waiver of immunity pursuant to 1605(a)(1)

On their face, none of the three requirements from *Tatneft* apply to the ICSID Convention.[3] The ICSID Convention does not require arbitration in another country because ICSID arbitration does not have a juridical seat. *See* Georges R. Delaume, *ICSID Arbitration Proceedings: Practical Aspects*, 5 Pace Law Review 563, 574 (1985).[4] Any other reading would lead to absurd results. The United States is a Contracting State, and even though ICSID is located in Washington D.C., it does not mean that only the United States kept its immunity while every other nation renounced its own. The other two indications of an implicit waiver easily fail. There is no "contract" at issue, and the ICSID Convention does not call for the application of a law outside that of a foreign state. There is only the law "agreed" to by the parties, the law of the foreign state that is a party to the dispute, or international law, which forms part of every country's law and is not foreign to it. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other

[3] Because there is no serious argument that Zimbabwe expressly waived its immunity in the ICSID Convention, the German Treaty, or the Swiss Treaty, Zimbabwe has not addressed the possibility. Naturally, Zimbabwe objects to any such allegation, should Petitioners make it.

[4] https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1586&context=plr (last visited on Nov. 19, 2021).

States, art. 42(1), *opened for signature* Mar. 28, 1965, 17 U.S.T. 1270 (hereinafter the "ICSID Convention"). Any other selection of law is outside the terms of the ICSID Convention. The third factor is inapplicable since Zimbabwe is filing its responsive pleading while asserting its defense of sovereign immunity.

That being said, some courts have focused on the enforcement mechanism in the ICSID Convention to reach a contrary result. Article 54 requires that Contracting States "shall" recognize an award rendered pursuant to the ICSID Convention and enforce its pecuniary obligations. *See* ICSID Convention, art. 54(1); *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 104 (2d Cir. 2017). But this conclusion cannot follow based only on ratification of the ICSID Convention.

Standing alone, ratification of the ICSID Convention does not indicate an "amenability to suit." *Turan Petroleum*, 406 F.Supp.3d at 11. The purpose of ICSID is to "provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States." ICSID Convention, art. 1(2). Upon becoming a Contracting State, the foreign state has created for itself the option to use ICSID arbitration in the future. But there can be no arbitration against the foreign state based only on the ICSID Convention. Any "amenability to suit" must therefore come through a separate instrument, such as a contract or treaty, where "the parties to the dispute consent in writing to submit to the Centre [ICSID]." *See* ICSID Convention, art. 25(1); CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 190-191 (2nd ed. 2009) (**Exhibit 1)**. Where there is no separate agreement, there is no lawsuit. Numerous examples prove this to be true. Take the case of Fiji, which is a Contracting State.[5] Of the four investment

[5]*See* ICSID, *Database of ICSID Member States*, https://icsid.worldbank.org/about/member-states/database-of-member-states (last visited Nov. 19, 2021).

treaties it has ratified, none provides for arbitration pursuant to the ICSID Convention.[6] There are no ICSID cases against Fiji, and there will not be any until Fiji has ratified a treaty, entered into an investment agreement, or passed a law whereby it consents to arbitration pursuant to the ICSID Convention. If the ICSID Convention were the sole instrument that showed an "amenability to suit," then Fiji would have long ago waived its immunity. The impossibility of any cases against Fiji shows otherwise.

In the case of Zimbabwe, there are examples of a similar nature. Zimbabwe has signed, but not ratified,[7] BITs with Mauritius,[8] Croatia,[9] and the Czech Republic,[10] among other nations. These three countries, along with Zimbabwe, are all Contracting States to the ICSID Convention.[11] If the ICSID Convention were an implied waiver of immunity, then there could be awards pursuant to the treaties with Mauritius, Croatia, and the Czech Republic. This is, of course, impossible, since there is no ratified BIT with each of these three countries.

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[6] The State Department has confirmed that the ICSID Convention is not applicable. *See* U.S. Department of State, *2021 Investment Climate Statements: Fiji*, https://www.state.gov/reports/2021-investment-climate-statements/fiji/ (last visited Nov. 19, 2021).

[7] *See* UNCTAD, *International Investment Agreements Navigator, Zimbabwe, Bilateral Investment Treaties (BITs)* (Nov. 19, 2021) https://investmentpolicy.unctad.org/international-investment-agreements/countries/233/zimbabwe

[8] *See Agreement for the Promotion and Reciprocal Protection of Investments, Mauritius-Zimbabwe*, Art. 8(6), May 17, 2000, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1998/download (requiring arbitration according to rules set by the arbitrators with "reference to" the ICSID Convention, not direct application of it.).

[9] *See Agreement on the Reciprocal Promotion and Protection of Investments, Croatia-Zimbabwe*, February 18, 2008, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/898/download

[10] *See Agreement for the Promotion and Reciprocal Protection of Investments, Czech Republic-Zimbabwe*, September 13, 1999, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1001/download

[11] *See* ICSID, *Database of ICSID Member States*, https://icsid.worldbank.org/about/member-states/database-of-member-states (last visited Nov. 19, 2021).

The context of the ratification of the ICSID Convention by the United States also does not support an implicit waiver. At the time the United States ratified the ICSID Convention in 1966 and adopted implementing legislation (also in 1966), foreign countries still had access to immunity from jurisdiction, even if their activities were "commercial." As detailed by the Supreme Court, until a decade later in 1976, foreign countries could lobby for immunity from any action. *Verlinden*, 461 U.S. 487-88. Courts were free to make their own determinations (*id*., at 488), and foreign countries could unilaterally withdraw a waiver of sovereign immunity. *See* H.R. REP. 94-1487, 18. Assuming, as we must, that Congress knew the then-existing law, the absence of any mention of a waiver of immunity is telling. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) ("legislature says in a statute what it means and means in a statute what it says there"). A sovereign state could have easily obtained complete immunity from an ICSID award in 1967, and any change in this analysis only came with the FSIA and its focus on future waivers, none of which could come from the ICSID Convention, finalized long before the FSIA.

