IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss and in Support of Cross-Motion for Judgment on the Pleadings

Chris Paparella
(Bar No. NY0091)
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, NY 10036-7703
Telephone: 212 506 3900
Facsimile: 212 506 3950
cpaparella@steptoe.com

Michael J. Baratz
(DC Bar No. 480607)
Edward G. Baldwin
(DC Bar No. 973850)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202 429 3000
Fax: 202 429 3902
mbaratz@steptoe.com
ebaldwin@steptoe.com

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Petitioners are members of the von Pezold family. They seek enforcement of an ICSID arbitration award rendered against Zimbabwe in the amount of $195 million plus interest to compensate the von Pezolds for Zimbabwe's expropriation of their properties and companies and for other measures Zimbabwe took with respect to the von Pezolds' investments in the country. The arbitration was conducted pursuant to the ICSID Convention as provided for in the ICSID arbitration provisions in Zimbabwe's bilateral investment treaties with Switzerland and Germany, of which the von Pezolds are nationals. Zimbabwe, Switzerland, Germany, and the United States are all parties to the ICSID Convention.

Zimbabwe participated fully in the arbitration and never argued that the Swiss and German treaties required the von Pezolds to enforce any award exclusively in Zimbabwe. Far from it. *Post-award, when seeking a stay of enforcement,* Zimbabwe argued vigorously to the ICSID Committee that was hearing Zimbabwe's annulment request that the von Pezolds could enforce the Award in any ICSID country. Zimbabwe also promised it would pay the Award if its annulment request was denied. Zimbabwe's arguments were partially successful: the ICSID Committee ordered the von Pezolds to escrow any amounts they collected during the annulment proceeding. (In any event, no amounts were collected.)

Although Zimbabwe's annulment request was denied, Zimbabwe has not honored its promises to pay the Award. The von Pezolds therefore commenced this proceeding.

Zimbabwe's motion to dismiss is a last-ditch stalling maneuver without a foundation in the law or facts. Zimbabwe's argument that this Court lacks subject-matter jurisdiction is contrary to settled law that the FSIA's arbitration and implicit waiver exceptions confer the U.S. courts with subject-matter jurisdiction to enforce ICSID arbitration awards against parties to the ICSID Convention. Zimbabwe's argument that its Swiss and German bilateral investment

treaties make Zimbabwe the exclusive forum for enforcing the Award is contradicted by Zimbabwe's previous argument to the contrary and by the treaty provisions on which Zimbabwe relies. Those provisions merely give the von Pezolds the right to enforce the Award in Zimbabwe in accordance with Zimbabwean law. The provisions do not state Zimbabwe is the only place where the von Pezolds can enforce the Award. The provisions do not retract Zimbabwe's waiver of sovereign immunity in Article 54(1) of the ICSID Convention and in the ICSID arbitration clauses of the bilateral investment treaties.

Zimbabwe's argument that the von Pezolds are seeking a double recovery under the Award and the Border Award is wrong. To be sure, the von Pezolds are only entitled to a single recovery even if there are multiple awards for the same harm. But double recovery would only occur if the von Pezolds actually received more compensation than that to which they are entitled. That has not occurred. No party has recovered anything from Zimbabwe under either Award. Hence, the von Pezolds have the right to recover the amount in the Award that compensates them for Zimbabwe's expropriation of their Border property as well as the other amounts awarded to them for Zimbabwe's other bilateral investment treaty violations.

Zimbabwe's argument that Elisabeth von Pezold lacks standing to recover her deceased husband's share of the Award is incorrect. Ms. von Pezold inherited her late husband's share of the Award as demonstrated by her husband's will, an Austrian probate judgment, and other documents that the von Pezolds previously served on Zimbabwe.

Finally, Zimbabwe is incorrect that alleged minor defects in the papers served on it require dismissal. The alleged defects are remediable by re-service, which, to avoid disputes, the von Pezolds have done.

The von Pezolds respectfully request that the Court reject Zimbabwe's motion to dismiss and grant Petitioners' cross-motion for judgment on the pleadings.

BACKGROUND

Zimbabwe's discussion in its motion of the background to this case is incorrect and misleading in substantial respects. We submit a declaration by Matthew Coleman, who was lead counsel for the von Pezolds and the Border Claimants in their arbitrations against Zimbabwe. Mr. Coleman's declaration sets out an accurate and complete discussion of the relevant background and submits the key relevant documents. We summarize that background below.

The ICSID Arbitrations

The Award was issued in an ICSID arbitration the von Pezolds brought against Zimbabwe to recover for Zimbabwe's expropriation of their Makandi, Forrester, and Border estates (and the companies that owned those estates), as well as for certain other actions Zimbabwe took in violation of its Swiss and German investment treaties. Zimbabwe carried out its expropriation under its so-called "Land Reform Programme." As relevant here, the von Pezolds were majority owners of the Border Company and its subsidiaries that owned the Border Estate when Zimbabwe expropriated the company and estate.

