IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF KUALA LUMPUR
ORIGINATING SUMMONS NO: WA-24NCC-322-07/2021
ORIGINATING SUMMONS NO: WA-24NCC-323-07/2021

BETWEEN

1. ELISABETH REGINA MARIA GABRIELE VON PEZOLD
2. ANNA ELEONORE ELISABETH WEBBER (NEE VON PEZOLD)
3. HEINRICH BERND ALEXANDER JOSEF VON PEZOLD
4. MARIA JULIANE ANDREA CHRISTIANE KATHARINA BATTHYANY (NEE VON PEZOLD)
5. GEORG PHILIPP MARCEL JOHANN LUKAS VON PEZOLD
6. FELIX ALARD MORITZ HERMANN KILIAN VON PEZOLD
7. JOHANN FRIEDRICH GEORG LUDWIG VON PEZOLD
8. ADAM FRIEDRICH CARL LEOPOLD FRANZ SEVERIN VON PEZOLD ….PLAINTIFFS

AND

REPUBLIC OF ZIMBABWE …DEFENDANT

BRIEF GROUNDS OF DECISION

[1] The decisions of the Court are as follows:

a) Originating Summons No. WA-24NCC-322-07/2021 is allowed;

b) Originating Summons No. WA-24NCC-323-07/2021 is allowed;

c) Enclosure 11 of Originating Summons No. WA-24NCC-322-07/2021 is dismissed; and

d) Enclosure 11 of Originating Summons No. WA-24NCC-323-07/2021 is dismissed.

[2] My broad grounds are provided below.

[3] Originating Summons No. WA-24NCC-322-07/2021 and Originating Summons No. WA-24NCC-323-07/2021 are referred to together as "***the Originating Summonses***" below.

[4] The grounds below all relate to the decisions for the Originating Summonses and respective Enclosures 11 of the Originating Summonses except for paragraphs 66 to 72 which relate to the respective Enclosures 11 of the Originating Summonses only.

Jurisdiction

[5] It is clear that the Court is mandated under the Convention on the Settlement of Investment Disputes Act 1966 (Revised 1989) ("***ICSID Act***") to recognise the award rendered on 28.7.2015 ("***the Award***") and the Decision on

Annulment rendered on 21.11.2018 ("***Decision on Annulment***"). Section 3 of the ICSID Act provides that an award made by an arbitrator under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("***the ICSID Convention***") is binding and may be enforced as a decree judgment or order of the High Court. The ICSID Convention itself, which is the Schedule to the ICSID Act, also specifies that the award shall be binding on the parties, and each contracting state shall recognise and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgment of a Court in that state.

[6] The ICSID Act makes the provisions of the ICSID Convention effective in Malaysia and designates the High Court as the Court for the recognition and enforcement of ICSID awards. The designated Court is required to recognise the ICSID award and decision on annulment, and the Award and the Decision on Annulment are considered an award for recognition purposes.

[7] As long as the requirement of Article 54(2) of the ICSID Convention is satisfied, which the Plaintiffs have done by exhibiting a copy of the Award and the Decision on Annulment certified by the Secretary-General of the ICSID Centre, the Court is mandated to recognise the Award and Decision on Annulment pursuant to the provisions of the ICSID Act.

[8] The Court also has the jurisdiction to recognise the ICSID Award and Decision on Annulment. Section 23(2) of the Courts of Judicature Act 1964 ("***CJA***") confers jurisdiction to the High Court "such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction."

[9] In this case, the ICSID Act provides the necessary written law that mandates the Court to recognise the ICSID Award and Decision on Annulment as if it were a judgment or order of the Court.

[10] The Defendant argued that Section 23 of the CJA does not apply to this case, as none of the limbs mentioned under Section 23(1) of the CJA apply as the dispute between the parties has already been conclusively and finally determined by the issuance of the Award and Decision on Annulment. However, the Court finds that Section 23(2) of the CJA, which provides for the High Court to have such jurisdiction as may be vested in it by any written law in force within its local jurisdiction, is applicable to this case.