In this way, and others, the ICSID Convention is quite different from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Upon ratification (and implementation, if necessary) of the New York Convention, the courts of a foreign state had to recognize and enforce foreign arbitral awards, regardless of whether the foreign state was a party to any contract. This simply does not exist with the ICSID Convention, which does not require any recognition or enforcement unless a foreign state later opts-in to the ICSID system through a separate instrument, such as a treaty, contract, or investment law. *See* United Nations Conference on Trade and Development, *Dispute Settlement, 2.3 Consent to Arbitration*,

UNCTAD/ED/Misc.232/Add.2, at 7-9, 11-15, 17-21 (2003)[12] (hereinafter, the "UNCTAD Guide").

In sum, the ICSID Convention is nothing more than a facility to resolve disputes, and unless it comes coupled with some other consent to arbitration, it does not indicate an "amenability to suit" and cannot serve as the basis for an implicit waiver of sovereign immunity.

2. The German Treaty precludes any waiver pursuant to 1605(a)(1)

Neither the German nor the Swiss Treaty demonstrate an "amenability to suit" in the United States. The opposite is true. In both treaties, the parties committed to enforcement outside the United States, meaning they did not waive their immunity from suit within the United States. Zimbabwe addresses first the German Treaty followed by the Swiss Treaty.

The German Treaty makes significant limitations on enforcement that are encapsulated in Article 11(3): "[t]he award shall be enforced in accordance with the domestic law of the Contracting Party in the territory of which the investment in question is situated." Starting with the plain meaning of the sentence, it hinges on the verb "shall," which is mandatory and does not give Rüdiger (or the owner of his right) the ability to do anything but comply with the requirements that follow. *See D & S Consulting, Inc. v. Kingdom of Saudi Arabia*, 961 F.3d 1209, 1213 (D.C. Cir. 2020) (describing the forum-selection clause which notes that "[t]he grievance council shall be assigned for settlement of any disputes…" as mandatory) (emphasis added); *Marra v. Papandreou*, 216 F.3d 1119, 1120-1121 (D.C. Cir. 2000) (holding that a forum selection clause stating that "any dispute[s]…shall be settled by the Greek courts" was mandatory rather than permissive). The words "in accordance with the domestic law of the Contracting Party" can only

[12] https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf. (last visited on Nov. 19, 2021.

refer to either Germany or Zimbabwe—although not defined, the term "Contracting Party" is capitalized and must refer to the two countries that signed the treaty. And "domestic law" certainly does not mean federal law or the law of any state in the United States, neither of which are "domestic" to Zimbabwe or Germany.

Having required that the award must be enforced in accordance with German or Zimbabwean law, the remaining words to analyze continue with "in the territory." Courts should give effect to every word (*Bowsher v. Merck & Co., Inc.*, 103 S.Ct. 1587, 1593 (1983)), and after the treaty has already referenced "domestic law," the words "in the territory" cannot reasonably describe "domestic law" since "domestic law" does not need a territorial demarcation. Indeed, a reader will easily discern that "domestic law" applies within the boundaries of a country without the need for a further description such as "in the territory." To preserve the meaning of "in the territory," the best approach is to read it as an adverbial prepositional phrase that modifies the verb phrase "shall be enforced." Viewed this way, "in the territory" has its own meaning and shows where the award must be enforced. This interpretation also fits well with the thrust of the sentence, which has a decidedly local intent, requiring enforcement "in accordance with the domestic law." The remaining words, "of which the investment in question is situated," clarify that enforcement can only occur where the investment is located, which in this case is Zimbabwe (and not Germany).

Any reading that removes the territorial limit will prove unworkable. If this Court were to attempt to enforce the von Pezold Award in accordance with Zimbabwean law, then it would have to apply Zimbabwean law to the entirety of the proceeding. This is not a situation where the Court could apply only substantive Zimbabwean law, such as in the interpretation of a contract. The substantive decisions regarding the dispute are finished. Instead, future decisions will involve such issues as service of process and sovereign immunity. And choice of law clauses are foreign to

enforcement proceedings. Once a court has applied the parties' choice of law to the underlying dispute, enforcement becomes largely procedural in nature, with the creditor looking at the remedies available in that court, not a remedy available in some other country. *See* UNCTAD Guide, at 5; *see also* UNCITRAL Model Law on Cross-Border Insolvency, (c) (1997).[13]

In short, a plain meaning interpretation of the German Treaty requires for enforcement in Zimbabwe and in accordance with Zimbabwean law. Through the choice of language in the German Treaty, Zimbabwe limited enforcement to its courts, and without any waiver in the treaty, this limitation should be respected.

3. Similarly, in the Swiss Treaty, the text precludes any waiver pursuant to 1605(a)(1)

Although the language in the Swiss Treaty is different, it leads to the same result. The Swiss Treaty provides that "[t]he arbitral award shall be final and binding for the parties involved in the dispute and shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located." Art. 10(6). While the Swiss Treaty does not have the words "in the territory" like the German Treaty, the selection of either Swiss or Zimbabwean law as applicable is a defining feature.

As discussed above, the Contracting Parties' selection of law is proof of the intent to limit possible enforcement jurisdictions. Article 10(6) uses the mandatory verb "shall" and moves straight to requiring application of "the laws of the Contracting Party in which the investment in question is located." For the same reasons as the German Treaty, "Contracting Party" can only

[13] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (acknowledging that the Model Law does not impose on the "foreign proceedings the relief that would be available under the law of the enacting State") (last visited on Nov. 19, 2021). The United States has adopted the UNCITRAL Model Law on Cross-Border Insolvency. *See In re Iida*, 377 B.R. 243, 256 (B.A.P. 9th Cir. 2007).

mean Switzerland or Zimbabwe, pointing the reader to apply the law of one of those two countries based on where "the investment in question is located." This selection excludes the United States and leaves intact Zimbabwe's immunity from suit in this country.

