UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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) Case No. 21-cv-2428 (APM)
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Petitioners Border Timbers Limited and Hangani Development Co. (Private) Ltd. ask the court to certify as "frivolous" an interlocutory appeal by Respondent Republic of Zimbabwe from the court's ruling that it has subject matter over this matter. Pet'rs.' Mot. to Certify Appeal as Frivolous, ECF No. 59. The court is compelled to deny the motion.

<u>ORDER</u>

"An appeal is considered frivolous when its disposition is 'obvious,' and the legal arguments are 'wholly without merit." *Reliance Ins. Co. v. Sweeney Corp., Md.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986) (quoting *Gattuso v. Pecorella*, 733 F.2d 709, 710 (9th Cir.1984)). Here, Zimbabwe has appealed the court's decision on jurisdiction despite multiple cases holding that the Foreign Sovereign Immunity Act's arbitration exception and its waiver provision confer subject matter jurisdiction to enforce an ICSID award. *See Von Pezold v. Republic of Zimbabwe*, No. 21-cv-2004 (APM), 2023 WL 5547912, at *3 (D.D.C. Aug. 9, 2023) (citing cases). There is, however, no binding case from the D.C. Circuit to that effect. The cases the court cited are from the Second Circuit and trial courts in this District. *See id.* Although the court doubts Zimbabwe's prospects on appeal, *cf. Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria*, 27 F.4th 771, 776 (D.C.

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Cir. 2022) (holding that "application of the arbitration exception here is straightforward" in a case involving an award subject to the New York Convention), it cannot say that the outcome is "obvious" or that Zimbabwe's arguments are "wholly without merit."

Accordingly, Petitioners' motion is denied. This matter shall be stayed pending the outcome of Zimbabwe's appeal to the D.C. Circuit.

Dated: October 19, 2023

Amit P. Mehta

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