[11] In *Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd* [2011] 5 MLJ 629, the Federal Court held that the High Court possesses original jurisdiction where it is expressly provided for by written law.

Sovereign Immunity

[12] The Defendant submitted that it is immune from both the present proceedings on the enforcement of the Award and the Decision on Annulment and the enforcement and/or the execution of the Award and Decision on Annulment against the assets and/or properties of the Defendant in Malaysia due to its status as a sovereign state.

[13] In this respect, the Defendant submitted that the Court cannot exercise jurisdiction over it in these proceedings because it has not submitted to the jurisdiction of the Malaysian Court or waived its immunity.

[14] The Defendant also submitted that, the Court has no jurisdiction over the Defendant as the Land Reforms implemented by the Defendant in Zimbabwe giving rise to alleged breaches of the Germany-Zimbabwe bilateral investment treaty signed on 29.9.1995 ("***German BIT***") and the Switzerland-Zimbabwe bilateral investment treaty signed on 15.8.1996 ("***the Swiss BIT***") and forming the core of the dispute between the Plaintiffs and the Defendant were actions of a governmental or sovereign nature, whereas the Court only has jurisdiction over actions of a commercial or private nature of a foreign sovereign state.

[15] The Defendant further submitted that as the Defendant does not have any commercial assets or properties in Malaysia and the only assets in Malaysia are diplomatic assets connected to its mission, it is not subject to the jurisdiction of the Court. In this regard:

a) The Plaintiffs have failed to disclose or identify any assets or properties of the Defendant they seek to enforce in Malaysia;

b) The Court lacks jurisdiction over Defendant's assets which are diplomatic and connected to its mission in Malaysia as stated in Article 22 of the Schedule of the Diplomatic Privileges (Vienna Convention) Act 1966 (Revised 2004);

c) The law relating to immunity of foreign states from execution continues to apply as stated in Article 55 of the Schedule to the ICSID Act;

d) The Defendant has not waived its immunity against the enforcement and/or execution of its diplomatic assets in Malaysia; and

e) The Plaintiffs' reliance on inconclusive media reports should be disregarded by the Court.

[16] I do not accept the Defendant’s submissions.

[17] The Plaintiffs in the Originating Summonses are seeking recognition, not execution, of the Award and the Decision on Annulment. Therefore, the consideration of immunity from enforcement and execution is premature and should

only be addressed when execution is sought, if raised by the Defendant.

[18] In the New Zealand case of *Sodexo Pass International SAS v Hungary* [2021] NZHC 371 it was held that a state, in this case Hungary, cannot claim state immunity to prevent an ICSID arbitral award from being recognised in domestic courts. The Court must recognise the award as if it were a judgment, but the state can still claim immunity from execution processes. The Court has jurisdiction to make decisions on immunity from execution, but only after the award has been recognised. The concepts of recognition and execution are different, and immunity from execution does not apply to recognition. Article 55 of the ICSID Convention does not make Hungary immune from the jurisdiction.

[19] In *Kingdom of Spain v Infrastructure Services Luxembourg SARL* [2021] FCAFC 3 the Australian Federal Court held that the obligation to recognise an award under Article 54 of the ICSID Convention was unaffected by questions of immunity from execution, and that a proceeding seeking an order to permit or facilitate enforcement of, or execution procedures for, pecuniary obligations imposed by an award was a species of recognition and could not be execution. The order given by the Court gives the award the required recognised status in the domestic legal system and is equivalent to a domestic judgment and is enforceable as such.

[20] The Court accepts the view stated by the learned authors Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair of The ICSID Convention: A Commentary who commented on Article 54(3) of the ICSID Convention stating that state immunity cannot be used to prevent the recognition of an ICSID award, and state immunity only applies when concrete measures of execution are taken to enforce the award's pecuniary obligations.

[21] The Plaintiffs seek for the reliefs in the Originating Summonses premised upon the ICSID Act and the ICSID Convention, which provide for recognition and enforcement of ICSID awards in the same manner as a Court judgment.

