No. _____

In the Supreme Court of the United States

AMAPLAT MAURITIUS LTD. AND
AMARI NICKEL HOLDINGS ZIMBABWE LTD.
Petitioners,

v.

ZIMBABWE MINING DEVELOPMENT CORP.;
CHIEF MINING COMMISSIONER, MINISTRY OF MINES OF ZIMBABWE; AND REPUBLIC OF ZIMBABWE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act allows suit against a foreign sovereign that "has waived its immunity . . . by implication." 28 U.S.C. § 1605(a)(1). The Second Circuit has long held that a foreign sovereign impliedly waives its immunity from a suit seeking recognition of a foreign judgment confirming an arbitral award where the sovereign both (1) joins the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") and (2) agrees to binding arbitration of a dispute in another Convention state. *See Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co.* v. *Navimpex Centrala Navala*, 989 F.2d 572, 581–583 (2d Cir. 1993).

In this case, the District of Columbia Circuit explicitly disagreed. App.12a–13a. As a result, an acknowledged conflict of authority exists between two of the "principal" circuits in which parties seek to enforce arbitral awards against foreign sovereigns. *See Bolivarian Republic of Venezuela* v. *Hemerich & Payne Intern. Drilling Co.*, 581 U.S. 170, 186 (2017).

The question presented by this Petition is:

When a foreign sovereign that is a party to the New York Convention agrees to arbitrate a dispute governed by the Convention, does it impliedly waive immunity from an action in U.S. courts to recognize a valid foreign judgment confirming the arbitral award in another member state. *See* 28 U.S.C. § 1605(a)(1).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

1. Petitioners Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd., were plaintiffs in the district court and plaintiffs-appellees in the D.C. Circuit.

2. Respondents Zimbabwe Mining Development Corporation, the Chief Mining Commissioner of Zimbabwe's Ministry of Mines, and the Republic of Zimbabwe were defendants in the district court and defendants-appellants in the D.C. Circuit.

3. Petitioners Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. are both privately-held companies incorporated under the laws of Mauritius. Both are majority-owned by Zimbabwe Investment Holdings, Ltd., a privately-held company, which is a subsidiary of Hybrid Capital Group, Inc., which has no parent company. No publicly-held company owns 10% or more of their stock.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

> *Amaplat Mauritius Ltd.* v. *Zimbabwe Mining Development Corp.*, No. 1:22-cv-00058-CRC (Feb. 9, 2024)

United States Court of Appeals (D.C. Cir.):

> *Amaplat Mauritius Ltd.* v. *Zimbabwe Mining Development Corp.*, No. 24-7030 (July 15, 2025)

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The district court's February 9, 2024, opinion is reported as *Amaplat Mauritius Ltd.* v. *Zimbabwe Mining Development Corp.*, 717 F.Supp.3d 1 (D.D.C. 2024) and is reproduced in the Appendix (App.19a–45a).

The court of appeals' opinion is reported as *Amaplat Mauritius Ltd.* v. *Zimbabwe Mining Development Corp.*, 143 F.4th 496 (D.C. Cir. 2025) and is reproduced in the Appendix (App.1a–18a).

JURISDICTION

The courts below had jurisdiction under 28 U.S.C. § 1330(a) and § 1292. This Court has jurisdiction under 28 U.S.C. § 1254.

The Court of Appeals for the D.C. Circuit issued its opinion on July 15, 2025. On September 24, the Chief Justice granted Petitioners' application to extend time to petition for a writ of certiorari until December 12, 2025.

STATUTORY PROVISIONS INVOLVED

The statutory provisions and Conventions involved are reproduced in the Appendix.

INTRODUCTION

The decision below creates a conflict of authority in the circuits regarding implied waiver of immunity under the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1605(a)(1). The Second Circuit has long held that, where a foreign sovereign has joined the New York Convention and agreed to arbitrate a dispute under its terms, it impliedly waives immunity from an action to recognize a foreign judgment confirming the arbitral award. *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co.* v. *Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993) (*Seetransport I*). In the decision below, the D.C. Circuit explicitly disagreed, holding that any implied waiver of immunity under the New York Convention does not extend to an action to enforce a judgment confirming an arbitral award. App.13a–15a.

This acknowledged conflict between these particular circuits is especially untenable because they oversee two of the "principal district courts in which these cases are brought." *Bolivarian Republic of Venezuela* v. *Hemerich & Payne Intern. Drilling Co.*, 581 U.S. 170, 186 (2017). Review is needed to ensure a uniform national rule in an important realm of international arbitration. The need for clarity "is doubly important here where foreign nations and foreign lawyers must understand our law." *Id.* at 183.

In disagreeing with *Seetransport*'s holding, the D.C. Circuit erred on an issue of critical international importance. The FSIA authorizes jurisdiction over sovereigns that waive immunity "by implication." 28 U.S.C. § 1605(a)(1). In considering this exception, Congress provided an "agreement to arbitrate" as a

quintessential illustration of such implied waiver. Lower courts, other than the panel below, have uniformly reasoned that, by joining the New York Convention and submitting to arbitration in another New York Convention state, a member state impliedly waives its sovereign immunity under the FSIA in an action to enforce a foreign arbitral award. *See Seetransport I*, 989 F.2d at 578; *see also S & Davis Int'l, Inc.* v. *The Republic of Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000). Prior decisions of the D.C. Circuit had agreed with this principle, but what had appeared to be settled is now very much unsettled. App.16a. The panel's newfound confusion regarding its own precedent is, independently, cause for alarm.

