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.	)	

OPPOSITION TO PETITIONERS' MOTION FOR JUDGMENT ON THE PLEADINGS AND SUPPORTING STATEMENT OF POINTS AND AUTHORITIES

Respondent, the Republic of Zimbabwe ("Zimbabwe"), through undersigned counsel, hereby files its Opposition to Petitioners' Motion for Judgment on the Pleadings (the "Motion for Judgment") (ECF 19), and in support, Zimbabwe states as follows:

INTRODUCTION

Judgment on the pleadings is only proper once the pleadings are closed, there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law, while granting all reasonable inferences in favor of the non-movant. This case falls far short of this standard. This case is not ripe for judgment on the pleadings for the following reasons, each of which is a valid basis to deny the motion:

- The Foreign Sovereign Immunities Act (the "FSIA") "guarantees" Zimbabwe the right to have its immunity defense resolved before any defense on the merits, making the Motion for Judgment untimely. The procedural posture and papers filed further support this conclusion.

- Material facts are in dispute, including the existence of double recovery, the value Petitioners received upon the disposition of their interest in Border Timbers,

Elisabeth's right to bring Rüdiger's claim, and facts related to Zimbabwe's affirmative defense of set-off that it will likely bring.

- Petitioners are not entitled to judgment as a matter of law. In addition to the legal defenses in the Motion to Dismiss, there are other legal issues such as the applicable law for a setoff claim, the interest rate, and Zimbabwe's guarantee to have its immunity defense heard and resolved first.

Based on the reasons stated above and elaborated herein, Zimbabwe requests that the Court deny the Motion for Judgment.

BACKGROUND

The Motion for Judgment consists of a couple of paragraphs at the end of Petitioners' Opposition to Zimbabwe's Motion to Dismiss (the "Opposition"). In the Opposition, Petitioners did not address the following issues:

- They do not engage with a binding precedent from the D.C. Circuit that provides a guarantee that Zimbabwe can receive a ruling on its defense of immunity from suit before any other defense on the merits (*see* Opposition, ECF No. 19, 26-28);
- They provided no breakdown of the duplicative interest sought through the improper, joint enforcement of both Awards. The amount could be substantial (*see* Opposition, ECF No. 19, 26-28);
- Petitioners made no attempt to defend against the many arguments that frequently exist after a ruling on a motion for dismiss (*see* Opposition, ECF No. 19, 26-28); and
- Petitioners relied almost entirely on their position that Zimbabwe had not raised a meritorious defense to recognition of the von Pezold Award (*see* Opposition, ECF No. 19, 27-28).

These shortcomings, combined with the procedural posture of this case and other open questions of fact and law, make the dispute wholly inappropriate for resolution through a motion for judgment on the pleadings.

ARGUMENT

I. Based on the legal standard, this case is not ripe for judgment on the pleadings

Under Rule 12(c) of the Federal Rules of Civil Procedure, a party may move for judgment on the pleadings "[a]fter the pleadings are closed." *See McNamara v. Picken*, 866 F. Supp. 2d 10, 14 (D.D.C. 2012) (quoting Fed. R. Civ. Pro. 12(c)); *see also* Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1369, p.1 (3d ed. 2004) ("pleadings must be closed before a party can move for judgment on the pleadings."); *id*., p. 2 (noting that, in contrast to a motion for a summary judgment, "neither party may move for a judgment on the pleadings until the close of the pleadings."). Pleadings are closed after "a complaint and answer have been filed." *Tapp v. Washington Metro. Area Transit Auth*., 306 F. Supp. 3d 383, 391, fn. 6 (D.D.C. 2016). As it has been repeatedly affirmed by this Court and the D.C. Circuit, a motion to dismiss is not an answer to a complaint. *See Johnson v. D.C.*, 244 F.R.D. 1, 4 (D.D.C. 2007), *aff'd in part*, 552 F.3d 806 (D.C. Cir. 2008) ("[a] motion to dismiss is not ordinarily considered a 'responsive pleading.'"); *see also Bowden v. United States*, 176 F.3d 552, 555 (D.C. Cir. 1999) (same); Fed. R. Civ. Pro. 12(b) (treating a responsive pleading and a motion as distinct submissions and noting that a party may file a motion to dismiss before any responsive pleading, which includes an answer to a complaint).