[22] The ICSID Convention has different terms for the recognition and execution of the award and decision on annulment. Article 54 of the ICSID Convention requires each Contracting State to recognise the award and decision on annulment, while Article 55 states that this recognition does not affect the law in force relating to the immunity of the state from execution. Therefore, according to the ICSID Convention, the consideration of sovereign immunity is limited to the execution stage after the recognition of the Award and Decision on Annulment as a final judgment of the relevant Contracting State.

[23] The words employed in Articles 54 and Article 55 of the ICSID Convention are clear and this Court will give them their natural and ordinary meaning without departing from their plain meaning as there are no clear reasons for doing so. See *Hj Mostapa bin Asan, deceased) v Hulba- Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721 (Federal Court).

[24] Regarding the question of the Defendant's submission to the jurisdiction of the Malaysian Court or waiver of its immunity, it is the finding of this Court that the Defendant has, through its conduct, submitted to the jurisdiction of the courts of every contracting state to the ICSID Convention where the Award and Decision on Annulment are being recognised. Moreover, the Defendant is considered to have waived its immunity before the courts of every contracting state where the Award and Decision on Annulment are being recognised.

[25] On the subject of whether the Land Reforms are of a governmental or sovereign nature, and with regard to the Tribunal's ruling of jurisdiction, and in light of Articles 53(1) and 54(1) of the ICSID Convention, the Defendant is precluded from reopening the question of the Tribunal's decision in the Award and Decision on Annulment. The Defendant's reference to the Land Reforms and subsequent implementation as acts of a sovereign and governmental nature cannot be sustained. The Award and the Decision on

Annulment are now final and binding on the parties and must be recognised by all the Contracting States to the ICSID Convention, including the Defendant.

Lack of procedural framework

[26] The Defendant submitted that the Court has no jurisdiction over the Defendant, a foreign sovereign state, given that there is no procedural framework legislated by Parliament for the enforcement of ICSID awards. Section 3 of the ICSID Act only states that ICSID awards can be enforced in the same way as a Court order, without any specific procedural mechanism.

[27] The contrast between the treatment of arbitration awards and foreign judgments is highlighted by the Defendant in relation to the procedural frameworks provided by the Arbitration Act 2005 ("***AA 2005***"), the Arbitration Act 1952 ("***AA 1952***"), and the Reciprocal Enforcement of Judgments Act 1958 ("***REJA 1958***"). Order 69 of the ROC 2012 only applies to proceedings governed by AA 2005 and the repealed AA 1952 and does not give the Court the powers to enforce awards under the ICSID Act.

[28] The Defendant also contrasted the position in Malaysia with that of other jurisdictions such as the United Kingdom and Singapore where specific laws and rules have been enacted to govern the registration and enforcement of ICSID awards. In the UK, ICSID arbitration awards are governed

by the Arbitration (International Investment Disputes) Act 1966 and the Civil Procedural Rules 1998 whereas in Singapore this is governed by the Arbitration (International Investment Disputes) Act 1968 and the Arbitration (International Investment Disputes) Rules 2002 Chapter 11, Section 6.

[29] The Defendant also argued that under Malaysian law, the courts are only empowered to interpret laws passed by Parliament and cannot use their inherent power to address gaps in the law. The responsibility to legislate and remedy any gaps in the law lies with Parliament. In support, the Defendant cited *Peh Chin Ping v Gan Ho Soon [2021] MLJU 2001* (High Court), *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 (Supreme Court) and *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753 (Federal Court)

[30] I do not agree with the Defendant's submissions.

[31] The absence of a "procedural framework" does not preclude the Court from exercising substantive powers conferred by statute. The Court is permitted to adapt its existing procedures to whatever extent is necessary to exercise the substantive jurisdiction conferred upon it by statute. Regard must be given to the Court's power to administer justice which is a power of substance, not form.