Hence, Zimbabwe's assertion that the von Pezolds are "owners of thriving estates" is both incorrect and cynical. Mot. at 1. The von Pezolds did own thriving estates, but Zimbabwe expropriated them.

The von Pezolds are German and Swiss nationals, except for the late Rüdiger, who was solely a German national. Zimbabwe's bilateral investment treaties with Germany and Switzerland provide investors like the von Pezolds with the right to arbitrate investment disputes under the ICSID Convention. Specifically, Article 11(2) of Zimbabwe's bilateral investment treaty with Germany provides that investor/state disputes can be "submitted for arbitration under

the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18th March, 1965." In similar language, Article 10(2) of Zimbabwe's bilateral investment treaty with Switzerland provides that investor/state disputes can be "submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States." As noted, Zimbabwe, Germany, Switzerland, and the United States are all signatory and contracting states to the ICSID Convention. *Database of ICSID Member States*, INTERNATIONAL CENTRE FOR INVESTMENT DISPUTES, https://icsid.worldbank.org/about/member-states/database-of-member-states.

The Border Claimants, which were companies that were then majority-owned by the von Pezolds, commenced their own ICSID arbitration against Zimbabwe in December 2010. The Border Claimants' claims were based on Zimbabwe's expropriation of the Border Estate, and other breaches relating to that Estate; there were no claims concerning the other Estates. Those claims overlapped with the von Pezolds' claims for expropriation of the Border Estate. However, Zimbabwe's assertion that the von Pezolds and the Border Claimants made identical claims is incorrect. Mot. at 3. The von Pezolds' claims were not limited to the Border Estate. The von Pezolds also made claims for expropriation of the Makandi and Forrester estates and for other actions taken by Zimbabwe in violation of its treaties. Coleman Decl. ¶¶ 9, 15.

Two separate arbitral tribunals made up of the same three arbitrators heard the von Pezold and Border Arbitrations, but the cases were never formally consolidated.

Zimbabwe's assertion that the von Pezolds disposed of their interests in the Border Estate under terms unknown to Zimbabwe is untrue. Mot. at 4. In February 2012, during the arbitrations, the von Pezolds entered into a joint venture with the Høegh family. The von

Pezolds contributed their interest in the Border Estate to the joint venture. That interest was treated as having no current value: it was assigned a contingent value that depended on the outcome of the arbitrations. The von Pezolds received nominal consideration of $1 and warrants that allowed them to share in any amounts received. The von Pezolds and the Border Companies disclosed all relevant facts concerning the joint venture to Zimbabwe and the arbitral tribunals in the arbitrations. Coleman Decl. ¶ 20. The von Pezolds subsequently sold their share in the joint venture for a nominal US$1, but they have retained their right to compensation in regard to all relief awarded to them including in regard to the Border Estate. Coleman Decl. ¶ 21.

The ICSID Awards

The arbitral tribunals issued separate awards in the von Pezold and Border Arbitrations on July 28, 2015. Each Award contains an anti-double recovery provision such that any amount that either set of claimants recovers from Zimbabwe for the Border Estate reduces the total amount claimants can recover for the Border Estate. Coleman Decl. ¶ 32. The von Pezolds are not attempting to obtain a double recovery and will not do so. In fact, neither the von Pezolds nor the Border Arbitration claimants have recovered anything with respect to the Border Estate.

Zimbabwe Argued the Award Was Enforceable in All ICSID Countries

After the Awards were issued, Zimbabwe applied to the ICSID Committees in October 2015 to annul the Awards pursuant to Article 52 of the ICSID Convention. Zimbabwe requested that the Committees stay enforcement of the Awards while its annulment applications were pending. In support of its application, Zimbabwe's Attorney General submitted a "Statement Regarding Zimbabwe's Intention to Honour Awards if Not Annulled" in March 2016. Coleman Decl. ¶ 36, Ex. 7. Therein, Zimbabwe's Attorney General confirmed the Awards were governed

by the ICSID Convention, without exception, and that if the Awards were not annulled, Zimbabwe would pay them as it was obligated to do under the ICSID Convention:

> This letter is a formal written statement on behalf of the State of Zimbabwe to confirm its intention to honour the above-referenced Awards in the event they are not annulled in these proceedings . . . .
>
> [Zimbabwe's] Constitution stipulates that: "(6) When interpreting legislation, ***every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention***, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty, or agreement."
>
> The ICSID Convention is incorporated into the domestic law of Zimbabwe . . . .
>
> [I]n the event the Committee confirms the awards, the State of Zimbabwe will therefore not ask for the awards to be revised by any Court of Zimbabwe or elsewhere; and will therefore comply with the Awards under and in accordance with the ICSID Convention in the event that the Awards are not annulled.

Id. at ¶¶ 1, 5, 6, 47 (emphasis in original).