In light of the "strong policy…in favor of ensuring a litigant a full and fair hearing on the merits of a claim," federal courts apply a "strict standard…in ruling on Rule 12(c) motions." *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 15 (1987) (citing to *Greenberg v. FDA*, 803 F.2d

1213, 1216 (D.C.Cir.1986)); *see also Tapp v. Washington Metro. Area Transit Auth*., 306 F. Supp. 3d 383, 391–92 (D.D.C. 2016) (quoting *Baumann v. District of Columbia*, 744 F.Supp.2d 216, 221 (D.D.C. 2010) ("[b]ecause a Rule 12(c) motion would summarily extinguish litigation at the threshold and foreclose the opportunity for discovery and factual presentation, the Court must treat [such a] motion with the greatest of care and deny it if there are allegations in the complaint which, if proved, would provide a basis for recovery") (internal quotation marks omitted).

To succeed in a Rule 12(c) motion, the movant must establish that "no material issue of fact remains to be resolved, and [the movant] is clearly entitled to judgment as a matter of law." *McNamara v. Picken*, 866 F. Supp. 2d 10, 14 (D.D.C. 2012) (quoting *Montanans for Multiple Use v. Barbouletos*, 542 F.Supp.2d 9, 13 (D.D.C. 2008)). "A fact is material if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Brown v. D.C*., 249 F. Supp. 3d 439, 443 (D.D.C. 2017).

In deciding on such motion, "the Court should accept as true the allegations in the opponent's pleadings' and 'accord the benefit of all reasonable inferences to the non-moving party." *Clark v. Colvin*, 187 F. Supp. 3d 76, 80 (D.D.C. 2016) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n. 11 (D.C. Cir.1987) (internal quotation marks omitted); *see also Tapp v. Washington Metro. Area Transit Auth*., 306 F. Supp. 3d 383, 392 (D.D.C. 2016) ("well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false."); *Statewide Bonding, Inc. v. U.S. Dep't of Homeland Sec.*, 422 F. Supp. 3d 42, 46 (D.D.C. 2019), *aff'd sub nom. Statewide Bonding, Inc. v. United States Dep't of Homeland Sec.*, 980 F.3d 109 (D.C. Cir. 2020) ("[w]hen deciding… [a motion for

judgment on the pleadings], courts should view all facts and draw all inferences in the light most favorable to the non-moving party.").

II. As a threshold matter, the Court should deny the Motion as untimely

The simplest way to deny the Motion is to follow the precedent laid out in *Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 585 (D.C. Cir. 2020) (hereinafter, *P&ID*). As held in *P&ID*, the FSIA "guarantees" a State the resolution of an assertion of immunity before the State must respond on the merits. *Ibid*. That case analyzed the Federal Arbitration Act (the "FAA"), but the result does not change when dealing with an award issued pursuant to the ICSID Convention. Under both statutes, the award creditor must comply with the FSIA as a threshold matter. *Id*., at 584 (immunity must be decided at the threshold of every action); *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 117 (2d Cir. 2017) (finding "that the FSIA's requirements and the United States' obligations under the ICSID Convention do not stand in significant tension"). The Motion for Judgment has offered no principled basis to depart from *P&ID*, and the Court should deny the motion accordingly. *See* Opposition, ECF No. 19, 26-28.