In *Seetransport*, the Second Circuit extended this implied waiver over award enforcement to include actions seeking recognition of a foreign *judgment* that confirms the award because "the cause of action [to confirm a foreign judgment] is so closely related to the claim for enforcement of the arbitral award." *Seetransport I*, 989 F.2d at 583. Under the rule of *Seetransport*, the implied waiver exception of the FSIA is satisfied when a foreign sovereign joins the New York Convention and agrees to arbitrate under its terms.

That conclusion is undoubtedly correct. In contrast, the D.C. Circuit has unnecessarily transformed this issue into one requiring explicit waiver. Where a Convention member sovereign agrees to arbitrate in another Convention state, its adversary can avail itself of the courts of any signatory state—including the United States—to reduce the arbitral award to an enforceable judgment. An action to confirm a foreign arbitral award and an action to enforce a foreign

judgment confirming that award both stem from the same implicit waiver of sovereign immunity and are both subject to the sovereign's implied waiver. And both result in the same thing—a judgment from a U.S. court that effectuates the arbitral panel's decision.

The only difference is the procedures that gets the enforcing party to its ultimate objective. Under the New York Convention, award enforcement is a one-step process in which the prevailing party seeks both recognition and enforcement in a foreign state. Judgment enforcement in this context involves recognizing a foreign judgment that has already, itself, recognized the arbitral award. But both processes result in "enforcement" of the award (by an identical U.S. judgment), and both rely on the same "implicit waiver" of sovereign immunity (by agreeing to the New York Convention and agreeing to arbitrate a dispute).

While the New York Convention was meant to streamline the enforcement process, it did not preclude the two-step process that has generally prevailed (and indeed, was required for signatory states) under the predecessor international treaty governing arbitral awards, the Geneva Convention of 1927. Indeed, the New York Convention permits enforcement under any "rules of procedure of the territory where the award is relied," which, here, includes judgment recognition under state law. App.103a (NY Conv. Art. III).

Glossing over this, the D.C. Circuit ignores Congress' express sanction of waiver "by implication," requiring an explicit waiver when an implied one is all that Congress required. Its construction that cannot be squared with either the plain language of the FSIA

or the New York Convention's liberal preference for arbitration and enforcement.

Review is especially important for those prevailing parties that cannot, for one reason or another, avail themselves of enforcement under the Federal Arbitration Act. Often, confirmation proceedings in the arbitration's seat cannot be completed or assets in the United States cannot be located before the FAA's three-year statute of limitation expires. *See* 9 U.S.C. § 207. In this case, for instance, Respondents' repeated baseless challenges to the award in Zambia, the seat of the arbitration, ran well past the three-year period for FAA enforcement. Complicating matters further, Zimbabwe and its instrumentalities had been sanctioned in the U.S. until recently, and it was not clear that assets could be reached here at all.

In similar circumstances, many U.S. courts have recognized an alternative avenue to "enforcement" of arbitration award by enforcing a foreign judgment confirming that award. That important alternative remedy would be foreclosed by the D.C. Circuit's sovereign immunity determination.

The Court should grant this Petition.

STATEMENT

A. Legal Background

1. The New York Convention

The principal international treaty governing enforcement of foreign arbitral awards is the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, commonly called the New York Convention. Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a*

Uniform Interpretation 7–9 (1st ed. 1981) ("*Uniform Interp*."). The New York Convention built on the foundation of a prior treaty, the Geneva Convention on the Execution of Foreign Awards of 1927. *Id*. at 6–7.

The Geneva Convention, although innovative for its time, employed cumbersome enforcement procedures, including requiring an award to be confirmed twice—the "double-exequatur" requirement. *Id.* Under the Geneva Convention, an "award had to become 'final'" in the country of origin before it could be enforced internationally. *Uniform Interp*. 7. This meant that the prevailing party was first required to seek leave to enforce the judgment ("exequatur") in the country of origin before again doing so again abroad in a country where assets were located. *Id.*

The New York Convention addressed these issues by simplifying procedures and expanding enforcement to any acceding country. *Uniform Interp*. 6–7. Under the Convention, joining states "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the arbitration is relied upon." App.103a (NY Conv., Art. III). The New York Convention eliminated the "double-exequatur" requirement by changing the Geneva Convention's "finality" requirement to a requirement that the award is "binding" before seeking enforcement in another country. *See* App.105a (NY Conv., Art. V(e)). But in doing so, the New York Convention retained the prior prevailing two-step process as an *option*: "[W]here enforcement was possible under the Geneva Convention, it should certainly be possible under the New York Convention." *Uniform Interp*. 7.

