UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY TO OPPOSITION TO MOTION TO DISMISS
AND SUPPORTING STATEMENT OF POINTS AND AUTHORITIES

Respondent, the Republic of Zimbabwe ("Zimbabwe"), through undersigned counsel, hereby files its Reply to Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss (the "Opposition") (ECF 18), and in support, Zimbabwe states as follows:[1]

INTRODUCTION

By not disputing many of Zimbabwe's arguments, and narrowing the scope of the dispute substantially, dismissal is even more appropriate now than when Zimbabwe filed its Motion to Dismiss.

- On the first ground to challenge immunity from suit, § 1605(a)(1), the Opposition relies on "well settled law" without providing a single citation to a case from this Circuit. The Opposition does not rebut the argument that the ICSID Convention does not meet one of the three exceptions recognized in this Circuit, and in the one case with facts similar to this one, *Zeevi v. Bulgaria*, the Opposition does not argue that dismissal was improper. The United States has recently disagreed with Petitioners' argument as well. This is a failure to plead or prove subject matter jurisdiction.

- On the second ground to challenge immunity from suit, § 1605(a)(6)(B), the Opposition does not dispute that the German Treaty and the Swiss Treaty are the relevant "agreement to arbitrate," but it fails analyze the role of the "agreement to arbitrate" in the statutory scheme. Turning to the text of the treaties, the Opposition's requirement of "only" or "exclusive" has been rejected by this Court and other Circuit Courts of Appeal. Again, the Opposition does not prove the existence of subject matter jurisdiction.

- The Opposition rests its argument as to *forum non conveniens* almost entirely on its misguided, and rejected, requirement to include the word "only." It remains undisputed that this is a separate ground for dismissal, and the Court should dismiss the case accordingly.

- The arguments regarding judicial estoppel focus on the wrong treaty, detail nothing of substance, and fail to show that Petitioners got anything less than they wanted.

- The Opposition has not contradicted Zimbabwe's arguments showing double recovery and offered vague explanations for the 2014 transaction that do not make economic sense.

- Petitioners have essentially admitted that they failed to properly serve Zimbabwe.

[1] All capitalized terms have the same definition as in the Motion to Dismiss.

- The Opposition still has not shown that after the death of one of the Award creditors, Rüdiger von Pezold, Elisabeth has 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.

ARGUMENT[2]

I. The Petitioners have still failed to allege subject matter jurisdiction

The Opposition does not dispute the Motion's legal standard, and when it moves to the grounds for finding a waiver of sovereign immunity, the Opposition does not dispute the simple fact that the Petition contains no meaningful factual or legal support for a waiver of sovereign immunity. Even though the factual allegations in the Petition "bear closer scrutiny," (Motion to Dismiss, ECF No. 11, p. 5), the Opposition cannot, and does not, point to a single factual allegation to support its argument for subject matter jurisdiction. The Opposition also chooses not to defend two of the four statutory provisions cited: §§ 1610(a)(1) and (6). Zimbabwe can only assume that Petitioners have dropped these arguments. *See* Motion to Dismiss, ECF No. 11, FN 2. The two remaining grounds, implicit waiver based on 1605(a)(1) and the arbitration exception under 1605(a)(6)(B), do not fare much better.

A. In analyzing the implicit waiver requirement of § 1605(a)(1), the Opposition fails to engage with the statutory text, binding precedent, the text of the Convention, or the numerous examples cited by Zimbabwe

For implicit waiver under § 1605(a)(1), the Opposition must show that the ICSID Convention contains Zimbabwe's waiver from suit, and in broad strokes, the Opposition cites to relevant cases, such as *Tatneft v. Ukraine* and *Foremost-McKesson v. Iran*. *See* ECF No. 18, p. 16.

[2] Zimbabwe does not agree with much of the content of the Background portion of the Opposition but has instead chosen to address the particular allegations in the context of the Argument section.

But the Opposition fails to engage with the requirements of these cases or the statutory text they construe. Binding precedent directs courts to interpret narrowly the text of § 1605(a)(1). *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). And this same precedent provides three examples of an implicit waiver, none of which the ICSID Convention meets. *Ibid*. The Opposition does nothing to refute this point.

Instead, the Opposition seeks to craft an exception that is new to this Circuit by making passing citations to purportedly "well-settled law" finding an implicit waiver in the ICSID Convention. ECF 18, p.17. But the Opposition does not include a single case from this Circuit that interprets the ICSID Convention, citing instead to *Tatneft v. Ukraine* (not an ICSID case, 301 F.Supp.3d 175, 191-192), *P&ID v. Nigeria* (not an ICSID case, 962 F.3d 576, 579-580); and *Foremost-McKeenon v. Iran* (a litigation, 905 F.2d at 441). *See* ECF No. 18, p 16. Looking at other circuits, one case, *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 574 (2d Cir. 1993), *as amended* (May 25, 1993), is not an ICSID case, and *BAE Sys. Tech. Sol. & Services, Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 195 F. Supp. 3d 776, 782 (D. Md. 2016), has nothing to do with arbitration at all.