Zimbabwe also submitted a Reply in further support of its stay request. Coleman Decl. ¶ 38, Ex. 8. Therein, Zimbabwe described its written submissions as "binding upon it as a sovereign state" and emphasized the importance of its Attorney General's March 2016 Statement (which Zimbabwe called a "Letter of Assurances"). Reply, at ¶ 4. Zimbabwe again repeatedly promised to pay the Awards if they were not annulled. *Id*. at ¶¶ 9, 13-14, 16, 18, 25, 30-31, 41, 229, 327-328, 367.

But most importantly here, Zimbabwe argued that the von Pezolds and the Border Claimants had the right to enforce their Awards in any ICSID country:

> [Claimants'] right of enforcement in Zimbabwe or elsewhere springs out of the Awards themselves, if they are not annulled. Zimbabwe's conduct cannot have any impact on enforcement of those awards outside Zimbabwe. Zimbabwe's duties under Section 6 of the ICSID Convention, comprised of Articles 53, 54 and 55 are discussed in §§ 1.3.2, 1.3.1 and 1.3.3 below. . . .

> It is abundantly clear that Applicant [Zimbabwe] recognizes [Claimants'] rights . . . to 'enforce' the Awards in any country that is a signatory of the ICSID Convention including in Zimbabwe[.]

Id. at ¶¶ 9, 18.

Zimbabwe was at pains to draw a "stark contrast" between its position and Argentina's position in *Sempra v. Argentina*, in which Argentina had argued that Sempra was required to seek recognition and enforcement of its Award in Argentina. *Id*. at ¶¶ 223-226. Zimbabwe insisted that, unlike Argentina, "Zimbabwe has never sought to submit its obligation to 'abide by and comply with the terms of the Award' to any condition that the award creditor go before local Zimbabwe courts." *Id*. at ¶ 226.

Zimbabwe's Stay Request Was Partially Successful

The von Pezolds responded to Zimbabwe's stay application by offering to escrow any amounts they recovered through enforcement of the Awards. Coleman Decl. ¶ 40. The ICSID Committees ordered that although the von Pezolds and the Border Claimants could enforce their Awards, they were obligated to deposit in escrow any amounts they recovered. *Id*. at ¶ 41. They did not recover any amounts.

Elisabeth von Pezold Has Standing to Recover Rüdiger's Share of the Award

Rüdiger von Pezold died in November of 2017. His last will and testament made his wife Elisabeth his sole heir. Elisabeth therefore has standing to enforce the part of the Award that is in favor of Rüdiger.[1]

[1] This standing was confirmed by both Professor Christian Rabl of Christian Rabl Rechtsanwalts GmbH and the Austrian court with jurisdiction over Rüdiger's estate. *See* Ex. 15: a copy of Professor Rabl's opinion, dated 22 July 2021; Ex. 14: the Decision of the District Court of Judenburg rendered, dated 25 April 2018, in German along with an English translation.

The von Pezolds Served Rüdiger's Will and the Probate Order on Zimbabwe

Zimbabwe's assertion that it has not received evidence of Elisabeth's rights is untrue. Mot. at 5. In November 2021, the von Pezolds served Zimbabwe with, among other things, Rüdiger's will, the Austrian court order that confirms Rüdiger's assets have been transferred to Elisabeth, and an opinion from the Austrian lawyer for Rüdiger's estate explaining the will and the court order. Ex. 13: the Last Will and Testament of Rüdiger von Pezold in German, dated 7 May 2015, along with an English translation; Ex. 14: the Decision of the District Court of Judenburg rendered, dated 25 April 2018, in German along with an English translation; Ex. 15: a copy of Professor Rabl's opinion, dated 22 July 2021. Moreover, the Award specifically permits Rüdiger and Elisabeth to allocate their shares of the Award among themselves as they see fit. Rüdiger allocated his share to Elisabeth through his will.

Annulment was Denied

The ICSID Committees rejected Zimbabwe's annulment applications in November 2018. Despite its promise, Zimbabwe has not complied with the Awards. Neither the von Pezolds nor the Border Arbitration claimants have collected a cent.

Service of the Petition

Petitioners served the instant petition to recognize the Award on Zimbabwe under 22 U.S.C. § 1608(a)(3). Petitioners sent a copy of the summons and complaint and a notice of suit, together with all other papers, to Zimbabwe's Ministry of Foreign Affairs. The papers identified Lieutenant General Sibusiso Moyo as head of the Ministry because Mr. Moyo was then listed as the head of the Ministry of Foreign Affairs on the Ministry's website. Paparella Decl. ¶ 2. After Zimbabwe contended service was defective in this motion, counsel for the von Pezolds, out of an abundance of caution, asked Zimbabwe's counsel to accept service. Zimbabwe's counsel

ignored this request despite the fact he had dealt with the von Pezolds on other matters, including seeking and receiving a lengthy extension of time. Lacking a response from Zimbabwe's counsel, on December 29, 2021 the von Pezolds re-served Zimbabwe's Ministry of Foreign Affairs with a copy of the summons, petition, and supporting papers. Paparella Decl. ¶ 4.