The United States joined the New York Convention in 1970. United Nations Convention on the Recognition of Enforcement of Foreign Arbitral Awards, June 10, 1958, 3 U.S.T. 2517, T.I.A.S. No. 6997. The Republic of Zimbabwe joined in 1994, and the Republic of Zambia did so in 2002.[1]

2. The Foreign Sovereign Immunities Act

Under the FSIA, a "foreign state is normally immune from the jurisdiction of federal and state courts" unless a statutory exception applies. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

This case is about the FSIA's waiver exception. That provision grants subject matter jurisdiction to federal courts if "the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). In the legislative process leading to enactment, Congress noted three examples of "implicit waivers," including "cases where a foreign state has agreed to arbitrate in another country." H.R. Rep. No. 94-1487 at 18, 1976 U.S.C.C.A.N. 6604 (1976).

3. Enforcing Arbitration Awards

There are at least two ways for litigants to turn foreign arbitral awards into enforceable U.S. judgments. First, the Federal Arbitration Act permits "any party to the arbitration" to apply for confirmation of the award within three years. 9 U.S.C. § 207.

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[1] *See* U.N. Off. of Legal Affs. Treaty Section, U.N. Treaty Collection, *Status of Treaties: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958,* M.T.D.S.G. ch. XXII.1, https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en.

Second, a U.S. court can enforce a foreign judgment that recognizes an arbitration award. "[U]nlike the recognition of arbitral awards, which is governed by federal law, the recognition of foreign judgments is governed by state law." *Seetransport I*, 989 F.2d at 582; *see also Commissions Import Export S.A.* v. *Republic of Congo*, 757 F.3d 321, 332 (D.C. Cir. 2014). In many states, these state laws include statutes designed to streamline foreign judgment recognition, such as the D.C. Uniform Foreign-Country Money Judgments Recognition Act (D.C. Code §§ 15-369 *et seq*.) and the New York Uniform Foreign Country Money Judgments Act (N.Y. CPLR §§ 5300 *et seq*.).

B. The Arbitration Agreement and Award

Petitioners Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. are mining companies incorporated under the laws of Mauritius. App.47a. In 2007 and 2008, Petitioners each entered into memorandums of understanding with Respondent Zimbabwe Mining Development Corporation ("ZMDC") related to locating and developing nickel and platinum deposits. App.47a. ZMDC is owned by the Republic of Zimbabwe. App.47a.

The agreements included arbitration clauses. Disputes would be submitted to the International Chamber of Commerce's International Court of Arbitration for "final and binding" arbitration. App.47a. Under the ICC's rules, ZMDC agreed to "undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." App.127a.

In 2010, ZMDC purported to cancel the agreements. App.47a. Petitioners initiated arbitration proceedings against both ZMDC and the Chief Mining Commissioner, an office in the Ministry of Mines. App.48a. The parties disagreed over where the arbitration should sit, and the ICC determined that the arbitration would proceed in Zambia. App.49a–50a. Thereafter, the parties executed further Terms of Reference which provided that the parties "agree[d] to submit to this arbitration and expressly waive any procedural objections they may have with respect to known events." App.48a. The parties further agreed that "[e]ach original of the Terms of Reference forms an original arbitration agreement for the purposes of Articles II and IV(1) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards." App.87a–88a.

The arbitration progressed for about eighteen months. App.49a. In August 2012, the panel began hearing evidence and ZMDC and the Commissioner cross-examined at least one witness. App.48a. During the hearing, ZMDC and the Commissioner sought leave to challenge the arbitral tribunal under the ICC Rules. App.49a. The panel denied the request. App.48a–49a. In response, ZMDC, the Commissioner, and their appointed arbitrator withdrew from the proceedings and obtained an ex parte order from a Zambian court temporarily enjoining the proceeding. App.49a. The Zambian court later found, however, that ZMDC and the Commissioner had "suppressed material facts and laws" in the ex parte application and dissolved the injunction. App.49a.

In January 2014, after further challenges by ZMDC and the Commissioner to panel reconstitution

and changes, the panel ordered ZMDC to pay Petitioners approximately $50 million. App.49a.

C. Petitioners' Enforcement Efforts

After the arbitrators issued the award, ZMDC and the Commissioner challenged the validity of the award in Zambian courts. Years of procedural wrangling followed. App.48a–49a. In August 2019, Petitioners finally received judgment from the High Court of Zambia. App.49a.

ZMDC and the Commissioner refused to pay the judgment, leading Petitioners to file suit in the U.S. District Court for the District of Columbia against ZMDC, the Commissioner and the Republic of Zimbabwe. App.50a. Petitioners' Complaint sought an order recognizing and enforcing the Zambian judgment under the D.C. Uniform Foreign Country Money Judgments Recognition Act and a finding that the Republic of Zimbabwe is the alter ego of the ZMDC and the Commissioner. App.51a.

D. The District Court Finds that Respondents Waived Immunity "By Implication"

Respondents moved to dismiss. App.50a. After full briefing challenging both the complaint and an amended complaint, the Court held it had jurisdiction under the FSIA over all Respondents: "When a sovereign (or its instrumentality) waives immunity by signing on to the New York Convention and agreeing to arbitrate in another signatory's jurisdiction, 'the cause of action to enforce [a] foreign judgment is within the scope of [that] implicit waiver of sovereign immunity.'" App.35a (*quoting Seetransport I*, 989 F.2d at 582).