The *Process & Indus. Devs. Ltd* citation is particularly concerning since the United States chose not to support an implicit waiver by virtue of ratification of the New York Convention. *See Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, No. 21-7003, Brief of the United States as Amicus Curiae (Jan. 20, 2022), pp. 21-23.[3] Applied by analogy, a relationship that Zimbabwe

[3] Courts give great deference to the executive's treaty interpretations. *See e.g., Erwin-Simpson v. AirAsia Berhad*, 375 F. Supp. 3d 8, 14 (D.D.C. 2019), aff'd, 985 F.3d 883 (D.C. Cir. 2021) (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

accepts only for the sake of argument but otherwise contests, if the United States is unwilling to defend the New York Convention as an implicit waiver, the ICSID Convention should not be an implicit waiver either. And despite citing often to *Zeevi v. Bulgaria*, the Opposition does not seek to distinguish the case, where the Court dismissed the action even though Bulgaria had ratified the New York Convention. *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 09-cv-8856, 2011 WL 1345155, at *2 (S.D.N.Y. Apr. 5, 2011). This is not the stuff of "well-settled law."

Turning to the two ICSID cases cited, both from the Second Circuit, the Opposition does not fit either of these cases into the three exceptions recognized in this Circuit. *See Foremost-McKeenon*, 905 F.2d at 444. The Motion points out that the ICSID Convention does not require a State to agree "to arbitrate in another country." ECF No. 11, p. 9. The Opposition does not contest this point, and there is no evidence that the Second Circuit in *Mobil Cerro Negro* or *Blue Ridge* were aware of this fact. Neither of the other two exceptions apply, thus ending the inquiry.

In addition to a lack of any "well-settled law," this case would fall outside any rule due to the language of the German Treaty and the Swiss Treaty. Neither *Mobil Cerro Negro* nor *Blue Ridge* dealt with treaties that included the limiting language found in the German or Swiss Treaties. *See, e.g., Mobil Cerro Negro v. Bolivarian Republic of Venezuela*, No. 14-cv-08163, ECF 3-1, ¶ 15 (S.D.N.Y. Oct. 10, 2014);[4] *Blue Ridge Investments, L.L.C. v. Republic of Argentina*, 735 F.3d 72, 76 (2d Cir. 2013).[5] And it is difficult to argue that the Second Circuit would somehow agree

[4] The text of the Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela can be found at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2094/download.

[5] The text of the Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment can be found at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download

with the Opposition. The Second Circuit affirmed dismissal in *Zeevi v. Bulgaria*, 494 Fed.Appx. 110 (2nd Cir. 2012), which is the most analogous set of facts since the parties chose to litigate enforcement in Bulgaria, despite Bulgaria's ratification of the New York Convention.

The Opposition also never engages with the analysis from *Turan* and the "amenability to suit" language that case employs. This is crucial. Zimbabwe cited to Article 1(2) of the ICSID Convention, which shows that the ICSID Convention, unlike the New York Convention, requires an additional agreement to opt-in to its application. Zimbabwe pointed to the history of the FSIA and sovereign immunity, and it highlighted the different functions of the New York Convention and the ICSID Convention. The former immediately applies to all commercial contracts calling for international arbitration, but the latter does not apply at all until there is a subsequent opt-in, bringing with it a specific regime and whatever terms and conditions the State parties chose to impose or accept. By failing to even deal with these meaningful distinctions, relying instead on a tenuous notion of "well-settled" law, the Opposition has failed to show that this Court has subject matter jurisdiction under § 1605(a)(1) merely because Zimbabwe ratified the ICSID Convention.

B. The Opposition does not dispute the relevant "agreement to arbitrate," but it fails to reckon with the consequences of this choice

The only other basis for immunity from suit is § 1605(a)(6)(B), but again, the Opposition never takes the Motion's argument head on. The issue is about the effect of the text "agreement to arbitrate" in § 1605(a)(6), not whether Germany, Switzerland, Zimbabwe, and the United States have ratified the ICSID Convention. As argued in the Motion to Dismiss (ECF 11, p. 16), subsection (B) follows and is subject to the "agreement to arbitrate" in subsection (6). This creates a hierarchy whereby the resulting award is "confirmed pursuant to" the "agreement to arbitrate." By never dealing with the relevance of the terms "agreement to arbitrate" in § 1605(a)(6), the Opposition chooses to mount no defense to the issue.

The Opposition's other citations all presume that there is no need to look at the "agreement to arbitrate," looking to agreements that do not contain a limitation on enforcement. In *Micula v. Romania*, the Sweden-Romania bilateral investment treaty had no text restricting or qualifying enforcement. 404 F. Supp. 3d at 270 (D.D.C. 2019).[6] As discussed above, *Blue Ridge* analyzed an award rendered pursuant to the US-Argentina bilateral investment treaty, which has no limiting language on enforcement. *See supra* Section I(A). The award in *Funnekotter v. Zimbabwe* is based on the Netherlands-Zimbabwe bilateral investment treaty. No. 09-civ-8168, ECF 1-2, ¶¶ 19, 95 (S.D.N.Y. Sept. 24, 2009). Like the other two cases, this treaty has no limitation on enforcement.[7] None of these cases is of any assistance where the "agreement to arbitrate" has specific, tailored language like the German Treaty or the Swiss Treaty.

To be clear, Zimbabwe is not advocating for a result where an award rendered pursuant to the ICSID Convention could never satisfy the arbitration exception in § 1605(a)(6)(B). Nothing could be further from the truth. Rather, Zimbabwe merely asks that the Court look at the specific facts of this case and apply every word in the statute and the relevant treaties. By first looking at the "agreement to arbitrate," States have the same party autonomy as any other party to a contract, and they are free to draft their treaties in the way they deem fit. Bulgaria could contract for enforcement in Bulgaria, a decision affirmed by the Second Circuit and one that the Opposition never argues was wrongly decided. *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 09-cv-8856,

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[6] The text of the Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments can be found here: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2212/download.