B. The relevant "agreement to arbitrate" does not provide an exception to immunity

An exception to sovereign immunity arises under 1605(a)(6) when there is an "agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not." This agreement then allows the private party to "confirm an award made pursuant to such an agreement to arbitrate" under one of four options:

> [I]f (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

Each of these subsections is thus subject to the "agreement to arbitrate," since the award must be made "pursuant to" the "agreement to arbitrate." Subsections (A) to (D) do not change this basic structure. As described in subsection (A), an arbitration can only take place pursuant to the "agreement to arbitrate." The same is true of subsection (B) since any "agreement or award" comes from the "agreement to arbitrate." Subsection (C) relates to a different circumstance where the foreign state could not have expected immunity because the entirety of the dispute could have equally occurred in U.S. courts. Subsection (D) points to 1605(a)(1), addressed above, and serves as a disjunctive catch-all for those lawsuits where the foreign state has already explicitly waived immunity or otherwise demonstrated an "amenability to suit." *See Turan Petroleum, Inc. v. Ministry of Oil and Gas of Kazakhstan*, 406 F.Supp.3d 1, 11 (D.D.C., 2019) (citing *Strange v.*

Islamic Republic of Iran, 320 F.Supp.3d 92, 98 (D.D.C. 2018)); *Tatneft v. Ukraine*, 771 Fed.Appx. 9, 10 (D.C Cir. 2019).

Here, only subsection (B) could seriously be in dispute. As for subsection (A), the arbitration did not take place and was not intended to take place in the United States. By their nature, ICSID arbitrations have no juridical seat and do not "take place" in any jurisdiction. *See* Georges R. Delaume, *ICSID Arbitration Proceedings: Practical Aspects*, 5 Pace Law Review 563, 574 (1985).[14] Subsection (C) is inapplicable because the underlying claim could not have been brought in the United States. There was no connection to the United States for any of the allegations, nor any commercial activities by Zimbabwe. Subsection (D) is subject to the separate discussion of 1605(a)(1), contained in Section I(A)(1).

As for subsection (B), the ICSID Convention cannot provide a basis for an exception to immunity since it is not "agreement to arbitrate." The only "agreement to arbitrate" was either the German or Swiss Treaties, and as Zimbabwe will show, neither of these treaties can lead to an exception from immunity.

1. <u>The ICSID Convention is not an "agreement to arbitrate" that can provide for an exception to immunity under 1605(a)(6)</u>

As discussed above in Section I(A)(1), the ICSID Convention creates a facility to arbitrate disputes, but any consent to arbitration comes in a different instrument. This conclusion flows from the plain meaning of the text. Article 25(1) provides for jurisdiction where "the parties to the dispute consent in writing to submit to the Centre [ICSID]." Art. 25(1). The ICSID Convention is not the "consent in writing." Otherwise, Article 25(1) would not require the additional "consent in writing" it so obviously necessitates.

[14]https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1586&context=plr (last viewed on Nov. 19, 2021).

Commentators in the field have followed this structure. As repeatedly noted, the ICSID Convention creates a framework for resolution of disputes on an opt-in basis, requiring a separate consent in writing from a Contracting State and a national of another Contracting State. *See* SCHREUER at 190-191 (**Exhibit 1**). The "agreement to arbitrate" is normally in the BIT, which is an open offer to consent to arbitration that the investor must accept in writing, normally by filing a notice of arbitration that accepts the offer or otherwise formally notifies the State of the investor's consent. *See* UNCTAD Guide, at 1; SCHREUER at 190-191 (**Exhibit 1**).

The von Pezold Award reached the same conclusion. The Tribunal routinely referred to the parties' consent to arbitration by citing to the German and Swiss Treaties. The Tribunal expressly found that, "[t]he Parties' arbitration agreements are contained in the respective BITs," using the acronym for "bilateral investment treaties" to refer to the German and Swiss Treaties. Award, ECF 1-2, ¶ 86. The Tribunal later reiterated this truism, stating that Zimbabwe consented to arbitration through the German and Swiss Treaties. Award, ECF 1-2, ¶199.

While courts have cited the ICSID Convention as the source of the waiver of sovereign immunity, the real analysis occurs in the text of the relevant instrument showing consent to arbitration. For example, in *Micula v. Romania*, this Court cited the ICSID Convention for the purpose of identifying the relevant section of the FSIA (in that case, as in this one, 1605(a)(6)), but it went on to analyze Romania's arguments under the Sweden-Romania BIT. 404 F.Supp.3d 265, 277-280 (D.D.C. 2019). Once convinced that Romania's arguments regarding the validity of the arbitration clause in the Sweden-Romania BIT had no legal merit, the Court satisfied itself of the existence of subject matter jurisdiction. *Id*. at 280. In sum, the ICSID Convention is not an "agreement to arbitrate," as revealed in its text, related practice and commentary, and the findings

of the von Pezold Award, and it cannot form the basis for a waiver of sovereign immunity under 1605(a)(6).

2. The "agreement to arbitrate" that includes the German Treaty does not provide for an exception to immunity in the United States

Turning to the first "agreement to arbitrate," the German Treaty, its express terms exclude any exception to immunity in the United States. As discussed in Section I(A)(2) and I(A)(3), there are specific limitations on enforcement in Article 11(3). The words "shall be enforced" coupled with the reference to "domestic law" and the later prepositional phrase "in the territory" all point to a decidedly local seat of enforcement. Nothing about the 1605(a)(6) language changes this analysis. The Contracting Parties did not waive immunity with the German Treaty, and their agreement to arbitrate, the German Treaty, certainly preserved it.

3. The "agreement to arbitrate" that includes the Swiss Treaty does not provide for an exception to immunity in the United States

The second "agreement to arbitrate" is the Swiss Treaty, and its use in Article 10(6) of the command that any award "shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located" leads to the same conclusion discussed in the Section I(B)(2). Again, since the limitation on enforcement comes in the agreement to arbitrate, it serves to equally limit any waiver of immunity (under 1605(a)(1)) and deny the existence of an exception (under 1605(a)(6)).