The district court found that the Commissioner fell within the FSIA's definition of "foreign state" so that it had "subject matter jurisdiction only if one of the FSIA's exceptions to sovereign immunity applies." App.78a. It then found that Zimbabwe had waived sovereign immunity. The court reasoned that a "cause of action to enforce the foreign judgment" on an arbitral award "is so closely related to the claim for enforcement of the arbitral award" that it reasonably falls within the scope of a sovereign's "implicit waiver of sovereign immunity" that flows from joining the New York Convention and agreeing to arbitrate a dispute. App.89a (*quoting Seetransport I*, 989 F.2d at 581–583). Here, the Commissioner not only participated in the arbitration, but also expressly agreed to the Terms of Reference "agree[ing] to submit to this arbitration" and treating the Terms of Reference as "an original arbitration agreement for the purposes of [the New York Convention]." App.87a–88a (*quoting* Terms of Reference §§ 8.1, 10.3). Zimbabwe had acceded to the New York Convention. App.91a.

The district court reasoned that the D.C. Circuit had repeatedly "favorabl[y] cit[ed] to *Seetransport*"—indicating "no present impediment to concluding that the waiver exception applies here." App.87a (*citing Creighton Ltd.* v. *Qatar*, 181 F.3d 118 (D.C. Cir. 1999) *and Tatneft* v. *Ukraine*, 771 F.App'x 9 (D.C. Cir. 2019) (mem.)).

On an amended complaint, the court also found that Zimbabwe was properly before the court as an alter ego and that all Respondents had impliedly waived immunity for the same reason as the Commissioner. App.34a.

E. The D.C. Circuit Reverses, Expressly Disagreeing with the Second Circuit

On appeal, the D.C. Circuit held that the FSIA's waiver exception did not apply. It reasoned that the "New York Convention governs the recognition and enforcement of arbitral awards, not of foreign judgments" and so "[s]igning the New York Convention thus is insufficient to show Defendants' intent to waive immunity from judgment recognition actions." App.11a.

The court expressly acknowledged its disagreement with the Second Circuit. The panel understood *Seetransport* this way: "the Second Circuit reasoned that if a state that had signed the Convention later entered into an agreement consenting to arbitration in a jurisdiction that had done the same, it 'logically … had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award.'" App.13a (*quoting Seetransport I*, 989 F.2d at 579). In the D.C. Circuit's view, however, the Second Circuit had gone "a step further to also encompass the claim for judgment recognition" but "the Second Circuit did not rely on the text or scope of the New York Convention" for this result. App.13a.

The panel noted that, although prior panels had expressed support for *Seetransport*, the circuit had "not yet 'formally adopted'" even "*Seetransport*'s conclusion that signing the New York Convention and agreeing to arbitrate is even sufficient to waive immunity from award actions." App.16a. "[A]ssuming *arguendo* that a foreign sovereign intends to waive its immunity from actions to confirm arbitral awards when it signs the New York Convention and agrees to

arbitrate," however, the D.C. Circuit held that "such conduct does not demonstrate an intent to waive immunity from judgment recognition actions." App.13a.

Instead, the court held that the "New York Convention governs only the recognition and enforcement of arbitral awards" because the "text makes clear that '[t]his Convention shall apply to the *recognition and enforcement of arbitral awards* . . . .'" App.13a. "In light of the scope of the New York Convention, asking only whether foreign court judgments are 'closely related' to arbitral awards is too insubstantial a connection to establish strong evidence of a sovereign's intent to waive its immunity." App.15a. The D.C. Circuit distinguished its prior decisions expressing support for *Seetransport* because "[n]either case concerned a foreign court judgment." App.16a.

This Petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES AN ACKNOWLEDGED CONFLICT WITH THE SECOND CIRCUIT ON IMPLIED WAIVER OF FOREIGN SOVEREIGN IMMUNITY

A. The Conflict Is Direct, Explicit, and Dispositive

The decision below creates an explicit conflict of authority with longstanding precedent of the Second Circuit on an important question of foreign sovereign immunity: whether a foreign sovereign that has joined the New York Convention and agreed to arbitrate a dispute has thereby waived its immunity by implication in an action to recognize a foreign judg-

ment confirming the arbitral award. This acknowledged conflict of authority between the two most important circuits addressing questions of arbitral enforcement in disputes involving foreign sovereigns should be resolved through this Court's review. Rule 10(a).

The Second Circuit. In *Seetransport*, the Second Circuit addressed an arbitration award that a German shipbuilder had obtained against Navimpex, which was "wholly owned by the Romanian Government" and thus a "foreign state" under the FSIA. *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co.* v. *Navimpex Centrala Navala*, 989 F.2d 572, 574–575 (2d Cir. 1993). Navimpex challenged the award abroad, and it took the Court of Appeals in Paris more than three years to confirm the award. *Id.* at 574. By the time the German shipbuilder sought enforcement in federal district court, the Federal Arbitration Act's three-year statute of limitations applicable to foreign arbitration awards (9 U.S.C. § 207) had expired. *Id.* at 574, 581. Plaintiff thus sought recognition of the judgment confirming the award under New York state law. *Id.* at 581–583.