[7] The text of the Agreement on the Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of the Netherlands can be found at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2099/download.

2011 WL 1345155, at *4, 9 (S.D.N.Y. Apr. 5, 2011) *aff'd*, 494 Fed.Appx. 110 (2nd Cir. 2012). Zimbabwe, Germany, and Switzerland should all be able to do the same.

C. The Opposition does not offer a convincing interpretation of the German Treaty and the Swiss Treaty

The Opposition does not present a different legal standard than Zimbabwe's, which means there is no dispute that the Court should construe the relevant treaty like a contract, seeking to determine the parties' intent by applying the plain meaning of the words. *See* Motion, ECF 11, pp. 7-8. This standard quickly disposes of the Opposition's last argument, or intimation, that Zimbabwe must identify other ICSID cases with same language as the German Treaty and the Swiss Treaty. *See* ECF No. 18, p. 20. No such standard exists for contracts, and it is nonsensical to apply it to treaties, especially when the Opposition offers no citation to this effect.

1. The German Treaty does not limit itself to a subset of enforcement actions in Zimbabwe and does not need additional language to interpret the parties' intent

The Opposition tries to read the German Treaty in a way creates a subset of enforcement actions within Zimbabwe, as if Germany and Zimbabwe had to remind each other that their law would apply in their own courts. *See* ECF No. 18, pp. 14-15. This is not a persuasive approach. Courts should not assume superfluous language, and it is difficult to believe that Zimbabwe wanted or needed to inform Germany that Zimbabwean law would apply in Zimbabwean enforcement actions in Zimbabwean courts. *See United States v. Smith*, No. 09-CR-237-RCL-1, 2020 WL 5816496, at *6 (D.D.C. Sept. 30, 2020). As discussed in the Motion to Dismiss, and unchallenged by Petitioners, there is no basis to assume that anything other than the law of the place of enforcement applies. *See* Motion to Dismiss, ECF No. 11, pp. 14-15. In such case, the parties would never add language in the way suggested by the Opposition.

The Opposition does not dispute that the text of the German Treaty contains mandatory words such as "shall," and there is no dispute with the proper connection of the words "in the territory" and the rest of the sentence. *See* Motion to Dismiss, ECF No. 11, p. 14. Instead, the Opposition would require that the parties should have added words like "only," while paradoxically citing cases in which none of them use the word "only." ECF No. 18, pp. 14-15. This is not a convincing argument.

In support, the Opposition cites two of the cases with the mandatory word "shall" followed by the courts of a city or country. *See* ECF No. 18, p. 20 (citing *Commerce Consultants Int'l v. Veterie Riunite S.p.A.*, 867 F.2d 697, 698-99 (D.C. Cir. 1989); *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 134-35 (D.D.C. 2003)). This is essentially the text of the German Treaty, which is the word "shall" followed by "in the territory of which the investment is situated." German Treaty, art. 11(3). It takes no leap to understand that this is either Zimbabwe or Germany since that is the only location where an investment can be. The same can be said for the only case with the word "exclusive." *Azima v. RAK Inv. Auth.*, 926 F.3d 867, 870 (D.C. Cir. 2019). Under the Opposition's argument, the word "exclusive" is unnecessary since indicating the court is sufficient, and in the German Treaty, "exclusive" would be superfluous since enforcement must be "in the territory of which the investment in question is located." German Treaty, art. 11(3).

In the two cases with the word "any," not one of the words that the Opposition would require, those cases need the word "any" since there could be a variety of disputes that the parties wanted to capture. *D&S Consulting Inc. v. Kingdom of Saudi Arabia*, 961 F.3d 1209, 1213 (D.C. Cir. 2020); *Marra v. Papandreou*, 216 F.3d 1119, 1120 (D.C. Cir. 2020).[8] The German Treaty

[8] It is unnecessary to address the reference to "the grievance council" and the "Greek courts" since the parties to the German Treaty already included a location: the place of the investment.

does the same by speaking only about award enforcement, the only option for court intervention in an ICSID arbitration—the only forum available in the treaty. Stated another way, the word "any" would be also superfluous because the sentence can only apply to enforcement—requiring "any" does nothing more than restate the obvious.[9]

The Opposition's focus on "only" has little support in a broader review of the case law. In one of the defining cases on forum selection clauses, the Supreme Court enforced a clause stating, "Any dispute arising must be treated before the London Court of Justice." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972). There was no "only" or "exclusive" and the "London Court of Justice" did not exist. The court in question is the "High Court of Justice in London." Indeed, this Court has rejected the Opposition's argument, where a party contended that "to be mandatory, a forum-selection clause 'should' contain magic works like 'exclusively' or 'solely' or 'only.'" *Glycobiosciences, Inc. v. Innocutis Holdings, LLC*, 189 F. Supp. 3d 61, 70 (D.D.C. 2016). It went on to cite *M/S Bremen*, stating that arguments like the Opposition's are "belied by the Supreme Court's conclusion that a forum-selection clause stating that '[a]ny dispute arising must be treated before the London Court of Justice' was 'clearly mandatory.'" *Ibid*. In addition to citing other courts to support its position, *Glycobiosciences* relied on the fact that the clauses used the article "the" to designate the forum and required the application of foreign law. *Ibid*.