B. The overall structure of the ICSID Convention, combined with the treaty practice of the United States and other countries, further reinforces the necessity to enforce the limitations selected by Germany, Switzerland, and Zimbabwe

The result of the foregoing analysis is not complicated, and it is certainly not surprising. Zimbabwe made an open offer to arbitrate disputes with nationals from either Germany or Switzerland, pursuant to the German Treaty and the Swiss Treaty. Zimbabwe had no obligation to

take the ICSID Convention exactly as it found it. Zimbabwe could condition its consent on the exhaustion of local remedies (*see* art. 26), and it could remove its consent to a class of disputes. *See* ICSID Convention, art. 25(4). Zimbabwe could also modify the ICSID Convention, which many countries, including the United States, have frequently done. For example, the United States has modified the provisions regarding enforcement of awards. In the United States-Mexico-Canada Agreement (the "USMCA"), parties cannot seek enforcement while a request for revision or annulment is pending. *See* United States-Mexico-Canada Agreement, art. 14.D.13(9)(a), Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited Nov. 19, 2021). This is contrary to the ICSID Convention, which allows for enforcement during annulment and revision. *See* ICSID Convention, art. 52(5). In the Comprehensive and Economic Trade Agreement ("CETA"), the parties are Canada and the European Union, who made open offers of consent to ICSID arbitration but created an appellate mechanism and expanded the grounds of review, again in direct conflict with the ICSID Convention. *Compare* Comprehensive Economic and Trade Agreement (CETA), Canada-European Union, art. 8.28, Sept. 12, 2016, https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf *with* ICSID Convention, art. 52(1). Following the 2002 Trade Promotion Authority Act, which recognized the importance of an appellate mechanism in attaining "coheren[t]…interpretations of investment provisions…,"[15] the United States entered into investment treaties that provide the possibility for establishing an appellate mechanism in the

[15] *See* Trade Promotion Authority Act (2002), 19 U.S.C. § 3802(b)(3)(G)(iv), noting that an appellate body is necessary "to provide coherence to the interpretations of investment provisions in trade agreements."

future.[16] Many other countries have similarly modified their investment treaties.[17] Here, the Contracting Parties chose to modify the German and Swiss Treaties, and in so doing limit enforcement to the courts of the Contracting Parties and exclude the courts of any other country. It is now time for this Court to honor that choice and dismiss the Petition.

C. The absence of any waiver should come as no surprise to Petitioners

The limitations on enforceability were easy to find, both located in treaties with less than 16 pages each. The portion limiting execution comes in the same article as the offer to consent to arbitration, and the Tribunal included the limitations in the text of von Pezold Award. *See* Award,

[16] *See e.g.*, Free Trade Agreement, Singapore-U.S., art 15.19(10), Jan. 1, 2004, USTR, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf ; Free Trade Agreement, Chile-US, art. 10.19 (10), annex 10-H, June 6, 2003, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text; Free Trade Agreement, Morocco-US, art. 10.19(10), annex 10-D, June 15, 2004, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text; Treaty on the Encouragement and Reciprocal Protection of Investment, Uruguay – US, art. 28(10), annex E, Apr. 11, 2005, USTR, https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america; Trade Promotion Agreement, Peru – US, art. 10.20(10), annex 10-D, Feb. 1, 2009, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; Free Trade Agreement, Oman – US, art. 10.19(9)(b), annex 10- D, Jan. 1, 2009, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text; Trade-Promotion Agreement, Panama–USA, art. 10.20(10), annex 10-D, Oct. 31,2012, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text; Trade Promotion Agreement, Colombia – US, art. 10.20(10), annex 10-D, May 15, 2012, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/final-text; The Dominican Republic-Central America-United States Free Trade Agreement, art. 10.20(10), annex 10-F, Jan.1, 2009, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text. Australia and Korea have also adopted the same measure. *See* Free Trade Agreement, Australia – Korea, art. 11.20(13), annex 11-E, Aug. 4, 2014, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2971/download.

[17] *See e.g.*, The Dominican Republic-Central America-United States Free Trade Agreement, art. 10.26(6), Jan. 1, 2009, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text; Free Trade Agreement, Singapore-U.S., art 15.19(10), Jan. 1, 2004, USTR, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf; Free Trade Agreement, Chile-US, art. 15.25(6)(a), June 6, 2003, USTR, https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.

ECF 1-2, ¶¶ 86-87. Petitioners, multi-millionaires with sophisticated counsel and advisors, surely knew the text of the treaties, and they took advantage of the treaties, granting them rights to compensation superior to others whose land was expropriated, such as foreigners not covered by an investment treaty or other non-indigenous Zimbabweans. *See* Award, ECF 1-2, ¶ 162. While they may now claim disbelief or cry foul, their complaints ring hollow.

The choices under the German Treaty and the Swiss Treaty are analogous to a long line of cases in the United States where parties modify the contours of the dispute resolution process. Courts across the country have routinely enforced contractual decisions to restrict the scope of the parties' agreement. This can include applicable law, the jurisdiction of the courts of a particular county or state, and the right to appeal. *See Commerce Consultants Int'l, Inc. v. Vetrerie Riunite S.p.A.*, 867 F.2d 697, 698-699 (D.C. Cir. 1989) (holding that the parties' agreement to adjudicate their contractual disputes in Italy must be enforced); *Wye Oak Technology, Inc. v. Republic of Iraq*, No. 10-cv-01182, 2021 WL 3634116, at *7 (D.D.C. Aug. 21, 2021) (enforcing the parties' selection of Iraqi law as the applicable law for resolving disputes under their construction contract). These limitations also extend to enforcement. For example, a party can waive its right to a specific type of enforcement, condition enforcement on other conditions precedent, or contractually agree to enforcement of an arbitration award in a foreign country. *See, e.g., In re SeaEscape Cruises, Ltd.*, 172 B.R. 1002, 1010 (S.D. Fla. 1994) (waiving right to enforce maritime lien); *Capistrano Union High Sch. Dist. of Orange County v. Capistrano Beach Acreage Co.*, 10 Cal. Rptr. 750 (Cal. Ct. App. 1961) (in eminent domain proceeding, "either of the parties may waive enforcement of the judgment"); *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 09-cv-8856, 2011 WL 1345155, at *4, 9 (S.D.N.Y. Apr. 5, 2011) (court refused to enforce an award in New York and issued under the New York Convention because the parties agreed to execute the award in Bulgaria in

accordance to Bulgarian law); *HFC Commercial Realty, Inc. v. Vashi*, No. 88-C-7926, 1989 WL 103407, at *2 (N.D. Ill. Aug. 31, 1989) (recognizing the plaintiff's waiver of "its right to deficiency judgment" in "exchange for a reduction of the redemption period."). To reach a similar conclusion but in a different context merely applies the freedom of contract inherent to our legal system.