ARGUMENT

I. This Court Has Subject-Matter Jurisdiction Under the FSIA

Zimbabwe's argument that this Court lacks subject-matter jurisdiction over this proceeding under the FSIA is groundless. Mot. at 5. As discussed below, this Court has subject-matter jurisdiction under both the FSIA's arbitral award and waiver exceptions because the Award is an ICSID Award and Zimbabwe and the United States are signatory and contracting states to the ICSID Convention. Zimbabwe's argument that the Award cannot be enforced anywhere but Zimbabwe is contradicted by Zimbabwe's argument and acceptance in the annulment proceeding that the von Pezolds could enforce the Award in any ICSID country. The argument is also contradicted by the language of the German and Swiss treaties. There is simply no evidence that Zimbabwe ever retracted the waiver it agreed to in Article 54(1) of the ICSID Convention.

A. Jurisdiction Is Proper Under the FSIA's Arbitral Award Exception

The arbitration exception of the FSIA, section 1605(a)(6)(B), provides:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which the action is brought . . . to confirm an award made pursuant to such an agreement to arbitrate, if . . . 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[.]

28 U.S.C. § 1605(a)(6)(B). The Court has subject-matter jurisdiction under this provision. Zimbabwe, the United States, Germany, and Switzerland are signatory and contracting states to

the ICSID Convention. The Award was rendered in an arbitration conducted pursuant to the ICSID Convention as provided in Article 11(2) of Zimbabwe's bilateral investment treaty with Germany and Article 10(2) of its bilateral investment treaty with Switzerland. Ex. 1: Award, ICSID Case No. ARB/10/15, 28 July 2015; *Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments* (the "German treaty"), Art. 11(2); *Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments* (the "Swiss treaty"), Art. 10(2).

As this Court noted in a recent decision, "[c]ourts consistently have held that the FSIA's arbitration exception confers subject-matter jurisdiction over petitions to enforce ICSID awards." *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 277 (D.D.C. 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020), and *motion for relief from judgment denied*, No. 17-CV-02332 (APM), 2020 WL 6822695 (D.D.C. Nov. 20, 2020) (citing *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 85 (2d Cir. 2013) for its holding that "every court to consider whether awards issued pursuant to the ICSID Convention fall within the arbitral award exception to the FSIC has concluded that they do"); *see also Funnekotter v. Republic of Zimbabwe*, No. 09 CIV. 8168 CM, 2011 WL 666227, at *2 (S.D.N.Y. Feb. 10, 2011) (holding that court had subject-matter jurisdiction over Zimbabwe under FSIA Section 1605(a)(6)(B) because the Netherlands, Zimbabwe and the United States are parties to the ICSID Convention and petitioners' arbitration award was obtained pursuant to that treaty).

Zimbabwe's argument that the ICSID Convention merely creates "a facility to arbitrate disputes" is incorrect and misses the point. Mot. at 17. The ICSID Convention does not merely create an arbitration facility. As relevant here, the Convention also contains an agreement by its

member states that arbitral awards against them can be enforced in other member states' courts. *See* International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, T.I.A.S. No. 6090, 17 U.S.T. 1270, art. 54(1). The von Pezolds' arbitration against Zimbabwe was pursuant to the ICSID arbitration provisions in Zimbabwe's bilateral investment treaties with Germany and Switzerland. The Award is therefore an ICSID award and, prior to this proceeding, Zimbabwe always acknowledged this fact.

Zimbabwe's reliance on Article 25(1) of the ICSID Convention and an article by Christoph Schreur is off-point. Mot. at 17. Article 25(1) merely provides for the jurisdiction of the arbitration center the ICSID Convention established and Mr. Schreur discusses this in his article. Article 25(1) does not affect the jurisdiction established by Article 54(1). Mot. at 18.

B. Jurisdiction Is Proper Under the FSIA's Waiver Provision

Zimbabwe concedes that *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 104-05 (2d Cir. 2017) and other decisions have held that this Court has subject-matter jurisdiction to confirm ICSID awards pursuant to section 1605(a)(1) of the FSIA because Article 54(1) of the ICSID Convention contains a waiver of sovereign immunity for arbitral awards governed by the Convention. Mot. at 10; *see also 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)); *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, No. 18-CV-594 (CRC), 2020 WL 7122896, at *3 (D.D.C. Dec. 4, 2020); *Blue Ridge*, 735 F.3d at 84 ("In light of the enforcement mechanism provided by the ICSID Convention, we agree with the District Court that Argentina must have contemplated enforcement actions in other [Contracting] [S]tates,' including the United States.") (quoting *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989

F.2d 572, 578 (2d Cir. 1993)); *Mobil Cerro Negro,* 863 F.3d at 104-05; *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 195 F. Supp. 3d 776 (D. Md. 2016).