The German Treaty easily fits this standard. It uses the word "shall" in a mandatory manner (not disputed by the Opposition) and requires that the Award "be enforced in accordance with the domestic law of the Contracting Party," which is obviously not the United States. German Treaty, art. 11(3). The German Treaty further requires enforcement "in the territory of which the

[9] Notably, two of the five cases that the Opposition cites employ clauses without the word "any." *Commerce Consultants Int'l v. Veterie Riunite S.p.A.*, 867 F.2d 697, 698-99 (D.C. Cir. 1989); *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 134-35 (D.D.C. 2003).

investment is located," not "a" court, wherever in might be located. *Ibid*. In other words, there is no need to use the words "only" or "exclusive," as advocated by the Opposition, and numerous courts have rejected the Opposition's argument.

2. The analysis of the Swiss Treaty does not lead to a different result

Because the Opposition simultaneously responded to Zimbabwe's arguments regarding the limitations contained in the text of the German Treaty and the Swiss Treaty (ECF 19, pp. 14-15), there is little need for a separate section dealing only with the Swiss Treaty. If this Court decides that the text of the German Treaty is sufficient to grant the motion to dismiss, then the same result should apply based on the text of the Swiss Treaty. In the interests of efficiency, Zimbabwe will not belabor the point and instead directs the Court to its arguments regarding the German Treaty in Section I(C)(1).

3. The Opposition concedes that Zimbabwe, Germany, and Switzerland were able to modify the scope of their consent in the German Treaty and Swiss Treaty

The Opposition insists that the German Treaty and the Swiss Treaty do not "withdraw" Zimbabwe's immunity, but then it follows by citing to *Zeevi* as a successful case of withdrawal. *See* ECF No. 18, pp. 19-20. Petitioners therefore accept that a State can modify by contract a waiver of sovereign immunity contained in a treaty. This concession ends the discussion. Petitioners do not dispute that a treaty is a contract between nations analyzed with contract interpretation tools. If a contract can modify treaty obligations as in *Zeevi*, another treaty could do the same. The only dispute is the language contained in the modification, and as Zimbabwe has

explained above, there is no need to include "only" in order to achieve the purpose the parties set out to establish.[10]

4. The Most-Favored Nation ("MFN") Clauses cannot apply

Mindful of the territorial limitation of the enforcement provisions in the German Treaty and the Swiss Treaty, Petitioners submit that "Zimbabwe committed in the [MFN] clauses [of these Treaties] that if Zimbabwe gave investors from other countries better rights, Swiss and German investors would also obtain those rights." ECF 18, p. 21. As elaborated below, this Court does not have jurisdiction to apply the substantive protections of the German Treaty or the Swiss Treaty. In any event, the MFN clauses do not extend to the enforcement provisions in these treaties.

a. This Court does not have jurisdiction to apply the MFN clauses in the Treaties

The dispute settlement clauses in the German Treaty and Swiss Treaty only permit an arbitration tribunal established under the ICSID Convention to settle a dispute over the substantive protections in these treaties. *See* German Treaty, art. 11(2); Swiss Treaty, art. 10(2). Aside from simply demanding that the Court apply the MFN clauses in these Treaties, Petitioners have not provided any legal basis for the Court to encroach into matters that are clearly outside of its jurisdiction. *See* Opposition, ECF No. 18, p. 21. Without jurisdiction, this Court cannot apply the MFN clauses to import the enforcement provision in the Netherland-Zimbabwe Treaty. *See, e.g., Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, FN

[10] Because the Opposition takes no issue with the legal standard or examples given, Zimbabwe will not further characterize the arguments made in pages 19-21 of the Motion to Dismiss (ECF 11), except to clarify that the motion describes a modification of the treaty parties' rights and obligations in the context of an ICSID arbitration, not a modification of the German Treaty or the Swiss Treaty as stated in page 21, which is nothing more than an unfortunate typo.

361 (Aug. 22, 2012); *Kimberly-Clark Dutch Holdings B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/3, Award, ¶ 168 (Nov. 5, 2021).

b. The MFN clauses in the Germany-Zimbabwe Treaty and the Swiss-Zimbabwe Treaty do not have extraterritorial applications

On the merits of their argument, the text of the MFN clauses defeats the Opposition's argument. *See* ECF No. 18, p. 21. Contrary to other treaties,[11] the MFN clauses in the German Treaty and Swiss Treaty are limited to a Contracting State's treatment "in its territory." *See* Germany Treaty, art. 3(1)(2), Swiss Treaty, art. 4. The territorial limitation is further reinforced in the Preamble of both treaties. This is precisely the kind of limiting language in MFN clauses that tribunals have recognized and adhered to. *See Daimler Financial Services*, Award at ¶¶ 228, 230; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶ 116 (May 31, 2017); *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic I*, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 306 (Feb. 10, 2012).[12]

Petitioners cite to two cases that hardly move the needle in their favor: *Maffezini v. Spain*, ICSID Case No. ARB/97/7 and *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10. *See* ECF 18, p. 21. In *Maffezini*, the tribunal analyzed the Argentina-Spain treaty, which, unlike the German Treaty and the Swiss Treaty, extended the MFN clause to "all matters subject" to the treaty. *See Maffezini*, Decision on Jurisdiction at ¶ 38; *Gas Natural*, Decision of the Tribunal on Preliminary Questions on Jurisdiction at ¶¶ 26, 30, 45-49. *Maffezini* found that MFN

[11] *See e.g.*, United Kingdom-Kenya Treaty, Article 3(3), Article 8 (noting that the MFN clause extends to the dispute settlement provision); United Kingdom-Albania Treaty, Article 3(3), Article 8 (same); United Kingdom-Zimbabwe Treaty, Article 3(3), Article 8 (same).