II. The Court should dismiss the Petition because the Contracting States have agreed to enforce the underlying Award in Zimbabwe

Where there is a valid forum selection clause, a party may move to dismiss pursuant to the doctrine of *forum non conveniens*. *See Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 50 (2013) ("[w]hen a forum-selection clause points to a state or foreign forum, the clause may be enforced through the doctrine of *forum non conveniens*."); *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019). A court may rule on such action before deciding on jurisdiction. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007); *Dahman v. Embassy of Qatar*, 364 F.Supp.3d 1, 4 (D.D.C. 2019) (opting to consider the question of *forum non conveniens* before assessing "whether an exception to the Foreign Sovereign Immunities Act…allow[s] the suit to proceed.").

Generally, a motion to dismiss based on *forum non conveniens* involves "a multi-step inquiry." *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F.Supp.3d 52, 73 (D.D.C. 2017). The district court must determine "1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *Balkan Energy Limited v. Republic of Ghana*, 302 F.Supp.3d 144, 155 (D.D.C. 2018). But "the presence of a valid forum selection clause radically alters the *forum non conveniens* calculus." *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F.Supp.3d 52, 76 (D.D.C. 2017). In such circumstances, "the plaintiff's choice of forum merits no weight" and no

consideration is given to "the parties' private interests." *Atl. Marine Const. Co.*, 571 U.S. at 50; *see also EIG Energy Fund XIV, L.P.* 246 F.Supp.3d at 76.

Courts will defer to the parties' forum selection clause unless the party opposing the enforcement proves that "public-interest factors overwhelmingly disfavor[] a transfer." *Atl. Marine Const. Co.*, 571 U.S. at 51; *see also Overseas Partners, Inc. v. PROGEN Musavirlik*, 15 F.Supp.2d 47, 54 (D.D.C. 1998) *quoting M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 15 (1972). Among others, the public interest factors include "the interest in deciding local controversies at home, judicial economy, [and] familiarity with applicable law." *Azima v. RAK Investment Authority*, 926 F.3d 870, 875-76 (D.C. Cir. 2019); *see also D & S Consulting, Inc. v. Kingdom of Saudi Arabia*, 322 F.Supp.3d 45, 51-52 (D.D.C. 2018); *Atlantic Tele-Network, Inc. v. Inter-American Development Bank*, 251 F.Supp.2d 126, 136-37 (D.D.C. 2003). In the presence of a forum selection clause, a plaintiff rarely succeeds in preventing a dismissal based on such factors "because [i]n all but the most unusual cases…the interest of justice is served by holding parties to their bargain." *D & S Consulting, Inc. v. Kingdom of Saudi Arabia*, 322 F.Supp.3d 45, 49–50 (D.D.C. 2018), *aff'd*, 961 F.3d 1209 (D.C. Cir. 2020) *quoting Atl. Marine Const. Co.*, 571 U.S. at 66 (2013); *see also Azima v. RAK Investment Authority*, 926 F.3d 870, 875-76, (D.C Cir. 2019); *Billard v. Angrick*, 220 F.Supp.3d 132, 142-43 (D.D.C. 2016).

An enforcement of a forum selection clause in the underlying agreement does not result in a breach of the ICSID Convention. *See, e.g., Zeevi Holdings Ltd.*, 2011 WL 1345155, at *4, 9. In *Zeevi*, the court dealt with the New York Convention, which is similar in this one way to the ICSID Convention—it requires contracting States to arbitral awards in line "with the rules of procedure of the territory where the award is relied upon." *Id*. The *Zeevi* court held that "an American district court…may…enforce a forum selection clause in the underlying agreement without contravening

the New York Convention[.]" *Id*. While the D.C. Circuit and this Court have in the past declined to apply the doctrine of *forum non conveniens* to actions to enforce foreign arbitral awards against foreign states, those cases turned on a fact absent here. In the leading case, the decision on *forum non conveniens* came down to the necessity of needing a court in the United States to attach property held, or to be held, by the defendant-debtor. *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303-304 (D.C Cir. 2005). The D.C. Circuit then reaffirmed this core tenet, finding there was no conflict with the Supreme Court's ruling in *Sinochem*. *BCB Holdings Ltd. v. Gov't of Belize*, 650 Fed.Appx. 17, 19 (D.C Cir. 2016). But this issue does not arise because the parties have removed the question from the purview of courts in the United States.

Here, the Contracting Parties to the Germany and Swiss Treaties have, as discussed in Section I(A)(2) and I(A)(3), restricted the enforcement of the von Pezold Award to Zimbabwe. They used mandatory language, employing "shall," and linked the command to enforcement. Indeed, this is precisely the kind of case suited for a *forum non conveniens* dismissal. The Contracting Parties selected the domestic law of Zimbabwe, creating a significant burden on any foreign court. Any future proceedings would have to apply laws and procedures unknown to courts in the United States, and in the case of this Court, the post-judgment remedies under Zimbabwean law would be impossible to reconcile with the post-judgment remedies provided by the Federal Rules of Civil Procedure. While the typical forum selection clause relates to the merits of the dispute, this does not make the present post-award clauses in the German and Swiss Treaties any less valid.