In addition to the rule laid out in *P&ID*, the Motion for Judgment is untimely because Zimbabwe has not filed any answer, pleading, or response that fully deals with the issues. The Motion does not address this basic requirement, asserting blithely that "Zimbabwe has offered no viable defense to enforcing [the von Pezold Award]," (ECF 19, p. 27) as if this were a basis to seek judgment on the pleadings. The Motion contains nary a citation to support this conclusion. *See* Opposition, ECF No. 19, 26-28. Instead, the Motion points to, without explicitly relying on, two cases that are unhelpful. *See id*., at 26.

The citation to *Mobil Cerro Negro* illustrates precisely the need to tread carefully when ruling on a petition to recognize an ICSID award. *See id.,* at 26. In *Mobil Cerro Negro*, the award creditor used a state law procedure to register the ICSID award in New York, skirting the FSIA's requirements for service. 863 F.3d at 99. The Southern District of New York enforced the award without any appearance by Venezuela, the award debtor. *Ibid*. The Second Circuit of Appeal then reversed, requiring the award creditor to re-file the case and serve Venezuela in accordance with the FSIA. *See id*., at 125. Without having served Zimbabwe, Petitioners invite this Court to adopt a path that resulted in reversal in *Mobil Cerro Negro*. *See* Opposition, ECF No. 19, p. 26. This is hardly comforting.

The citation to *TECO Guatemala v. Guatemala* is even more puzzling. This Court did not take the path advocated by Petitioners, proceeding instead by ruling on a motion to dismiss followed by a motion for summary judgment and motion for judgment on the pleadings. *See TECO Guatemala Holdings, LLC v. Republic of Guatemala*, No. CV 17-102 (RDM), 2018 WL 4705794, at *4 (D.D.C. Sept. 30, 2018); *id*., Memorandum Opinion (October 1, 2019) [ECF No. 48]. This case can hardly stand for the high standard Petitioners seek, which is that a motion for judgment on the pleadings is appropriate where there is "no viable defense" to enforcing the award.

This Court has taken the more orderly route of deciding first on the motion to dismiss and then either a motion for summary judgment or a motion for judgment on the pleadings. In *OIEG v. Venezuela*, this Court took the occasion of a motion for summary judgment to decide issues of the proper party as plaintiff and the interest rate. *See OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, No. CV 16-1533 (ABJ), 2019 WL 2185040, at *1 (D.D.C. May 21, 2019). This case was much simpler and did not have the particularities present here.

While this Court has ruled on a motion for judgment on the pleadings where there was no answer, the situation is not analogous. *See, e.g., Micula v. Government of Romania*, 404 F.Supp.3d 265 (D.D.C. 2019). In *Micula*, Romania did not assert its immunity from suit. This is a distinction with a substantial difference. In 2020, one year after *Micula*, the D.C. Circuit held that the FSIA "guarantees" a State the right to have its immunity defense resolved before any defense on the merits. *See P&ID*, 962 F.3d at 585. By asserting a colorable claim of immunity from suit in its Motion to Dismiss, Zimbabwe has thus placed its case in a different position than Romania's. There are many other differences, including factual disputes on double recovery and the appropriate interest rate (inexplicably left unchallenged by Romania), among others. How a State chooses to litigate its case is important (s*ee, e.g., id.*, at 585), and Zimbabwe's litigation strategy calls for a different result than in *Micula*.

III. There are material facts in dispute that make the Motion for Judgment improper, and Zimbabwe's guarantee of a decision on its immunity from suit make judgment on the pleadings improper

Zimbabwe has raised factual issues that, if the Petition is not dismissed, will have to be addressed. For example, Zimbabwe has pointed to the double recovery sought by virtue of seeking interest twice for the same principal sum. *See* Motion to Dismiss, ECF 11, pp. 28-30. Petitioners have not tried to explain this glaring discrepancy, potentially worth tens of millions of dollars, and if the case continues, this number must be calculated and reduced. *See* Opposition, ECF 19. Zimbabwe has alerted the Court to the improbable description of the disposition of Petitioners' holdings in Border Timbers. *See* Motion to Dismiss, ECF 11, p. 30. The documents do not match with Petitioners' description of them, and they strongly indicate that Petitioners received much more than nominal value for their interest in the Awards. *See ibid*. Petitioners have provided confusing documents purporting to prove Elisabeth's right to bring Rüdiger's claim, and to this

point, Petitioners have not definitely stated that Rüdiger could assign his claim. *See* Opposition, ECF No. 19, pp. 25-26.