[12] Because courts rarely, if ever, interpret MFN clauses, Zimbabwe has had to cite to international tribunals.

clause should not be used "to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question." *See Maffezini* at ¶ 62. Among others, an investor cannot invoke the MFN clause to alter the Contracting States' forum selection. *See id*., at 63. Under this reasoning, the MFN clause in the German Treaty and Swiss Treaty could not, under any circumstance, change the forum selection clause that exists for enforcement.

The decision in *Maffezini* has also been widely rejected among scholars and international arbitration practitioners. *See* Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation of the Rails, Journal of International Dispute Settlement*, Vol. 2, No. 1 (2011), pp. 98, 102, fn.1; *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, ¶ 92 (Sept. 13, 2006); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 217-223 (Feb. 8, 2005). This is hardly an appropriate basis for this Court to venture into international law, and the Court should decline to follow the Opposition into a disfavored theory that lacks any textual support.

5. The Opposition has offered no separate basis to deny the motion to dismiss based on *forum non conveniens*

Petitioners do not dispute that this Court can rule on the issue before deciding on jurisdiction. *See* Motion, ECF 11, p. 23. And they rest almost the entirety of their argument on its interpretation of the German Treaty and the Swiss Treaty. *See* Opposition, ECF 18, pp. 21-22. Once the Court determines that the treaties contain an applicable forum selection clause, then the Opposition would have no defense to dismissal based on *forum non conveniens*. Petitioners' reference (without a legal citation) to the private interests of the Petitioners is irrelevant. *See* ECF 18, p. 22. As Zimbabwe explained, and Petitioners did not contest, when there is a valid forum selection clause, "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. Petitioners otherwise did not engage with Zimbabwe's public interest factors, which would be the only issue remaining. In other words, once the Court finds that the forum selection clause is valid and applicable, Petitioners' other argument falls away, and the motion to dismiss should be granted.

6. Any application of judicial estoppel is groundless

Judicial estoppel applies where: 1) "a party's later position [is] clearly inconsistent with its earlier position," 2) "the party succeeded in persuading a court to accept that party's earlier position…," and 3) "the party seeking to assert an inconsistent position [would] derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Burton v. D.C.*, 153 F. Supp. 3d 13, 52-53 (D.D.C. 2015). "Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits." *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 647 (D.C. Cir. 2010). Petitioners must prevail on all three elements, and none are present here.

The first statement, a letter from the Attorney General that calls for a reasonable interpretation of legislation (ECF 18, p. 11), is nothing more than Zimbabwe sought before the *ad hoc* Committee and this Court. The next statement characterized Petitioners' right to seek enforcement of the Award. *See* ECF 18, pp. 11-12. This restated the obvious: Petitioners are free to seek enforcement wherever they want, and wherever Petitioners go, Zimbabwe also has the right to assert the defenses available to it. The third statement clarified that Zimbabwe was not adopting Argentina's interpretation of Article 53 of the ICSID Convention. *See* ECF 18-1, p. 1596. This is still true. Zimbabwe did not adopt Argentina's position before the *ad hoc* Committee, and it is not offering any interpretation of Article 53 now.

As to the second element, Zimbabwe achieved no success by virtue of its prior positions. The *ad hoc* Committee did not stay the Award based on Zimbabwe's representation that the "von Pezolds had the right to enforce the Award in any ICSID Country." *See* Opposition, ECF No. 18, p. 18. Contrary to Petitioners' submission, the *ad hoc* Committee completely rejected Zimbabwe's "request for the continued stay of the enforcement of the Award" and lifted the provisional stay of the Award. *See* ECF No. 18-1, p. 1667, ¶ 99(1)(2). The *ad hoc* Committee paid no regard to the statements above made by Zimbabwe. *See id*., pp. 1660-1662, ¶¶ 83-87 (considering rather whether "lifting the stay could cause irreparable injury to [Zimbabwe]."). Given that the *ad hoc* Committee never relied on the above statements nor ruled in Zimbabwe's favor, judicial estoppel is inapplicable. *See Thomas v. Gandhi*, 650 F. Supp. 2d 35, 39 (D.D.C. 2009).

The Opposition points to Petitioners' offer to keep in escrow any funds it seized through enforcement during the annulment phase, but this does nothing to advance the argument. *See* ECF No. 18-1, p. 1665, ¶ 97. Petitioners received precisely what they offered to accept. ECF 19, p. 12 ("the von Pezolds responded to Zimbabwe's stay application by offering to escrow any amounts they recovered through enforcement of the Awards.") (emphasis added). Zimbabwe can hardly be said to have prevailed when the von Pezolds received what the von Pezolds offered.

The remaining arguments regarding treaty interpretation are incorrect and invite the Court to rule on matters outside of its jurisdiction. *See* Opposition, ECF No. 18, p. 18. As stated before and throughout the Motion to Dismiss and the Reply, Zimbabwe is not interpreting the ICSID Convention, which was the focus in the ICSID proceedings, but rather the German Treaty and the Swiss Treaty. The Opposition responds by pointing generically to "Zimbabwe's prior statements" as some sort of interpretation of Zimbabwe's "treaty obligations" offered in this proceeding. *See* Opposition, ECF No. 18, p. 18. This is far from a convincing argument. Zimbabwe has not offered

any interpretation of the ICSID Convention beyond hornbook law, such as the fact that the ICSID Convention is not an agreement to arbitrate—a position that Petitioners do not contest. This case revolves around construing the limitations imposed by the German Treaty and the Swiss Treaty, neither of which were the subject of the ICSID proceedings. Stated simply, there is no overlap of statements between the two proceedings sufficient to constitute a "subsequent practice."