Neither of the public interest factors weigh in favor of denying the Motion. The Zimbabwean High Court is the preeminent expert in Zimbabwean law. Given that the United States has little to no relationship to the case, there is also no material interest in enforcing the von Pezold

Award in this Court. On the other hand, citizens of Zimbabwe have significant interest in the case because of its close association with Zimbabwe. The von Pezold Award is based on Petitioners' investments in Zimbabwe that were affected by events that entirely occurred in Zimbabwe. *See* Award, ECF 1-2, ¶¶ 288, 488-521, 543-561, 576-581, 593-599, 605-609. Lastly, judicial economy and administrative inconvenience weight in favor of dismissing the Petition because transporting State officials and legal experts back and forth between the United States and Zimbabwe will contribute to unnecessary delays. This is particularly true where this Court would have to apply Zimbabwean law to the entirety of the procedure, a task that will only require greater participation by Zimbabwean counsel.

Where—as here—the interest of the local forum surpasses the interest of keeping the case in the United States and the local forum has more familiarity with the appliable law, courts grant motions to dismiss for *forum non conveniens*. *See, e.g.*, *BPA Intern., Inc. v. Kingdom of Sweden*, 281 F.Supp.2d 73, 86 (D.D.C. 2003) (granting the motion to dismiss for *forum non conveniens* because "citizens of Sweden have a much more significant interest [than the local community] because the case involves Swedish corporations and the Kingdom of Sweden itself, and stems almost entirely from events that occurred in Sweden."); *Azima v. RAK Investment Authority*, 926 F.3d 870, 880 (D.C Cir. 2019) (dismissing the complaint because the courts of England have better familiarity with English Law). To hold otherwise will have a detrimental consequence. Enforcing an "arbitral award in a forum with no connection to the parties or the underlying events 'might chill international trade if the parties had no recourse but to litigate, at any cost, enforcement of [an] arbitral award [] in a petitioner's chosen forum.'" *Zeevi Holdings Ltd.*, 2011 WL 1345155, at *3, *quoting Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 496-497 (2d Cir. 2002). Proceeding with the enforcement of the von Pezold Award in this Court, despite

the Contracting Parties' agreement to enforce the Award in Zimbabwe, would also defeat the object and purpose of the ICSID Convention to encourage international private investments by providing an effective means of enforcing contractual agreements to arbitrate investment disputes. *See* ICSID Convention, Preamble.

While the underlying analysis of the German and Swiss Treaties is essentially the same, the *forum non conveniens* defense raises a different means for disposal of the Petition. From Zimbabwe's perspective, this case is one where "a court can readily determine that it lacks jurisdiction over the cause or the defendant," meaning that "the proper course would be to dismiss on that ground." *Sinochem*, 549 U.S. at 436 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587-588 (1999)). But to the extent the Court has any difficulty with subject-matter or personal jurisdiction, there are "*forum non conveniens* considerations [that] weigh heavily in favor of dismissal," which allow the Court properly to take "the less burdensome course" and dismiss based on *forum non conveniens*. *Sinochem*, 549 U.S. at 436. Either option is appropriate.

III. The Court should dismiss the Petition for failure to state a claim upon which relief can be granted

As a separate, alternative ground, the Court should also dismiss the Petition because Petitioners' use of the duplicative nature of the Awards violates the von Pezold Award's terms and seeks an impermissible windfall recovery. To withstand a motion to dismiss under Rule 12(b)(6), the "complaint must contain sufficient factual allegations that, if accepted as true, 'state a claim to relief that is plausible on its face.'" *See United States ex rel. Scott v. Pac. Architects & Eng'rs, Inc*., 270 F.Supp.3d 146, 152 (D.D.C. 2017) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (internal quotations omitted)). A claim is said to be facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that" the plaintiff is entitled to the requested relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

While a court must treat the complaint's factual allegations as true, it is not bound to accept legal conclusions and inferences drawn by the plaintiff. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("we accept neither inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint, nor legal conclusions cast in the form of factual allegations.") (internal quotations omitted)); *Molock v. Whole Foods Mkt., Inc.*, 297 F.Supp.3d 114, 122 (D.D.C. 2018), *aff'd on other grounds sub nom, Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293 (D.C. Cir. 2020)

In ruling on a motion to dismiss for failure to state a claim, the court can consider "documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies on even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F.Supp.2d 117, 119 (D.D.C. 2011), (citing *Hinton v. Corr. Corp. of Am.*, 624 F.Supp.2d 45, 46 (D.D.C. 2009)).

A. Based on the text of the von Pezold Award, the Court should dismiss the Petition until Petitioners have complied with the Tribunal's order to only enforce one of the two Awards

For reasons known only to Petitioners, they elected to bring nearly identical cases, one in their own names and another indirectly, through companies they controlled. As a part of this litigation strategy, Petitioners committed to only collect once, and the Tribunal limited the enforceability of the two awards. To wit, in paragraph 938, the von Pezold Tribunal stated plainly that "although the von Pezold Claimants and the Border Claimants have each been granted the same relief in respect of the Border Estate, these rights cannot both be jointly enforceable." Award, ECF 1-2. Now, Petitioners are dead set on collecting more than they are owed.

1. *Petitioners cannot state an actionable claim while seeking double recovery*

As currently configured, Petitioners have exceeded the rights given to them, a fact exacerbated by the practical consequences of their decision. Petitioners have no enforcement rights beyond those granted in the Award. In the same way that they cannot seek more money than was awarded, a higher interest rate than the amount granted, or another party than the one that was a respondent in the arbitration, Petitioners cannot enforce an award where the Tribunal expressly prohibited enforcement. *See, e.g., Miminco, LLC v. Democratic Republic of the Congo*, 79 F.Supp.3d 213, 218 (D.D.C. 2015) (recognizing the limits of the court's discretion in awarding prejudgment interest where the arbitral tribunal determined that such interest is not available). As the Tribunal expressly stated, both awards were not, nor could they ever be, "jointly enforceable," and as long as Petitioners insist on enforcing both awards at once, they do not have the right to enforce either.