[32] The argument that the absence of a specified "procedural framework" under the ICSID Act does not prevent the recognition of the Award and Decision on Annulment is supported by various Commonwealth authorities, which include the following:

a) In the Australian case of *R v Rawson, exparte Moore* [1976] Qd R 138 it was held that if a statute confers jurisdiction on an inferior Court for a substantive matter, and there is no established procedure for the Court to exercise the jurisdiction, then the statute impliedly confers jurisdiction on the Court to adapt its procedures as necessary to exercise the substantive jurisdiction. This position is based on the principle that procedure with its rules is the handmaid, not the mistress, of justice.

b) In the English Court of Appeal case *Re King & Co.'s Trade Mark* [1892] 40 W.R. 580 it was held that the lack of a fixed procedure is not a bar to the jurisdiction of the Court and that any procedure which meets the standard of justice is sufficient to satisfy the relevant act.

c) In the Privy Council case of *Board v Board [1919] A.C. 956 (on an appeal from Alberta, Canada)* it was held that if a right exists and there is no other mode of enforcing it prescribed, then the presumption is that there is a Court which can enforce it. To oust

jurisdiction, it is necessary to plead that jurisdiction exists in some other Court.

d) In the New Zealand Court of Appeal case of *New Zealand Baking Trades Employees Industrial Union of Workers v General Foods Corporation (NZ) Ltd* BC8560136 it was held that the absence of express rules of procedure does not preclude the exercise of a jurisdiction conferred by statute, and natural justice requires that an adequate opportunity of hearing be given to the parties. The jurisdiction can be exercised either on a separate application or in proceedings already before the Court.

e) In the Canadian case of *Freeman (Re), [1924] N.S.J. No. 20* it was held that a Court's jurisdiction is not necessarily restricted to the confines of the country creating the Court, and that the legislative authority creating the Court can confer jurisdiction beyond the country's boundaries. The Court also has incidental powers within the purview of its grant of authority that are reasonably necessary to enable it to accomplish the objects for which it was invested with jurisdiction.

f) In the Malaysian case of *Rashidah Bte Mohammad v Mayban Finance Bhd* [2003] 5 MLJ 529 it was held that if a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power

conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same.

[33] The jurisdiction of the Court to recognise the Award and the Decision on Annulment under the ICSID Act is clear, and the High Court has been designated as the competent Court for recognition and enforcement of awards made under the Convention under the instrument of ratification as provided by Malaysia to the ICSID Centre.

[34] The lack of a procedural framework does not bar the recognition of the Award and the Decision on Annulment under the Originating Summonses as the substantive power of the Court to recognise the Decision on Annulment has been provided for under the ICSID Act. The Court's duty is to interpret and enforce the laws enacted by Parliament, and to expound the language of the Act in accordance with the settled rules of construction, as stated in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 3920 (Supreme Court).

[35] The inherent powers of the Court are a separate and distinct source of jurisdiction from statutory powers of the Court. These powers are intrinsic to a superior Court and are necessary to enable it to act effectively within its limited jurisdiction. They are invoked in relation to the process of litigation and are complementary to the powers specifically conferred by the rules on the Court. The Court is free to

exercise these powers towards the ends of justice or to prevent the abuse of the process of the Court. The doctrine of inherent jurisdiction should be exercised judiciously and with flexibility, and should not be circumscribed by rigid criteria or tests. See *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 2 MLJ 208.

[36] The Court allows the Plaintiffs' application for recognition of the Award and the Decision on Annulment as not doing so based on the lack of a specified procedural framework would undermine the substantive authority of the Court under the ICSID Act and Malaysia's treaty obligations as a contracting state to the ICSID Convention. The absence of a specific procedural framework does not bar the recognition of the Award and the Decision on Annulment, as the Court can adapt its procedures to give effect to the substantive powers conferred on it by statute. The Court's declaratory jurisdiction is one of the widest application, and its power to make a declaratory order is indeed unlimited, subject only to the Court's own discretion, as has been well-established in *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (Federal Court).

[37] It is of note that in New Zealand, there is no specific procedural framework or statute for the recognition of an ICSID award or for service on a foreign state. Despite this, the New Zealand High Court in *Sodexo v Hungary* was able allow service of the originating proceedings on a foreign

state under Order 6.27m of their High Court Rules 2016, which permits service out of jurisdiction "when it is sought to enforce any judgment or arbitral award" similar to our Order 11 rule 1(1)(M) of the ROC 2012.