The Second Circuit held subject matter jurisdiction existed under the FSIA's implied waiver exception. The court reasoned that Romania had clearly waived immunity from suit to recognize and enforce arbitral awards. Romania had acceded to the New York Convention, which "specifically declares that it 'shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. . . .'" *Id.* at 578 (*citing* NY Conv., Art. I). The Convention "further provides that

'[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .'" *Id.* at 578 (*citing* NY Conv., Art. III). Thus, "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory States." *Id.* at 578.

By agreeing in the underlying suit "that any disputes would be submitted to arbitration," Romania "logically" "had to have contemplated the involvement of the courts of any of the Contracting states in an action to enforce the award." *Id.* at 579. Romania had "implicitly waived any sovereign immunity defense" as to enforcing arbitration awards. *Id.*

The Second Circuit then concluded that the implied waiver extended to actions to recognize a foreign judgment confirming the award. The cause of action to "enforce the foreign judgment is within the scope of [Romania's] implicit waiver of sovereign immunity." *Id.* at 582–583. "[B]ecause the cause of action is so closely related to the claim for enforcement of the arbitral award," the sovereign's consent to one necessarily implies consent to the other. *Id.* at 583. On appeal after remand, the court determined that the French exequatur was "a judgment in and of itself" and fell within New York's Uniform Foreign Country Money Judgments Recognition Act. *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co.* v. *Navimex Centrala Navala*, 29 F.3d 79, 82 (2d Cir. 1994) (*Seetransport II*). Courts thus had jurisdiction to enforce the judgment under the FSIA's implied waiver exception. *Id.*

The D.C. Circuit. Were *Seetransport*'s rule applicable here, Petitioners would be able to enforce the Zambian judgment. But the decision below explicitly rejected *Seetransport* and departed from its own prior caselaw to reach the opposite conclusion: "[W]hen [a foreign sovereign] signs the New York Convention and agrees to arbitrate, such conduct does not demonstrate an intent to waive immunity from judgment recognition actions." App.13a. In the D.C. Circuit's view, the New York Convention "governs only the recognition and enforcement of arbitral awards" and so only the "recognition and enforcement of arbitral awards" can be within the scope of the waiver. App.2a. The D.C. Circuit relied on a faulty reading of Article I(1): "[t]his Convention shall apply to *the recognition and enforcement of arbitral awards* made in the territory of a State other than the State where *the recognition and enforcement of such awards* are sought." App.13a. The New York Convention's silence regarding "recognizing foreign court judgments after having sought recognition and enforcement of the award" decided the question for the panel below. App.13a.

As discussed herein, the panel was wrong. It decision misread not only FSIA's authorization of "implicit" waivers—reading it entirely out of FSIA's waiver exception—but also the New York Convention's consent to "enforcement of arbitral awards" in the courts of any member country. *See infra*, Section II. Review is needed to resolve this acknowledged and important conflict.

B. Absent This Court's Review, Confusion Will Prevail on Important Issues Concerning Arbitration Against Foreign States

1. This conflict will not abate on its own. Both circuits are firmly settled on this question.

The Second Circuit's opinion in *Seetransport* has been the leading case on implied waiver by treaty for three decades without being revisited or overturned, as its continued citation in treatises on this point attests. *E.g.*, Rest. (Third) of Int'l Comm. & Investor-State Arb. § 4.26, cmt. i (2023) (*citing Seetransport I* as example of where state "deemed to have implicitly waived any sovereign-immunity defense"); Martin Domke, et al. Domke on Commercial Arbitration, 1 Domke on Com. Arb. § 22:7, nn. 3, 4 (*citing Seetransport I*); Alexa Ashworth, et al., Federal Procedure, Lawyers Edition, 13A Fed. Proc., L. Ed. § 36:467 & n. 6 (Nov. 2025) (*citing Seetransport I* for proposition that "where a foreign government that is a signatory to the New York Convention agrees to arbitrate in the territory of a state that has signed the Convention, it is appropriate to find an implied waiver, since by the very provisions of the Convention the signatory state must have contemplated enforcement actions in other signatory states"). The Second Circuit has explicitly extended *Seetransport*'s logic to find implied waiver under other treaties, including the primary investor-state treaty, the ICSID Convention. *Blue Ridge Investments L.L.C.* v. *Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013).

At the same time, the D.C. Circuit intentionally and expressly charted a different course. It did so despite repeatedly "favorably cit[ing] *Seetransport* and

its reasoning." *Process & Indus. Devs. Ltd.* v. *Fed. Republic of Nigeria*, 27 F.4th 771, 774 (D.C. Cir. 2022) (*P&ID*). In so doing, the D.C. Circuit abrogated decades of district court decisions within the circuit recognizing judgments consistently with *Seetranspor*t. *See, e.g.*, *Continental Transfer Technique Ltd.* v. *Federal Government of Nigeria*, 697 F.Supp.2d 46 (D.D.C. 2010) (jurisdiction to recognize English judgment confirming arbitral award); *A.D. Trade Belgium S.P.L.R.* v. *Republic of Guinea*, No. 22-245, 2023 WL 2733773, *3 & n.4 (D.D.C. Mar. 31, 2023) (finding jurisdiction to recognize French judgment confirming award).