The Award's restriction on enforceability is particularly important in this case. By authorizing two filings, Petitioners are creating additional, unnecessary costs and fees for Zimbabwe. Petitioners are also seeking damages plus interest, even though there is no protection in the von Pezold Award from having to pay interest on two sums, one for the Border Claimants (as controlled by Petitioners) and another for Petitioners. In the von Pezold Award, this equals USD 66,416,859.86, GBP 1,596,655.91, and ZAR 136,096.36 in pre- and post-award interest (ECF 1-4, p. 2). Zimbabwe is not taking any position on the Border Claimants matter, but it takes little imagination to see the impact of duplicative enforcement—Petitioners are actively seeking a windfall worth tens of millions of dollars.

But Petitioners seek even more than duplicative interest. On some level, Petitioners have already received compensation. Based, in part, on *Heinrich v. BTL*,[18] Petitioners have cashed out their investment in the Border Claimants, essentially receiving compensation based on any money the Border Claimants could seek from Zimbabwe. Petitioners have not fully disclosed their economic benefit from the transaction, but in order for the transaction to be legitimate (a conclusion presumed merely for the sake of argument), Petitioners had to receive some form of economic value. Zimbabwe also knows, based on the findings in the von Pezold Award, that the share capital is practically worthless due to the treaty breaches. This creates the reasonable conclusion that the Border Claimants have no assets other than the three estates, and any compensation or economic benefit from divestment in the ownership of the Border Claimants necessarily involves payment on the amounts owed under the von Pezold Award. In other words, Petitioners have received at least partial compensation for the losses claimed by the Border Claimants that Zimbabwe would have to otherwise pay, meaning Petitioners cannot now state a claim for the entirety of the von Pezold Award.

B. Petitioners no longer have the right to enforce the portion of the Awards related to the disposition of the Border Estate

Where a debtor has multiple creditors, but the debt was paid, the debtor is discharged as to that debt. *See, e.g. Byrnes v. Phoenix Assur. Co. of N.Y.*, 178 F.Supp.488, 491 (E.D. Wis. 1959). The debtor's knowledge of the third-party's payment is irrelevant because, "a performance rendered by [a] third person that is bargained for and received by [a] claimant in satisfaction of [a] claim operates as a discharge of the debtor." *Lehman Bros., Inc.*, 15 CIV. 8989 (LGS), 2016 WL

[18] *Heinrich v. BTL*, ¶ 8.

4197594, at *6 (S.D.N.Y. Aug. 8, 2016), *aff'd sub nom. In re Lehman Bros. Holdings Inc.*, 703 Fed. Appx. 18 (2d Cir. 2017) (*quoting* 13 Corbin on Contracts § 70.6).

As detailed in paragraph 8 of *Heinrich v. BTL*, Petitioners chose to dispose of their ownership of Border after the issuance of the von Pezold Award. By doing so, Petitioners received whatever compensation they were owed for Border, discharging Zimbabwe's debt as to that estate. Border Timbers Ltd. ("BTL") had no assets other than those subject to the ICSID arbitration, and disposal of BTL's shares had to include the entirety of the right to BTL's claim or Petitioners' corresponding claim to additional compensation. Zimbabwe does not presently know the terms of the disposition of the shares of BTL, but at a minimum, Petitioners no longer have a claim as to Borders, and the Petition should be dismissed as to at least that portion of the von Pezold Award.

IV. The Court should dismiss the Petition for insufficient service of process

When served with Rule 12(b)(2) motion, the plaintiff must demonstrate that the court has jurisdiction over the defendant. To "meet its burden, plaintiff must allege specific facts on which personal jurisdiction can be based; if cannot rely on conclusory allegations." *Atlantigas Corp. v. Nisource, Inc.*, 290 F.Supp.2d 34, 42 (D.D.C. 2003).

The FSIA provides the sole basis to exercise jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, a court can assume personal jurisdiction over a foreign sovereign only where: (1) the foreign state was served in accordance with the procedural requirements under Section 1608, and (2) the exceptions to sovereign immunity under 28 U.S.C. §§ 1605–1607 applies. *See Abur v. Republic of Sudan*, 437 F.Supp.2d 166, 172 (D.D.C. 2006).

Section 1608(a) outlines the process of effecting service on a foreign state. Where there is no "special arrangement for service between the plaintiff and the foreign state" or "an applicable

international law convention on service of judicial documents," Section 1608(a)(3) instructs the Clerk of the Court to effect service by:

> [S]ending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched …to the head of the ministry of foreign affairs of the foreign state concerned. (emphasis added)

Because the "service rules set out in Section 1608(a)(3)" apply "to a category of cases with sensitive diplomatic implications," courts have dismissed lawsuits against foreign states where service was not perfected in strict compliance with Section 1608(a). *See Republic of Sudan v. Harrison*, – U.S. –, 139 S.Ct. 1048, 1062 (2019) (reversing the default judgment against Sudan because the service was addressed and dispatched to the embassy of Sudan and not to the head of the ministry of foreign affairs of Sudan as required under Section 1608(3)); *Adetoro v. King Abdullah Academy*, No. 19-cv-01918, 2019 WL 3457989, at *2 (D.D.C. July 30, 2019) (noting that "service of process on a foreign state must strictly comply with the statutory requirements of § 1608(a)" and holding that service was not proper because petitioners mailed the documents rather than the clerk of the court); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (rejecting the "substantial compliance test" and holding that "strict adherence to the terms of 1608(a) is required.").

A. Petitioners failed to follow the requirements of the FSIA

Petitioners have made two fatal errors. They did not serve the "head of the ministry of foreign affairs," as required by the FSIA. They also failed to provide the proper "notice of suit." Zimbabwe takes each of these arguments in turn.