Enforcement limited under Swiss and German BITs

[38] The Defendant submitted that these present proceedings should be stayed, given that the applicable BITs under which the ICSID Award was made expressly limit enforcement to only Germany, Switzerland, and/or Zimbabwe i.e. within the jurisdiction of the contracting states to the BITs. The Defendant prays that the Court should stay the present proceedings, as Malaysia is not the proper forum for the claims and/or relief sought by the Plaintiffs.

[39] The provisions of the BITs stating that the arbitral award should be enforced according to the domestic laws of the Contracting Party where the investment is located are:

a) Article 11(3) of the German BIT which states: "...the award shall be enforced in accordance with the domestic law of the Contracting Party in the territory where the investment in question is located."

b) Article 10(6) of the Swiss BIT which states: "...the arbitral award shall be final and binding for the parties involved in the dispute and shall be enforceable in accordance with the laws of the

> Contracting Party where the investment in question is situated."

[40] I do not accept the Defendant's submissions on this point.

[41] Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT do not state that an investor can only enforce an arbitration award in Zimbabwe. There is nothing in these provisions to derogate from the waiver of sovereign immunity that exists due to the Defendant's agreement in the BITs to arbitrate disputes at ICSID and the terms of Article 54(1) of the ICSID Convention.

[42] The subsequent sentence of Article 11(3) merely states that if the Award and the Decision on Annulment is to be enforced in Zimbabwe, it shall be enforced in accordance with domestic laws of Zimbabwe but does not prevent the enforcement of the award outside of Zimbabwe.

[43] Article 11(3) of the German BIT provides that the remedy available is as provided in the ICSID Convention. The subsequent sentence that the award shall be enforced in accordance with the domestic law of the Contracting Party in the territory of which the investment is situated does not mean that the investor can only enforce an arbitration award in Zimbabwe. The purpose of investment treaties is to promote foreign investment, and the recognition and enforcement mechanism under the ICSID Convention is a core feature. If the award could only be enforced in the

respondent state, this would nullify the purpose of investment treaties. There is no language in the article that prohibits the enforcement of the award outside of the respondent state.

[44] In Article 10(6) of the Swiss BIT, there is no restriction at all in this Article that limits the enforcement of the ICSID Award and Decision on Annulment in Zimbabwe alone. Instead, there is a recognition that the ICSID Award and Decision on Annulment is enforceable in Zimbabwe in accordance with its domestic laws.

[45] The absence of any reservation made by the Defendant to restrict the terms of the ICSID Convention is significant, as it means that the Convention can be enforced in any ICSID Contracting State. This is reinforced by Article 70 of the Convention, which specifies that the Convention applies to all territories for which a Contracting State is responsible, unless they have excluded them.

[46] The Defendant referred the Court to the Court of Appeal case of *World Triathlon Corporation v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394 for the proposition that Malaysian courts are required to enforce an agreed jurisdiction clause, and a stay should be granted unless the challenging party can demonstrate exceptional circumstances justifying a refusal. However, this case is not applicable as it dealt with agreements with “exclusive jurisdiction clauses” while there is no such clause in this

case. Instead, the ICSID Act enforces the ICSID Convention which provides for the recognition and enforcement of pecuniary obligations imposed by an ICSID award as if it were a final judgment of a Court arising from treaty obligations of nations under the ICSID Convention.