More fundamentally, the Opposition is far off base in its interpretation of the Vienna Convention on the Law of Treaties (the "VCLT") and "subsequent practice." Article 31(3)(b) of the Vienna Convention, invoked by the Opposition, notes that a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be considered in the interpretation of a treaty. Article 31(3)(b) is plainly inapplicable. "The position on interpretation of a treaty, expressed by a Contracting State in its defensive brief filed in an international direct arbitration initiated against it by an investor of the other Contracting State" does not amount to practice. *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶ 112 (May 25, 2006); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, ¶ 51 (Dec. 19, 2012). And it is axiomatic that the Contracting States—Zimbabwe, Germany, and Swiss—agree on the interpretation of the enforcement provisions in the Treaties. *See Urbaser*, Decision on Jurisdiction at ¶ 51. No such showing can be made.

The Opposition's citation to "postratification conduct" is also unpersuasive. The Opposition points to *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 227 (1996), and includes a description of the case in a parenthetical. *See* Opposition, ECF 18, p. 19. In *Zicherman*, the Supreme Court was trying to determine what the treaty parties thought at the time of entering

into the treaty, not as a bar to future arguments. *See Zicherman*, 516 U.S. at 227. And the conduct was quite substantial, including the adoption of statutes and the decision of an appellate court, not an argument contained in a brief. The Opposition also cites to the Syllabus in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1641 (2020). But this is a citation to the Syllabus, which does not form a part of the Opinion and is improper for purposes of citation. *U.S. v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906). The headnote is even more unhelpful to Petitioners because it cites postratification conduct to determine the parties' intent upon drafting the treaty. *Ibid*. This is not relevant to the arguments at all.

Moreover, the Opposition does not wrestle with the broader consequences of its argument. From a logical perspective, if a State can change its interpretation of a treaty from one case to the next based on a sentence from counsel, it will become nearly impossible to track a State's position, especially since some States face numerous, simultaneous cases. And if briefing papers are binding postratification conduct, then a last-in-time approach would invariably apply, meaning that, even under the best of circumstances for Petitioners, Zimbabwe's current papers would supersede its prior ones. In short, there is no reason for the Court to indulge in the Opposition's attempt to play word games with prior statements about a different treaty in a separate context.

C. The Opposition does not engage with the substantial benefits that Petitioners gained through their ICSID claims

As the Motion plainly stated, courts routinely recognize the ability of parties to modify the terms of their relationship, from the applicable law to enforcement. *See* ECF No. 11, p. 22. The Opposition does not contest this general point and focuses instead on the language of the modification. *See* ECF No. 18, pp. 14-15. There is no argument that the limitations are unfair or difficult to find. Petitioners took advantage of the German Treaty and the Swiss Treaty, granting

them rights to compensation superior to others whose land was expropriated. *See* ECF 1-2, ¶ 162. They must now be held to the rest of the terms in the German Treaty and the Swiss Treaty.

II. The Court should dismiss the Petition for failure to state a claim upon which relief can be granted[13]

A. Petitioners have not explained why they can disregard the text of the von Pezold Award that prohibited joint enforcement of both Awards

The Opposition offers no real response to Zimbabwe's citation to paragraph 938 of the von Pezold Award and the Tribunal's finding 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." ECF 1-2. Instead, Petitioners merely assert that they are not seeking double recovery. *See* ECF No. 18, pp. 22-23. This misses the point. The threshold issue is whether the Awards are "jointly enforceable," and the Opposition provided no basis to allow Petitioners to seek joint enforcement of both Awards even though the Tribunal expressly precluded this tactic. Zimbabwe should not have to defend two cases seeking the same, duplicative relief, especially when the Awards did not grant Petitioners this right.

The second issue goes to the actual amount of the judgment sought by Petitioners, and again the Opposition offers little in response. Zimbabwe alerted the Court to the fact that Petitioners are seeking damages plus interest on both of the Awards, even though the principal upon which interest is calculated in both Awards includes the Border Estate. *See* Motion, ECF 11, pp. 29-30. By way of example, if the principal is $100 and interest is 10%, at the end of the year the debtor owes $110. But if there are two claims both seeking the same 10%, the total interest pursued is $20, wrongly inflating the debt from $110 to $120. Petitioners are seeking much more,

[13] Zimbabwe notes in passing that there is no dispute as to the legal standard employed for this argument.

potentially tens of millions of dollars—a fact that Petitioners do not deny. Petitioners must quantify what they want from Zimbabwe, and by saying nothing, they are plainly seeking an impermissible double recovery.

B. Petitioners have failed to explain the value they received from the disposition of their interest in Border Timbers, and the reasonable inferences drawn from the documents in the Coleman Declaration do not support the "nominal" value that Petitioners claim

The Opposition goes to great pains to describe the value of the Award as "nominal," but this is a word confined largely to the Coleman Declaration and other assertions by counsel. ECF No. 18, p. 10. The only reasonable inference is that the actual value is something greater, as shown by the documents attached to the Coleman Declaration. Exhibit 2 is the Project Shona Framework Agreement (the "Shona Agreement"), and it is full of acronyms and corporate names, trust companies, and offshore vehicles without the names of the ultimate beneficial owners. The Shona Agreement also contains the reference to value, but never "nominal" value.