Zimbabwe's arguments that this Court should not follow this well-settled law are incorrect and unsupported by any on-point authority.

Contrary to Zimbabwe's argument, the plain language of Article 54(1) of the ICSID Convention waives sovereign immunity for an ICSID arbitration award: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Numerous courts have found this language effects a waiver. Zimbabwe cites no decision to the contrary.

As discussed above, Zimbabwe's argument that Article 25(1) of the ICSID Convention somehow requires a further agreement to implement the waiver in Article 54(1) misreads that article. Mot. at 10.

Zimbabwe's reliance on countries that have not been involved in ICSID arbitration misses the point. Mot. at 10-11. Unlike those countries, Zimbabwe agreed to ICSID arbitration in its Swiss and German bilateral investment treaties and the Award was rendered pursuant to those treaties.

C. The Swiss and German Treaties Do Not Limit Enforcement to Zimbabwe

Zimbabwe's argument that its Swiss and German bilateral investment treaties provide that Zimbabwe is the only country in which the Award can be enforced is flatly contradicted by Zimbabwe's previous argument that the von Pezolds could enforce in any ICSID Country. Zimbabwe's argument also has no support in the language of the treaties.

Zimbabwe's New Argument Is Barred by Judicial Estoppel

As discussed above, Zimbabwe obtained an order that required the von Pezolds to escrow amounts collected in enforcement by arguing that the von Pezolds had the right to enforce the Award in any ICSID Country. Therefore, Zimbabwe's new argument on this motion that the von Pezolds can only enforce the Award in Zimbabwe is barred by the doctrine of judicial estoppel . *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.").

Zimbabwe's Prior Statements Evidence How Its Treaties Should Be Interpreted

Zimbabwe's prior statements that the Award was enforceable in any ICSID country also constitute a subsequent practice that rebuts its new and incorrect interpretation of its treaty obligations. *See* Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980), reprinted in 8 I.L.M. 679 (1969) ("There shall be taken into account, together with the context: . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"); *Logan v. Dupuis*, 990 F. Supp. 26, 29 n.6 (D.D.C. 1997) (holding that the United States "regards the substantive provisions of the Vienna Convention (and specifically, Article 31) as codifying the customary international law of treaties") (citing Restatement (Third) of the Foreign Relations Law of the United States, Part III, introductory note (1986)); *Medellin v. Texas*, 552 U.S 491, 507 (2008) (U.S. courts "consider[] as aids to interpretation the negotiation and drafting history of the treaty as well as the postratification understanding of the signatory nations."); *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*,

140 S. Ct. 1637, 1641 (2020) (citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227 (1996) (finding that "postratification understanding of other contracting states" need not only include decisions of the courts of other Convention signatories, but can also include the "postratification conduct" of a contracting state government)).

The Treaties Do Not Limit Enforcement to Zimbabwe

Aside from being contradicted by its previous positions, Zimbabwe's argument has no support in the language of Article 11(3) of its German treaty and Article 10(6) of its Swiss treaty. *See* Mot. at 19. Articles 11(3) or 10(6) do not state that an investor can only enforce an arbitration award in Zimbabwe. Rather, those articles provide that "[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" and "[t]he arbitral award…shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located." German Treaty, Art. 11(3); Swiss Treaty Art. 10(6).

These clauses merely state that if German and Swiss investors enforce arbitral awards in Zimbabwe, the Zimbabwean courts will do so in accordance with Zimbabwean law (which includes the ICSID Convention). Limitative words such as "exclusively" or "only" are not present. *Zeevi Holdings Ltd. v. Republic of Bulgaria*, 494 F. App'x 110 (2d Cir. 2012), which Zimbabwe cites, illustrates why Zimbabwe's interpretation is incorrect. In contrast to the language used in Articles 11(3) and 10(6), the forum selection clause in *Zeevi* stated that "'[t]he execution of an award against the Seller . . . may be conducted *only* in Bulgaria in accordance with the provisions of Bulgarian law.'" *Id*. at 113 (emphasis added).[2] Similarly, the other cases

[2] *Zeevi* did not, in any event, involve an agreement like Zimbabwe's to hold ICSID arbitration with investors and did not otherwise implicate the ICSID Convention.

Zimbabwe cites all involved specific exclusivity language. *See D&S Consulting Inc. v. Kingdom of Saudi Arabia*, 961 F.3d 1209, 1213 (D.C. Cir. 2020) ("[T]he *grievance council* shall be assigned for settlement of *any* disputes or claims[.]" (emphasis added)); *Marra v. Papandreou*, 216 F.3d 1119, 1120 (D.C. Cir. 2020) ("*[A]ny* dispute[s] . . . shall be settled by the *Greek courts*.") (emphasis added); *Commerce Consultants Int'l v. Veterie Riunite S.p.A.*, 867 F.2d 697, 698-99 (D.C. Cir. 1989) ("The validity, enforceability and interpretation of this agreement shall be determined . . . by the appropriate court of *Verona, Italy*." (emphasis added)); *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 134-35 (D.D.C. 2003) ("ATN and GT & T shall submit themselves to the jurisdiction *of the courts of Guyana*." (emphasis added)); *Azima v. RAK Inv. Auth.*, 926 F.3d 867, 870 (D.C. Cir. 2019) ("[T]he Parties submit to the *exclusive jurisdiction of the courts of England and Wales*." (emphasis added)). Moreover, none of the cases Zimbabwe cites involved ICSID arbitration awards or agreements.