[47] In any event, the interpretation that the BITs expressly limit enforcement of the awards to only Germany, Switzerland, and/or Zimbabwe is not consistent with the Most Favored Nation ("***MFN***") clauses present in the agreements as the effect of this interpretation would be the investments and activities of nationals of Germany and Switzerland will be treated less favorably than investments and activities of third states. The MFN clauses are:

a) Article 3 of the German BIT which establishes that each contracting party shall treat investments and activities of nationals or companies of the other party no less favorably than investments and activities of its own nationals or companies, or those of any third state.

b) Article 8 of the German BIT which provides that if there are existing laws or international obligations that provide more favourable treatment to investments by nationals or companies of one Contracting Party than what is provided by the current agreement, then that more favourable treatment will prevail.

c) Article 4 of the Swiss BIT which states that the Contracting Parties must accord treatment to investors of the other Contracting Party that is not less favorable than the treatment it accords to its own investors or to investors of any third State.

d) Article 8 of the Swiss BIT which provides that if there are provisions in the laws of either Contracting Party or in international agreements that entitle investments by investors of the other Contracting Party to more favourable treatment than that provided in this agreement, such provisions will prevail over this agreement.

[48] The BIT between the Netherlands and the Defendant does not contain the equivalent of Article 11(3) of the German BIT or the equivalent of Article 10(6) of the Swiss BIT. Through the German and Swiss BITs MFN Clauses, the Defendant made commitments to extend better rights to investors from other countries to Swiss and German investors. As there is no restriction in the Dutch BIT that enforcement of the awards is limited to only Netherland and/or Zimbabwe, the Plaintiffs, who are Swiss and German investors, should not be subject to the restrictions in Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT as interpreted to by the Defendant.

[49] The arbitration case of *Emilio Agustín Maffezini v The Kingdom of Spain* (ICSID Case No. ARB/97/7) dealt with this issue. The case concerns an MFN clause in the Argentine-Spanish BIT, which provides that foreign investors must receive treatment no less favorable than that accorded to investors of a third country. The Chile-Spain BIT allows investors to opt for arbitration without first seeking redress in domestic courts. The tribunal concluded that the MFN clause in the Argentine-Spanish BIT encompasses the dispute settlement provisions of the treaty, allowing the investor to submit the dispute to arbitration without first accessing the Spanish courts, in reliance on the more favorable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain regarding the treatment of its own investors abroad.

[50] I am of the view that this approach is correct and adopt the same by holding that the Swiss and German BITs MFN clauses is applied to extend provisions of the Dutch BIT to the protection of Plaintiffs' rights and interests as the beneficiary of the MFN clauses. In this instance the Dutch BIT relates to the same subject matter as the Swiss and German BITs. I also do not see that there is any contravention of public policy considerations in adopting this approach.

Absence of Defendant's assets in Malaysia

[51] The Defendant's position is that the Plaintiffs cannot enforce the Award and the Decision on Annulment in Malaysia against the Defendant's assets when the Plaintiffs have failed to show assets or properties of the Defendant that they can enforce in Malaysia when applying for the recognition and enforcement of the ICSID Award and Decision of Annulment as a judgment of the High Court. The Defendant argued that the Plaintiffs' action is speculative since the Plaintiffs failed to do any prior analysis or investigation to disclose sufficient facts to enable the Court to properly assess jurisdiction and merely relied on media reports alleging that the deceased former President of the Defendant and/or members of his family have assets in Malaysia, which should be disregarded.

[52] The Defendant's argument that the Defendant lacks assets in Malaysia or that the Plaintiffs have failed to show that the Defendant has assets in Malaysia is irrelevant to the Plaintiffs' right to seek recognition of the Award and the Decision on Annulment and associated reliefs under the Originating Summonses. Pursuing such relief is consistent with both the ICSID Act and Malaysia's obligations as a Contracting State to the ICSID Convention.

[53] In the *Sodexo v Hungary* case, the applicant had also failed to provide evidence of Hungary's assets in New Zealand for execution purposes. However, the New Zealand High Court held identification of assets should not be required at the recognition stage as there were good reasons to assume

jurisdiction, including New Zealand's international obligation to recognise the award, even if there was no evidence of assets for execution. The Court also considered that requiring a party to identify the assets they wish to proceed against could potentially prejudice their ability to do so, so the identification of assets should not be required at the recognition stage. Issues regarding the extent to which enforcement steps may be taken is an argument for another day.