Entered into on February 28, 2012 (ECF 18-1, p. 664), the Shona Agreement is long and difficult to decipher for those not intimately familiar with the transaction. Sometime after February 28, 2012, there were a number of "closings" scheduled when various companies would transfer shares, assume debts, and otherwise convey interests in a number of corporate vehicles. Article 11 deals with the Border Timbers Award. ECF No. 18-1, p. 685. It provides that "prior to the 12th anniversary of the BT Closing," a date sometime after February 28, 2012, or less than twelve years ago, the Shona Agreement would cover two options. *Ibid*. If the Border Timbers Award results in Border Timbers receiving value, either by settlement or otherwise, and the value exceeds USD 84 million, then RVC, a party to the Shona Agreement, would have to issue shares in itself to GAH, another party to the Shona Agreement. ECF 18-1, p. 685. The real identity of RVC and GAH is impossible to confirm, but this is irrelevant. Our focus is value, and the issuance of these shares,

the ones to be issued in the future, is "as additional consideration for the SEL Shares sold to RVC[.]" *Ibid*. Those words, "additional consideration," speak to the value, which is somewhere above USD 84 million and somehow acceptable to RVC. In other words, the value of the Awards, is part of the consideration for the SEL Shares, without any use of the word "nominal."

Based on the Petition and the documents attached to the Opposition, Zimbabwe cannot attach a value to the "additional consideration," in part because there is no value ascribed to the SEL Shares. But it is reasonable to assume that the "additional consideration" is substantial. The von Pezold family is economically powerful, so much so that it can pay the substantial fees charged by its counsel. *See* Award, ECF No. 1-2, p. 302, ¶ 965. The transaction is related to operational assets that the Tribunal valued at multiple millions of dollars. And for GAH to relinquish its right to RVC shares, the SEL Shares had to also possess some sort of high value. Otherwise, as Petitioners try to explain, but never can, there is no reasonable economic rationale for RVC acquire something worth millions of dollars, hold it for 12 years, and then release it, apparently for free, once this time has passed.

In any event, the amount is much more than "nominal," and the only reasonable path forward is for Petitioners to quantify the amount they seek so that Zimbabwe can properly respond. At this point, Zimbabwe does not know how much it owes Petitioners, and neither Zimbabwe nor the Court has the tools to figure it out.

Petitioners' other arguments on this point are unavailing. The Opposition (not the Petition) claims that the "von Pezolds subsequently sold their share in the joint venture for a nominal US$1," but the Opposition does not identify any document to support this allegation or point to any paragraph in the Petition as support. *See* ECF No. 18, p. 10. The Opposition includes the Coleman Declaration, which points to the fact that Petitioners disclosed the transaction before the issuance

of the Awards. But this does not resolve the issue. At that time, Zimbabwe had no reason to object to a private, commercial transaction. In 2012, there were no awards, and the value of the "additional consideration" was irrelevant to Zimbabwe. When they discussed the transaction before the Tribunal, the von Pezold Claimants did not attach the transaction documents—offering only a description of them that excluded certain terms. The remaining explanations in the Coleman Declaration are superficial and require assumptions regarding the identity of the "joint venture" and the value of the Border Estate that are not readily apparent from the Shona Agreement. In sum, the documents contradict the generic assertions in the Petition and do not establish the "nominal" value or the basis on which this value was acquired and then disposed of.

Digging further into the documents, the submission dated September 4, 2012, included as Exhibit 3 to the Coleman Declaration, claims a lack of value that relies on the legal fiction that the von Pezolds were "unable to offer any value" to the Border Estates. *See* Claimants' Notification, ECF No. 18-1, p. 780, ¶ 24. The Høeghs, a third-party, assigned a value of USD 84 million. *See id.*, p. 782, ¶ 33. And the Border Estate continued to operate, growing in value until the date of the Awards. *See* Award, ECF No. 1-2, p. 63, ¶159. Presumably, the Høeghs have received their share in the returns generated by the Border Estate, thus explaining their willingness to agree to the 12-year term, after which their obligations to issue shares in favor of the von Pezold Claimants would cease. These are sophisticated families, and contrary to the narrative provided to the Tribunal, the "additional consideration" referenced in the Shona Agreement had a meaning between the parties that was economically advantageous to both, not the nominal value claimed. At some point,

Petitioners will have to explain the actual value, but based on the text of the Petition and the documents attached, that moment cannot be now.[14]

C. Petitioners have provided no legal argument to rebut Zimbabwe's assertion that Petitioners no longer have the right to enforce the portion of the Awards related to the disposition of the Border Estate

In the Motion to Dismiss, Zimbabwe cited numerous cases that discussed situations where a debtor has multiple creditors but the debt was partially paid by a third party. *See* Motion to Dismiss, ECF No. 11, pp. 30-31. The Opposition offered no contradictory legal authority, and to the extent that there was a response, the Opposition states that "a transaction between the von Pezolds and the Border Claimants cannot discharge Zimbabwe's obligations under the Award." Opposition, ECF No. 18, p. 24. This conclusory statement appears to address only the factual arguments asserted in the paragraphs above. There is no engagement with the legal standard, and Zimbabwe can only assume that Petitioners do not oppose it.