2. There is compelling need to resolve this conflict of authority.

The courts of appeals in disagreement supervise the "principal district courts" addressing sovereign immunity from arbitral enforcement actions. *Hemerich*, 581 U.S. at 186. The need for uniform treatment is especially warranted in this critical international commercial dispute context. *See Helmerich*, 581 U.S. at 183; *see also BG Grp. PLC* v. *Republic of Argentina,* 572 U.S. 25, 32 (2014). In *Jam* v. *International Financial Corp.*, this Court granted certiorari to address a question of immunity on which the D.C. and Third Circuits disagreed. 586 U.S. 199, 206–207 (2019). Similarly, in *Federal Republic of Germany* v. *Philipp*, the D.C. Circuit had created an explicit split with the Seventh Circuit and "tension" with others. *See Philipp*, No. 19-351, Pet. at 12 (filed July 26, 2019).

Sovereign immunity is an issue of international importance that warrants a uniform national approach. But as commentators have noted, the "clear

rift" created by the decision below gives rise to significant legal uncertainty.[2] Practitioners and arbitral victors had relied upon the judgment enforcement route rejected below as a "viable strategy" to recover against foreign sovereigns in the United States.[3] The decision below disrupts this settled approach to enforcing arbitral decisions against sovereigns.

3. The D.C. Circuit's decision also creates confusion on the more fundamental (and predicate) question of whether arbitrating under the New York Convention effectuates *any* implicit waiver of sovereign immunity. Every other circuit to have reached the question has reasoned that a sovereign who has acceded to the New York Convention and agreed to arbitrate under its terms impliedly waives immunity as to actions to confirm an arbitral award. *S & Davis Int'l, Inc.*, 218 F.3d at 1301; *Seetransport I*, 989 F.2d at 581–582; *see also Joseph* v. *Off. of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Autotech Techs. LP* v. *Integral Rsch. & Dev. Corp.*, 499 F.3d 737, 743–44 (7th Cir. 2007); *Walker Int'l Holdings Ltd.* v. *Republic of Congo*, 395 F.3d 229, 234 (5th Cir. 2004).

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[2] Jeffrey A. Rosenthal et al. "D.C. Circuit Holds That Neither the FSIA's Arbitration Exception nor Its Waiver Exception Applies to Actions to Enforce Foreign Judgments" (July 24, 2025), https://www.clearygottlieb.com/news-and-insights/publication-listing/dc-circuit-fsias-arbitration-exception-nor-its-waiver-exception-actions-enforce-foreign-judgments.

[3] Robert Kry, "Enforcement Deadlines for Foreign Arbitral Awards and Judgments," Transnational Litigation Blog (July 29, 2025), https://tlblog.org/enforcement-deadlines-for-foreign-arbitral-awards-and-judgments/.

The D.C. Circuit had previously seemed to join this consensus, endorsing the reasoning of *Seetransport*: "In *Seetransport* the Second Circuit reasoned, correctly we think, that 'when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states.'" *Creighton*, 181 F.3d at 123 (*quoting Seetransport I*, 989 F.2d at 578). A more recent unpublished opinion reiterated the understanding that, "[i]n *Creighton*, we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states." *Tatneft*, 771 F.App'x at 10 (*citing Creighton*, 181 F.3d at 123).

The panel below strained to distance itself from the D.C. Circuit's prior consideration of the question by minimizing these prior decisions, concluding that "we have not yet 'formally adopted' *Seetransport*'s conclusion that signing the New York Convention and agreeing to arbitrate is even sufficient to waive immunity from award actions" (App.16a (*quoting P&I.D.* 27 F.4th at 774))—even though it had favorably cited *Seetransport* and the concepts embodied therein on multiple prior occasions. The D.C Circuit now describes the question of implied waiver as "unsettled" in the circuit (*NextEra*, 112 F.4th at 1100 (quotation omitted)), a matter it could now only "assume[e] *arguendo*" (App.13a).

The D.C. Circuit's vacillation on this critical question further supports the need for this Court's review. This Court cannot find an implied waiver as to foreign judgment enforcement without first confronting the question of implied waiver as to award enforcement. But by casting doubt on the fundamental question of

implied waiver as to *award* enforcement, the D.C. Circuit decision sews unnecessary confusion. Without further review, the dispute threatens to seep into other areas of sovereign immunity long thought to be settled.

II. THE D.C. CIRCUIT WRONGLY DECIDED A QUESTION OF GREAT INTERNATIONAL IMPORTANCE

Review is also warranted because the D.C. Circuit wrongly decided a dispositive issue of foreign sovereign immunity impacting foreign policy.