Double Recovery

[54] The Defendant, relying on paragraph 938 of the Award, argued that losses from the Border Estate cannot be recovered by both the Von Pezolds Arbitration and Border Arbitration, as there cannot be double recovery of the same losses. The doctrine of double recovery is premised on the principle that a party cannot be compensated twice for the same loss.

[55] The Court finds that the Defendant's argument of double recovery is without merit.

[56] The Tribunal in the Von Pezold Arbitration and the Border Arbitration acknowledged that the von Pezold Claimants and the Border Claimants had been granted the same relief for the Border Estate. However, the Tribunal also noted that their rights could not be jointly enforceable, and that impermissible double recovery would only occur if one set

of Claimants brought proceedings consecutively rather than concurrently.

[57] There is no bar to the current proceedings based on the ICSID Award, as no right has been enforced to make it legally and materially impossible for the other set of Claimants to pursue the same. Double recovery can only occur if one set of Claimants has already obtained restitution or compensation in respect of the Border Estate, and the other set of Claimants pursues the same remedy while ignoring the compensation already recovered.

[58] The ICSID Award recognised the Plaintiffs' entitlement to pursue the current proceedings independently of the claimants in the Border Companies Arbitration. As the Defendant has not made any payment towards either the Award or the Decision on Annulment to date, there has been no impermissible double recovery on the facts.

[59] The Framework Agreement required Gusterheim Africa Holdings Limited to transfer the Plaintiffs' entire interest in the Border Companies into the Joint Venture in exchange for a nominal consideration of US$1 and the issuance of B Warrants. However, the purpose of the nominal consideration of US$1 was to make the contract binding under English law, and that the Framework Agreement emphasised that the von Pezolds retained all rights of action and claims for reparation and rights to any reparation awarded, including restitution and compensation, in relation

to the Von Pezold Arbitration and its subject matter. Therefore, there was no assignment of any of the rights or claims that are the subject of the Von Pezold Arbitration and the Border Companies Arbitration.

[60] The Defendant had the opportunity to raise the impact of the divestment point during the hearing of the Von Pezold Arbitration, but chose not to do so. Therefore, it is too late to raise this point now.

Orders for Service Out of Jurisdiction

[61] The Defendant takes the position that the Order for Service out of Jurisdiction for OS 322 and Order for Service out of Jurisdiction for OS 322 for OS 323 both given by the Court on 25.8.2021 (together, "***the Orders for Service out of Jurisdiction***") were not properly granted by the Court in light of the lack of legislation with respect to service of process on a foreign sovereign state in Malaysia. In this regard the Defendant contended as submitted as follows:

a) Unlike the UK and Singapore, there is no legislation in Malaysia that governs the procedure for service of process on a foreign sovereign; and

b) Any attempt to serve process on a foreign state must be made in accordance with the principles of common law, and the Court cannot create new

jurisdiction or expand its jurisdiction where none existed before.

[62] I do not accept the Plaintiffs' position. Other jurisdictions having specific legislation does not undermine the authority of the Court to grant the Orders for service out of Jurisdiction.

[63] The New Zealand High Court in Sodexo v Hungary allowed service of originating proceedings on a foreign state to enforce an ICSID award, despite the lack of a specific procedural framework or statute for such recognition or service. The court relied on Order 6.27m of their High Court Rules 2016, which permits service out of jurisdiction for the enforcement of any judgment or arbitral award, similar to Order 11 rule 1(1)(M) of the ROC 2012.

[64] As stated above, the Court can exercise its inherent jurisdiction to give effect to the Award and Decision on Annulment and ensure that Malaysia fulfills its treaty obligations under the ICSID Convention. Therefore, it is possible to resort to to Order 11 rule 1(1)(M) ROC 2012 so as to permit service of the Originating Summonses and the Plaintiffs' Affidavit in Support on the Defendant since what is at hand is originating process "to enforce or set aside a judgment or an arbitral award". In this regard, the Originating Summonses are claims that seek to enforce both a judgment and an arbitral award. The Award and the Decision on Annulment are awards given by the arbitrator

under the ICSID Act and viewed as a final judgment in each Contracting State (including Malaysia). Order 11 rule 1(1)(M) of the ROC applies to the enforcement of a judgment as well as an arbitral award, and is not limited to enforcement under the Arbitration Act 2005.