The Treaties Do Not Withdraw Zimbabwe's Waiver of Sovereign Immunity

To the extent Zimbabwe is arguing that Articles 11(3) and 10(6) withdrew the waiver of sovereign immunity Zimbabwe provided in Article 54(1) of the ICSID Convention and its clear agreement to ICSID arbitration in the Swiss and German treaties, that argument lacks merit. A country must use specific and explicit language to withdraw a waiver of sovereign immunity. The House Report regarding the FSIA explains that a waiver of immunity "may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract." H.R. Rep. 94-1487, at 18 (1976). The D.C. Circuit, citing this language, has made clear that a statement of a "specific and explicit nature" is required to effect the withdrawal of a waiver. *See Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1100 n.10 (D.C. Cir. 1982). *Zeevi* is the only instance of which Petitioners are aware in which a U.S. court recognized

the withdrawal by contract of a waiver in an international arbitration convention. But, as discussed above, the arbitration agreement in *Zeevi* specifically provided that enforcement could occur "only" in Bulgaria. Such specific limitative language is not present here.

The Most Favored Nation Clauses of the Treaties Bar Zimbabwe's Argument

Zimbabwe's new and incorrect interpretation of Articles 11(3) and 10(6) is also barred by the most favored nation clauses in its German and Swiss treaties (Articles 3(1), 3(2) and Article 4, respectively). This is because the language Zimbabwe relies on in Articles 11(3) and 10(6) is not in Zimbabwe's bilateral investment treaty with the Netherlands. *See Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of the Netherlands*, Art. 9. Zimbabwe committed in the most favored nation clauses that if Zimbabwe gave investors from other countries better rights, Swiss and German investors would also obtain those better rights. Because Dutch investors can enforce ICSID awards in any ICSID countries, Swiss and German investors like the von Pezolds are entitled to the same right. *See, e.g.*, ILC MFN Report, [162-163; 216]; *see also, e.g.*, *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, ¶¶ 45, 49-50, 54, 56, 61, 64 (a most favored nation clause allowed an Argentine investor who was pursuing an arbitration under treaty with Spain to rely on the more favorable arbitration clause in Spain's investment treaty with Chile); *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, ¶¶ 29, 31, 49 (same).

This Court is Not Forum Non Conveniens

Zimbabwe's argument that this Court is forum non conveniens lacks merit because it depends entirely on Zimbabwe's groundless argument that the German and Swiss investment

treaties contain a forum selection clause that enforcement of arbitration awards must take place exclusively in Zimbabwe. Zimbabwe rightly concedes that this Court will not apply the doctrine of forum non conveniens to proceedings to enforce foreign arbitral awards against foreign states. This is because, as the District of Columbia Circuit held in *TMR Energy Ltd. v. State Property Fund of Ukrain*e, 411 F.3d 296, 303-04 (D.C. Cir. 2005), there is no other forum where the award creditor can reach the award debtor's U.S. property. Mot. at 25.

Moreover, Zimbabwe's treatment of the von Pezolds as demonstrated by the Awards and Zimbabwe's constant maneuvering to avoid its obligations under the Awards (of which its motion to dismiss is just the latest example) show that if the von Pezolds are required to seek enforcement only in Zimbabwe, they will be deprived of their day in court and will never be treated fairly. *See Zeevi Holdings Ltd. v. Republic of Bulgaria*, 494 F. App'x 110, 114 (2d Cir. 2012).

II. The von Pezolds Are Not Seeking Duplicative Recovery

Zimbabwe's argument that by bringing this proceeding the von Pezolds have violated the Award's bar on double recovery under the Award and the Border Award is incorrect. In the context of arbitral awards, double recovery is triggered where the "arbitration award orders a party to pay damages that have already been paid or which are included elsewhere in the award." *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994); *see Priority One Servs., Inc. v. W & T Travel Servs., LLC*, 825 F. Supp. 2d 43, 57 (D.D.C. 2011). Zimbabwe has not paid anything under either award. In such circumstances, the von Pezolds have the right to enforce that portion of the Award that compensates them for Zimbabwe's expropriation of the Border Estate. Of course, any amounts the von Pezolds recover for the Border Estate cannot be recovered again by the Border Claimants, and vice-versa.