III. Because Petitioners have not served Zimbabwe, despite commencing the action six months ago, the Court should dismiss the Petition

Petitioners do not dispute that service to foreign sovereigns must be perfected in strict adherence to 28 U.S.C. § 1608(a). In support of this position, the legal authorities cited by Petitioners establish that neither substantial compliance nor actual notice can cure a failure to effect service in compliance to 28 U.S.C. § 1608(a). *See* Supplemental Authority, ECF No. 21, *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic of Venezuela*, 23 F.4th 1036 (D.C. Cir. 2022); *see also Gretton Ltd. v. Republic of Uzbekistan*, No. CV 18-1755 (JEB), 2019 WL 3430669,

[14] The Opposition has chosen not to engage with Zimbabwe's citations to the proceedings in *Heinrich v. BTL*, and paragraph 8 that Heinrich and his family have "substantially disposed" of their interests in Border Timbers Ltd. Zimbabwe does not know if this is Shona Agreement, and the Opposition provided no clarification.

pp 3-4 (D.D.C. July 30, 2019) (holding that service is not proper where a petitioner fails to send copies of the "Notice of Suite and of the FSIA" to the head of the ministry of foreign affairs).

There is no debate that Petitioners have failed to properly serve Zimbabwe. Petitioners concede that the service of process dispatched by the clerk on August 20, 2021, was addressed to the former head of the ministry of foreign affairs who passed away six months before Petitioners commenced the action against Zimbabwe. ECF 18, p. 8. Attaching screenshots does nothing to change this fact. Zimbabwe does not have the burden to update its websites, especially when a simple Google search to confirm the content of the website would have confirmed the actual state of affairs. Petitioners also do not deny that a copy of the FSIA was not mailed to the ministry as required under 28 U.S.C. § 1608(a)(4). *See* Motion to Dismiss, ECF 11, p. 34. This is sufficient to show a lack of service.

No amount of blame-shifting can excuse Petitioners' failings. The Opposition criticizes Zimbabwe's counsel for failing to accept service, but the FSIA does not "compel[] a foreign sovereign to accept service through its counsel." *Jouanny v. Embassy of France in the United States*, 220 F. Supp. 3d 34, 39 (D.D.C. 2016). Petitioners then insist that they have "re-served Zimbabwe on December 29, 2021." But the record says otherwise. It is well-settled that "[s]ervice is not complete until the date of receipt as indicated in the certification, return receipt, or other proof of service." *Underwood v. United Republic of Tanzania*, No. CIV. 94-902, 1995 WL 46383, at *2 (D.D.C. Jan. 27, 1995). Here, Petitioners have not submitted any proof of service. Because jurisdiction over a State requires service, this Court "cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Jouanny*, 220 F. Supp. 3d at 40 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)); *see also Ellenbogen v. The Canadian Embassy*, No.

CIV.A. 05-01553JDB, 2005 WL 3211428, at *3 (D.D.C. Nov. 9, 2005); *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 84 (D.D.C. 2003); *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 124-25 (2nd Cir. 2017).

Petitioners neither sought nor deserve an extension of time to effect service. While this Court grants extension of time to perfect service "when there exists a reasonable prospect that service can be obtained," such extension is commonly limited to 30 days. *See, e.g., Jouanny*, 220 F. Supp. 3d at 40 (granting plaintiff 30 days to perfect service and noting that "[f]ailure to effect service within that time, or to seek additional time for service, may result in dismissal of this matter") (emphasis added); *Underwood v. United Republic of Tanzania*, No. CIV. 94-902, 1995 WL 46383, at *4 (D.D.C. Jan. 27, 1995) (giving plaintiff 30 days to provide proof of service and noting that it "will dismiss the case if such evidence is not filed within" such period) (emphasis added). It has been close to 90 days since the filing of the Motion on November 24, 2021, meaning Petitioners were, therefore, aware of the improper service. Petitioners have not and cannot provide any ground for failing to seek an extension of time.

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

In its arguments regarding Elisabeth's standing, the Opposition offers no contrary law to the legal standard offered by Zimbabwe. *See* ECF No. 18, pp. 25-26. At the same time, the Opposition does not heed the direction of this Court, which has counseled that the burden to establish standing falls squarely on the party invoking jurisdiction. *See Grand Lodge of Fraternal Order of Police v. Ashcroft,* 195 F.Supp.2d 9, 13 (D.D.C. 2001); Motion to Dismiss, ECF No. 11, pp. 34-35. Instead, Petitioners intimate that, even though they had the relevant documents for their Malaysian proceedings, they had no reason to attach them to the Petition, trying to shift the burden on Zimbabwe to know and respond to documents supposedly served on an agency different than

the one defending this action mere days before the deadline. Opposition, ECF 18, p. 25. Certainly, the Court will understand that it was for Petitioners to plead the facts showing standing, not for Zimbabwe to solve the question for itself after the fact.

Even with the chance to present documents, Petitioners have still failed to plead or provide the facts necessary to show that Elisabeth has standing to bring Rüdiger's claim. The Opposition relies on an order sent to Zimbabwe but not attached to the Opposition, a failing that means there is no document attached to the Petition or submitted by the parties that can provide any factual support to prove the text of Rüdiger's will. As this Court is surely aware, Petitioners must rely on "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 citation to an order does not fit this standard.

The Opposition does cite to the Awards and includes a reference to the Coleman Declaration, where there is a legal opinion (the "Rabi Opinion") from the lawyer who apparently represented Elisabeth—certainly not a disinterested person. The Rabi Opinion reaches the conclusion that Rüdiger could transfer everything except "highly personal" rights, but it never concludes that the right at issue falls outside this category. Neither Zimbabwe nor the Court are experts in Austrian law, and they cannot solve this ambiguity for themselves.

The Opposition relies on Rüdiger's ability to transfer his rights to Elisabeth (ECF 18, pp. 20-21), and the inability to present either documents or the categorical opinion of Elisabeth's lawyer means that the Petition has failed to allege Elisabeth's standing to sue in Rüdiger's name.

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 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