[65] Quite apart from Order 11 ROC 2012 which confers jurisdiction on the courts, Section 23 of the Civil Jurisdiction Act (CJA) also provides an independent source of jurisdiction for the courts. It was held by the High Court in *Goodness For Import And Export v Phillip Morris Brands Sarl Goodness For Import And Export v Phillip Morris Brands Sarl* [2016] 5 MLJ 171 although the defendant was a foreign entity, the High Court had jurisdiction over it through Order 11 ROC 2012 and the conferment of such jurisdiction was implicit in connection with the granting of leave by the High Court for service out of jurisdiction as Section 23(1) of the CJA also confers extra-territorial jurisdiction on the High Court independently of Order 11 ROC 2012. Therefore, this Court has the jurisdiction to consider the Plaintiffs' Application for Leave and to issue the subsequent Orders for service out of Jurisdiction under Order 11 rule 1(1)(M) ROC 2012.

Failure to make full and frank disclosure

[66] The Defendant argued that the order granting the leave should be set aside because the Plaintiffs have failed to make full and frank disclosure of relevant facts and

documents by not producing the relevant German BIT and Swiss BIT with particular attention to Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT. The Defendant also argued that even if they had disclosed the BITs, they were also obliged to explain their relevance and materiality to the High Court which they had failed to do. As a result, the High Court was not presented with all the relevant and material facts to decide whether it had jurisdiction to grant leave.

[67] The Defendant submitted that full and fair disclosure of all relevant and material facts is necessary in an ex parte application for service of a writ out of jurisdiction, and cited several authorities to support their position. The Defendant also highlighted that failure to disclose such information can lead to material non-disclosure of relevant facts and result in setting aside an ex parte order. The cases of *Cantrans Services (1965) Ltd v Clifford* [1974] 1 MLJ 141 (Federal Court) and *Koperasi Permodalan Felda Malaysia Berhad v Alrawda Investment For Real Estate Development & Projects Management Co Ltd & Anor* [2019] 7 MLJ 647 (High Court) were specifically referenced to illustrate these points.

[68] The Defendant also submitted that the Plaintiffs have failed to make full and fair disclosure when it did not disclose or identify any assets and/or properties of the Defendant that are allegedly in Malaysia. In particular, the Plaintiffs failed to draw the attention of the Court that the only assets which

the Plaintiffs were relying on, were rumors of no probative value about assets and/or properties which the deceased former President of the Defendant and/or members of his family are alleged to have acquired decades ago in Malaysia.

[69] I do not accept the contentions of the Defendant above.

[70] In the Plaintiffs' Application for Leave, the Plaintiffs have placed before the Court all the relevant and material facts for the purposes of the Leave Application. The Orders for service out of Jurisdiction were properly granted by the Court with with due consideration of all material facts related to this matter.

[71] The Plaintiffs' non-disclosure or failure to identify any assets of the Defendant in Malaysia is irrelevant to the Plaintiffs' right to seek recognition of the Award and the Decision on Annulment and associated reliefs under the Originating Summonses and therefore cannot be regarded as the Plaintiffs' failure to make full and fair disclosure of material facts for the purposes of obtaining the Orders for service out of Jurisdiction.

[72] Similarly, there is no failure by the Plaintiffs to make full and frank disclosure of relevant facts and documents in respect of the German BIT and Swiss BIT as the BITs do not limit enforcement to only Germany, Switzerland, and/or Zimbabwe.

17 February 2023

-sgd-

ATAN MUSTAFFA YUSSOF AHMAD

Judge

Kuala Lumpur High Court NCC1

(Commercial Division)

Counsel:

For the Plaintiffs:	*John Mathew with Sabin Ann Thomas (Messrs. Christopher & Lee Ong)*
For the Defendant:	*Nitin Nadkarni with Soh Zhen Ning (Messrs. Lee Hishamuddin Allen & Gledhill)*