By way of background, the same arbitrators heard both the von Pezolds' arbitration and the separate arbitration brought by the Border Claimants. The von Pezolds and the Border Claimants were represented by the same lawyers at Steptoe & Johnson LLP. The cases were heard together, although not formally consolidated, as ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25. *See* Ex 1, *von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 Award, ¶ 5.

The von Pezolds and the Border Claimants sought and were granted the same relief by the arbitrators with respect to the Border Estate. *Id*. at ¶ 938. However, the arbitrators barred double recovery:

> To the extent that *one* set of Claimants (von Pezold or Border) enforces its right to restitution of the expropriated Border Properties, restitution will, become legally and materially impossible for the other set of Claimants. Similarly, to the extent that the Border Claimants enforce their right to compensation in respect of the Border Properties . . ., the right to compensation of that amount in the name of the von Pezold Claimants will become unenforceable as an impermissible double recovery.

Id. (emphasis added).

Zimbabwe has not paid any amount of the compensation awarded against it in connection with the Border Estate to either the von Pezolds or the Border Claimants. Indeed, in September of 2021, the Border Claimants filed their own petition to confirm the 2015 Award in this Court, which petition remains pending. *See Border Timbers Ltd. et al v. Republic of Zimbabwe*, No. 1:21-cv-02428-APM (D.D.C. Sept. 15, 2021). Therefore, the preclusive effect of paragraph 938 of the von Pezold Award does not apply.

Zimbabwe's argument that the von Pezolds have received some compensation for the expropriation of the Border Estate when the von Pezolds sold their interest in the Border claimant is incorrect. The von Pezolds only received warrants that allow them to share amounts

the Border Claimants recover from Zimbabwe. The von Pezolds did not receive any cash. The von Pezolds subsequently sold their share in the joint venture for a nominal US$1, but they have retained their right to compensation in regard to all relief awarded to them including in regard to the Border Estate. Moreover, pursuant to paragraph 938 of the Award, duplicative recovery is only triggered if either the von Pezolds or the Border Claimants receive compensation *from Zimbabwe* for the Awards rendered in 2015. A transaction between the von Pezolds and the Border Claimants cannot discharge Zimbabwe's obligations under the Award.

III. The Petition Should Not Be Dismissed for Insufficient Service of Process

Zimbabwe's argument that the Petition should be dismissed for certain minor alleged defects in service of process is unfounded. Petitioner properly served Zimbabwe's Ministry of Foreign Affairs; its use of the incorrect name of the head of Ministry does not warrant dismissal.[3] *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 27 (D.C. Cir. 2015) (holding district court had erroneously dismissed enforcement proceeding on ground that plaintiff had addressed the papers to the "Embassy of Zambia" rather than the head minister of the Ministry of Foreign Affairs). Similarly, the alleged failure to include a copy of the FSIA with the Petition is not grounds for dismissal. *Gretton Ltd. v. Republic of Uzbekistan*, No. CV 18-1755 (JEB), 2019 WL 3430669, at *2 (D.D.C. July 30, 2019), *appeal dismissed*, No. 19-7102, 2020 WL 4932321 (D.C. Cir. July 30, 2020) (denying motion to dismiss based on alleged failure to include FSIA, describing motion as "overreaching").

[3] Counsel for Petitioners obtained the name of the Minister of Foreign Affairs from Zimbabwe's official website, which did not reflect that individual's death some months earlier. Paparella Decl. ¶ 2, Ex. 1.

In order to avoid any further debate on this issue, counsel for the von Pezolds requested that counsel for Zimbabwe accept service. When Zimbabwe's counsel ignored the request, counsel for the von Pezolds re-served Zimbabwe on December 29, 2021.

IV. Elisabeth von Pezold Has Standing to Enforce Rüdiger's Share of the Award

Zimbabwe's argument that it has not seen proof that Petitioner Elisabeth von Pezold has standing to enforce her deceased husband Rüdiger von Pezold's rights in the Award is specious. *See* Mot. at 35-36. Zimbabwe has been provided with full proof that Elizabeth von Pezold inherited her late husband Rüdiger's rights in the Award and has standing to enforce those rights.

Among other things, in enforcement proceedings commenced in Malaysia, the von Pezolds served Zimbabwe with a copy of Rüdiger von Pezold's will, which provided: "I hereby appoint my wife, Elisabeth von Pezold, née Schwarzenberg . . . as my sole heir. 7 May 2015 Rüdiger von Pezold." Coleman Decl. ¶ 44.

The von Pezolds also served Zimbabwe in the Malaysian proceedings with the Austrian District Court order that confirmed Elizabeth von Pezold's rights. That order makes Elizabeth's rights crystal clear:

> **Bernhard Friedrich Arnd Rüdiger von Pezold, born 11/07/1941**,
>
> who passed away on 12/11/2017, leaving a last will and testament, and last resided at Gusterheimerweg 2, 8761 Pöls-Oberkurzheim, the court:
>
> 1. fully transfers ownership of the estate to the heir named below who, based on the last will and testament of 07/05/2015, with the benefit of inventory, declared her conditional acceptance of the inheritance: the widow of the deceased, Ms. **Elisabeth Regina Maria Gabriele von Pezold**, born 01/10/1947, Gusterheimer Weg 2, 8761 Pöls-Oberkurzheim.