The D.C. Circuit's reasoning is unmoored from common sense and the language of both the FSIA and the New York Convention. A sovereign indicates its amenability to entry of judgment confirming an arbitral award twice over in circumstances such as these: it has joined the Convention and agreed to arbitrate the specific dispute under its terms.

It should not matter whether the action is brought to confirm an award by entering a judgment or to recognize a judgment that already confirmed the award. Enforcing a foreign arbitral award and enforcing a foreign judgment on that award are, for relevant purposes, practically indistinguishable. *See Seetransport I*, 989 F.2d at 583. Both enforcement mechanisms (confirmation and recognition) seek the same ultimate relief—an enforceable judgment in the United States giving effect to the arbitral panel's award. It is illogical to impute to a sovereign the intent that U.S. courts could enter an identical enforceable judgment—with the same legal effect—one way but not the other. As *Seetransport I* properly held, a waiver for actions confirming an arbitral award necessarily extends to a

waiver for actions to recognize a foreign judgment confirming that same arbitral award.

The D.C. Circuit's contrary holding cuts against text, context, and history of both the FSIA and the New York Convention.

A. The D.C. Circuit Ignores the FSIA's Express Authorization of "Waiver . . . By Implication" and Misconstrues the New York Convention.

The analysis starts, as always, with the "relevant statutory text," read with an eye to its context and place in the statutory "structure." *CC/Devas (Mauritius) Ltd.* v. *Antrix Corp.*, 605 U.S. 223, 232, 234 (2025). "[S]tatutory language cannot be construed in a vacuum," "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

1. The FSIA provides an exception to sovereign immunity in any action "in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). The statute marks an intentional departure from the standard domestic rule regarding waiver, namely that a "waiver of the sovereign immunity of the United States cannot be implied but must be unequivocally expressed." *Franconia Associates* v. *United States*, 536 U.S. 129, 141 (2002).

The plain meaning of "implication" confirms that waiver extends beyond mere direct expression. At around the time Congress enacted the FISA, "implication" was defined as "[i]ntendment or inference, as

distinguished from the actual expression of a thing in words . . . . See Inference." BLACK'S LAW DICTIONARY (5th ed. 1979); *id.* "inference" (". . . A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts . . ."); *id.* "intendment of law" ("The true meaning, the correct understanding or intention of the law. A presumption or inference made by the courts.").

Congress provided three examples of waiver by implication, each consistent with this plain meaning. "With respect to implicit waivers," the Judiciary Committee's report identifies (1) "cases where a foreign state has agreed to arbitration in another country," (2) "where a foreign state has agreed that the law of a particular country should govern a contract," and (3) "a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, at 18 (1976). Each of these examples corresponds to waiver as a logical consequence of a sovereign's conduct, rather than an explicit statement.

While this Court has never defined "by implication" in the FSIA, it has addressed an outer limit of the waiver exception. In *Amerada Hess*, the Court held that a sovereign did not waive immunity by agreeing to treaties that "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs." 488 U.S. at 442. "Nor do we see how a foreign state can waive its immunity under 1605(a)(1) by signing an international agreement that contains no mention of waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." *Id.* at 442–443.

Amerada Hess confirms that sovereigns can waive immunity "by implication" apart from express waiver and as the logical consequence within the intention of the particular law at issue. By joining the New York Convention and agreeing to arbitrate under it, a foreign sovereign does just that. Unlike in *Amerada Hess*, the New York Convention unequivocally requires all Contracting Parties' courts to entertain enforcement actions and thus provides that member states submit to the judicial power of every Contracting Party, including the United States: "Each Contracting State shall recognize arbitral awards as binding and *enforce them in accordance* with the rules of procedure of the territory where the award is relied upon." App.103a (emphasis added).

2. By insisting that the New York Convention does not effectuate a waiver because it "mentions only confirmation and enforcement of awards" and "says nothing about recognizing foreign court judgments after having sought recognition and enforcement of the award" (App.13a), the decision below misses the distinction between explicit and implied waiver. It reasoned that, because "an arbitral award and a court judgment enforcing an arbitral award" are "distinct from one another," a sovereign could not waive immunity over judgment recognition unless the treaty *explicitly* mentions foreign judgments. App.15a (quotations omitted).

But signing the New York Convention, by necessary *implication*, leads to a state's amenability to entry of judgment confirming an arbitral award.[4] "An arbitral award is ordinarily enforced by confirmation in a judgment or by exequatur in the state where enforcement is sought." Restatement (Third) of Foreign Relations § 487, cmt. c (1987). "Because arbitration awards are not self-enforcing, they must be given force and effect by being converted to judicial orders by courts." *D.H. Blair & Co.* v. *Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006) (quotations and brackets omitted) (citing Black's definition of "enforce"). An award without a judgment has no force in the United States. Whatever moral value it has, absent a judgment, there is no coercive power to compel compliance. Likewise, a judgment without an award has no basis. One implies the other.