There is also the issue of setoff, which this Court has found is a defense properly asserted in the context of award confirmation and enforcement proceedings like this one. *See Micula v. Government of Romania*, 404 F.Supp.3d 265, 283 (D.D.C. 2021). And there can be little argument that Zimbabwe has waived its set-off defense by somehow offering it. In its Motion to Dismiss, Zimbabwe limited itself to threshold questions of jurisdiction based on the FSIA, the terms of the parties' arbitration agreement, the language in the Petition, and limitations found in the text of the von Pezold Award. *See* Motion to Dismiss, ECF 11. This does not begin to incorporate the broader issues related to setoff and the effect of the Court's ruling on Zimbabwe's threshold concerns.

When the time is ripe to discuss setoff, Zimbabwe will provide the applicable law and assert the full factual record as it relates to setoff. This is not a run-of-the-mill case of expropriation that resulted in an arbitration award. Petitioners continue to retain nearly exclusive possession of the Estates, which, in Petitioners' words, are "thriving." This creates issues regarding setoff that Zimbabwe, careful to preserve the issue for its proper moment, cannot elaborate on right now. But the Court must determine the value that Zimbabwe has not realized by allowing Petitioners to continue successfully use the Estates long past the date of the von Pezold Award. This amount has never been quantified, could be substantial, and must take into account the entirety of the enterprise as it relates to the Estates. Until the proper moment, Zimbabwe must instead insist on the guarantee provided by the FSIA to have its immunity from suit decided in the first instance.[1]

[1] Should there be any doubt, on this or any other issue, this Court should "accord the benefit of all reasonable inferences to the non-moving party," which would be Zimbabwe. *Clark*, 187 F.Supp.3d at 80.

IV. Petitioners are not entitled to judgment as a matter of law because there are legal issues not properly before the Court that are a precondition of any ruling on a motion for judgment on the pleadings

In addition to the factual issues raised in Section III, there are legal questions left unanswered and not briefed. The applicable law of any setoff is one such issue, as is the proper post-judgment interest rate, which is a complex question of law that Petitioners have not addressed and should not be able to in any reply to this Opposition. *See* Opposition, ECF 19. But the overriding legal impediment is the direction of the D.C. Circuit from *P&ID*. As Zimbabwe has referenced in Section II above, *P&ID* created a distinct regime for cases where a State has a colorable claim of immunity from suit, and based on Zimbabwe's arguments in its Motion to Dismiss, there is no legal entitlement to a judgment on the pleadings right now.

Notably, there is no reference in the Motion to *P&ID*, with the only mention coming in the Opposition to the Motion to Dismiss as a string cite in relation to the supposed waiver within the ICSID Convention. *See* Opposition, ECF 19, p. 16. The Motion does nothing to distinguish Zimbabwe's position from Nigeria's, and it does not discuss the finer (or broader) details that would counsel this Court to depart from the D.C. Circuit's holding in *P&ID* that a colorable claim of immunity from suit guarantees a State a resolution of this defense prior to any further action on the merits. Zimbabwe routinely cited to *P&ID*, including for the argument that the Court must decide on immunity before obligating it to litigate the merits. Motion to Dismiss, ECF 11, p. 6. By not addressing this precedent, Petitioners have waived any argument on this particular point, and the legal impediment described in *P&ID*, added to the others described above, prevents Petitioners from obtaining a motion for judgment on the pleadings.

CONCLUSION

For the foregoing reasons, Zimbabwe requests that the Court deny the Motion for Judgment on the Pleadings and grant such other relief the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, 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