Moreover, the Award provides that Rüdiger and Elisabeth can allocate their respective shares of the Award "in such manner as they may elect." *See* Ex. 1: Award, ICSID Case No.

ARB/10/15, 28 July 2015, ¶ 89. Rüdiger elected in his Will to transfer his share of the Award to Elisabeth on his death.

Accordingly, Petitioners have established that Rüdiger's portion of the Award validly passed to Elisabeth upon his death, and Elisabeth has standing to enforce the Award.

V. Petitioners Are Entitled to Judgment on the Pleadings Enforcing the Award

Zimbabwe has offered no viable defense to enforcing, and affording full faith and credit to, the Award. Accordingly, Petitioners respectfully request that the Court grant judgment on the pleadings in their favor.

Article 54 of the ICSID Convention obligates the domestic courts of the Contracting States, including the United States, to enforce ICSID awards. Congress granted federal courts exclusive jurisdiction to enforce ICSID awards. *See* 22 U.S.C. § 1650a(b). Awards issued pursuant to the ICSID Convention "shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). A federal court "may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." *Mobil Cerro Negro*, 863 F.3d at 102, 121. The court cannot "examine an ICSID award's merits, its compliance with internal law, or the ICSID tribunal's jurisdiction to render the award." *Id.* at 102, 118 (stating that an "ICSID-award debtor would be a party to the action . . . but would not be permitted to make substantive challenges to the award"); *see also TECO Guatemala Holdings, LLC v. Republic of Guatemala*, Civ. No. 17-102 (RDM), 2018 WL 4705794, at * 2 (D.D.C. Sept. 30, 2018) (citing *Mobil Cerro Negro*, 863 F.3d at 102, 121). An enforcement proceeding:

> does not portend a proceeding in which the court must entertain all manner of substantive defenses, or even defenses cognizable under the Federal Arbitration Act. . . . The ICSID award-debtor would be a party to the action and would be able to challenge the United States court's jurisdiction to enforce the award – for

> instance, on venue grounds – but would not be permitted to make substantive challenges to the award.

Mobil Cerro Negro, 863 F.3d at 117-18. The Federal Arbitration Act and its provisions governing court challenges to arbitration awards under the New York Convention do not apply to the recognition and enforcement of ICSID awards. *See id*. at 120-121.

Zimbabwe does not dispute the authenticity of the Award. As shown above, Zimbabwe has offered no viable defense to enforcement. Zimbabwe agreed to, and fully participated in, the arbitration under the ICSID Convention. The arbitration complied with the applicable procedural rules. The Award is final and binding. Zimbabwe acknowledged as much in its request for a stay of the enforcement of the Award pending outcome of the annulment proceedings, in which Zimbabwe stated its support for the ICSID regime and promised to comply fully with the Award if its annulment application were denied. *See* Reply, ¶ 18.

Moreover, the ICSID tribunal's award of interest at the six-month U.S. Dollar LIBOR rate is a "pecuniary obligation[] imposed by [the] award" and is therefore the appropriate post-judgment interest rate. *See Micula v. Government of Romania*, 404 F. Supp. 3d 265, 268 (D.D.C. 2019); *Micula v. Government of Romania*, Order and Final Judgment, No. 17-cv-02332 (APM), ECF No. 88, at 2 (D.D.C. Sept. 20, 2019) (entering "judgment for post-judgment interest at the rate identified in the Award from the date of judgment until the date of full payment"). The von Pezolds note the six-month U.S. Dollar LIBOR rate will no longer be effective after June 30, 2023. Hence, Petitioners reserve their rights to seek entry of comparable post-judgment interest by this Court and/or from the tribunal if the judgment is not satisfied as of the LIBOR expiration date.

In summary, the Award is a final, valid ICSID award. There are no defenses to its enforcement and no material facts in dispute. Petitioners therefore respectfully request that this

Court grant the Petition and enter judgment in the amounts reflected in the Award (including pre- and post-award interest) plus post-judgment interest at the rate identified in the Award pursuant to 22 U.S.C. § 1650a.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court dismiss Zimbabwe's motion to dismiss and grant Petitioners' cross-motion for judgment on the pleadings.

Dated: January 14, 2022

Respectfully submitted,

/s/ Chris Paparella

Chris Paparella
(Bar No. NY0091)
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, NY 10036-7703
Telephone: 212 506 3900
Facsimile: 212 506 3950
cpaparella@steptoe.com

Michael J. Baratz
(DC Bar No. 480607)
Edward G. Baldwin
(DC Bar No. 973850)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202 429 3000
Fax: 202 429 3902
mbaratz@steptoe.com
ebaldwin@steptoe.com

Attorneys for Petitioners