1. *Petitioners did not serve the "head of the ministry of foreign affairs" because the package was addressed to an individual who died in January 2021*

As widely reported by the New York Times[19] and BBC[20], among others, Lieutenant General Sibusiso Moyo passed away on January 20, 2021, due to complications caused by COVID-19. At that time, Mr. Moyo was Zimbabwe's Foreign Minister. Petitioners filed their lawsuit on July 23, 2021, many months after the death of Mr. Moyo. Despite this widely publicized fact, Petitioners included Mr. Moyo as the recipient for purposes of service. Mr. Moyo's name is on the airway bill (ECF 7-1), and Petitioners referenced Mr. Moyo in their Return of Service. *See* Return of Service, ECF 8-1. At no point did Petitioners refer to the fact that Mr. Moyo died many months prior or that another individual was the Minister of Foreign Affairs.

This error falls short of the strict compliance required by the Supreme Court and courts in this District, and it is particularly confounding in the present circumstances. Petitioners still operate the estates in Zimbabwe—they are not disconnected from the country in some way where they would not know who the foreign minister is. Moreover, Mr. Moyo was an outsized figure in the recent change of government, reading the message that announced the end of Robert Mugabe's time as president. Mr. Moyo's death received widespread attention, and a simple Google search would have revealed the name of the foreign minister. In any event, Mr. Moyo was not the "head of the ministry of foreign affairs," and Petitioners' failure to comply with the FSIA means that service was not effected and personal jurisdiction over Zimbabwe does not exist.

[19] Jeffrey Moyo and Lynsey Chutel, *Zimbabwe's foreign minister dies from Covid-19*, THE NEW YORK TIMES (Jan. 20, 2021) (**Exhibit 2**).

[20] *Sibusiso Moyo: Zimbabwe foreign minister dies from Covid-19*, BBC NEWS (Jan. 2021), https://www.bbc.com/news/world-africa-55731440 (last visited Nov. 24, 2021) (**Exhibit 3**).

2. *Petitioners failed to meet the statutory requirements for the contents of the "notice of suit"*

Service under 28 U.S.C. § 1608(a)(3), the method selected by Petitioners, requires more than just service of the summons and the complaint. The Petitioners must send "a copy of the summons and complaint and a notice of suit." *See* 28 U.S.C. § 1608(a)(4). The "notice of suit" requirement appears in by (a)(3) and (a)(4) and comes with the later clarification that, "[a]s used in this subsection, a 'notice of suit' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation." 28 U.S.C. § 1608(a)(4). The Court will readily appreciate that the word "shall," commonly used in 1608(a), appears again in reference to the contents of the "notice of suit." Federal regulation describes the contents of the "notice of suit" in 22 CFR 93.2, stating in subsection (8), that "[a] party shall attach, as part of the Notice of Suit, a copy of the Foreign State Immunities Act of 1976." Again, the word "shall."

Petitioners fell short of this mandatory requirement. The notice of suit did not contain a copy of the FSIA. *See* Declaration of Regis Chitambira, a true and correct copy attached as **Exhibit 4**. Zimbabwe can only venture a guess as to this shortcoming, but it underscores the importance of strict compliance with the FSIA. In this case, and based on a diligent search by Zimbabwe, Petitioners failed in yet another mandatory requirement of service under 1608(a)(3).

IV. Elisabeth von Pezold has failed to show that she has the authority to seek recognition of the Award

Issues of standing are dealt with under a 12(b)(1) challenge. *See, e.g., Grand Lodge of Fraternal Order of Police v. Ashcroft*, 195 F.Supp.2d 9, 13 (D.D.C. 2001). The burden to establish standing falls squarely on the party invoking jurisdiction. *Id.* Standing is a threshold issue, and a court has the discretion to solicit information outside of the pleadings in order to determine whether the court has subject-matter jurisdiction. *See, e.g., Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir.

1987); *see also Grand Lodge of Fraternal Order of Police,* 185 F.Supp.2d. at 13-14 ("In deciding a 12(b)(1) motion, the court need not limit itself to the allegations of the complaint").

Whether a party can bring claims on behalf of third parties or whether a party was properly assigned rights to pursue claims is a question of standing. *See, e.g., Cortland Street Recovery Corp. v. Deutsche Bank AG, London Branch,* No. 12-cv-9351, 2013 WL 3762882, at *1-2 (S.D.N.Y. July 18, 2013) (citing *Advance Magnetics, Inc. v. Bayfront Partners, Inc.,* 106 F.3d 11, 17 (2d Cir. 1997) (an assignment will satisfy Article III's standing requirements only if "the language [of the assignment] manifests [the previous owner's] intention to transfer at least title or ownership, *i.e.*, to accomplish a completed transfer of the entire interest of the assignor in the particular subject of assignment") (citations omitted)).

This is precisely the kind of case where Petitioners must show standing. In paragraph 7, footnote 1, Petitioners state that Rüdiger has passed away, granting Rüdiger's portion of the von Pezold Award to Elisabeth. This is an assigned right, and Petitioners offer nothing more than the allegation that there was an allocation of the amounts awarded by way of Rüdiger's will.[21] But Petitioners must do more. Zimbabwe has already discovered that Petitioners have received some compensation through their divestment in the Border Claimants. While Zimbabwe does not have access to Rüdiger's will or the probate proceedings, such transfers of assets are rarely without some dispute. Zimbabwe does not doubt his passing but rather seeks to highlight to lack of any documentation that can show the transfer of a substantial portion of the rights to the von Pezold Award. In other words, Elisabeth could only enforce the Award as to Rüdiger's rights if his rights

[21] There is only a general allegation that an "allocation" occurred. There is no evidence attached nor any language provided that describes the extent of rights or amounts of the Award allocated from Rüdiger to Elisabeth by way of his will.

under the Award were validly granted to Elisabeth. Without proof of a valid grant, this Court cannot satisfy itself that it has subject-matter jurisdiction over those claims.

CONCLUSION

For the foregoing reasons, Zimbabwe requests that the Court dismiss the Petition and grant such other relief the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, I electronically filed this document with the Clerk of the Court of the U.S. District Court of the District of Columbia by using the CM/ECF system, which will automatically generate and serve notices of this filing to all counsel off record. I further certify that I am unaware of any parties who will not receive such notice.

By: /s/ *Quinn Smith*
Quinn Smith