Thus, as the district court here explained, "[w]hen a sovereign (or its instrumentality) waives immunity by signing on to the New York Convention and agreeing to arbitrate in another signatory's jurisdiction, 'the cause of action to enforce [a] foreign judgment is within the scope of [that] implicit waiver of sovereign immunity.'" App.35a (*citing Seetransport I*). By waiving immunity to suit in the United States, a sovereign who joined the New York Convention necessarily agrees to the entry of a U.S. judgment on that arbitral award. But a judgment enforcement action seeks the exact same relief—entry of a U.S. judgment enforcing the arbitral panel's decision. It should not matter

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[4] As discussed, *infra*, Section II.B, the decision below also fundamentally misconstrues the New York Convention's authorization of "enforcement" of awards in the courts of member states.

whether that judgment results from confirmation of the award directly or from recognition of a foreign judgment confirming the award. The end result of both is the same. And that result is well contemplated by the New York Convention, which has a "principal purpose underlying" it "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts . . . ." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 & n.15 (1974).

The D.C. Circuit erred in limiting the FSIA's waiver exception to the *explicit* terms of the New York Convention, and in doing so effectively read waiver "by implication" out of the statute in the context of arbitral enforcement. In doing so, it "misse[d] the forest for the trees (and a single tree at that)." *Turkiye Halk Vankasi A.S.* v. *United States*, 598 U.S. 264, 277 (2023). "Nothing in the FSIA supports that result." *Id.*

3. There are at least three indications that Zimbabwe waived immunity here. The necessary implication of such conduct is that a judgment confirming an award can be enforced against it in the United States.

First, it agreed to binding arbitration of a dispute. It entered that agreement not once, but twice: both in the original contracts and then, again, in the ICC's Terms of Reference explicitly invoking the New York Convention. App.56a. Arbitration—and enforcement of any resulting award in a binding U.S. judgment—is the logical consequence of both of those agreements. Either or both of these contracts make this a "case[] where a foreign state has agreed to arbitration in another country," which the Judiciary Report identified

as an example of "implied waiver." H.R. Rep. No. 94-1487, at 18.

Second, Zimbabwe signed the New York Convention. That Convention contemplates "the availability of a cause of action in the United States," as *Amerada Hess* suggests is necessary. *See* 488 U.S. at 442–443 (1989). By its text, the Convention contemplates enforcement "with the rules of procedure of the territory where the award is relied upon" (App.103a, Art. III) and empowers "court[s] of a Contracting State" to enforce arbitration agreements (App.102a, Art. II, § 3). The United States is a Contracting State; thus, the logical consequence of joining is that Zimbabwe is subject to enforcement under the "rules of procedure" of the United States.

Those two actions alone are enough to find implied waiver by a sovereign. *E.g.*, *S & Davis*, 218 F.3d at 1301; *Seetransport I*, 989 F.2d at 578.

But there is more.

Third, Zimbabwe further waived immunity by agreeing to the ICC's Arbitration Rules. Rule 28(6) requires that all participants agree to "carry out any Award without delay" and "waive[]. . . any form of recourse" preventing execution. App.127a. The Fifth Circuit has long held that "waiv[ing] [its] right to any form of recourse" under the ICC's Arbitration Rules "explicitly waives" sovereign immunity and "precludes the [sovereign] from asserting a sovereign immunity defense." *Walker*, 395 F.3d at 234 (Garza, J.).

4. The D.C. Circuit purported to construe the FSIA waiver exception narrowly out of a concern for reciprocity—*i.e.*, that other foreign states will open

the doors to their courts widely to lawsuits against the United States. App.4a. But the Second Circuit applied the same narrow construction principle in finding an implied waiver in *Seetransport I*, thus giving meaning to "by implication." *See* 989 F.2d at 577. The panel's construction is much less compelling because *Congress* has expressly authorized waiver "by implication."

In any event, the reciprocity concerns are misplaced here because foreign courts *already* interpret agreements such as the New York Convention to effectuate implied waivers for arbitral enforcement. Courts in Australia, Canada, and the United Kingdom have held that multilateral treaties providing for award recognition contemplate submission to the courts of each contracting party and thus waive sovereign immunity. Indeed, just weeks before the D.C. Circuit's opinion in this case, a Canadian court entered judgment recognizing both the arbitration award and the very same Zambian judgment at issue here. *See* App.119a–124a. Moreover, the High Court of Australia (this Court's counterpart there) recently relied upon the Second Circuit's reasoning to confirm that its understanding of implied waiver of sovereign immunity under Australian law "aligns with the approach taken to waiver of immunity in the United States." *Kingdom of Spain* v. *Infrastructure Servs. Luxembourg S.a.r.l.* [2023] HCA 11 ¶¶ 27–29 (Austl.). Similarly, the Court of Appeal of Quebec found that agreeing to arbitrate under the New York Convention "by necessary implication" waived immunity to suit confirming the award in Canada. *Republic of India* v. *CCDM Holdings*, 2024 QCCA 1620 ¶¶ 80-81 (Can.).

And the English Court of Appeal considered it of "considerable persuasive force" that the courts of "Australia, New Zealand, the United States, France and Malaysia have all interpreted" the ICSID Convention as "a waiver of adjudicative immunity by each Contracting State." *Infrastructure Servs. Luxembourg S.a.r.l.* v. *Kingdom of Spain* [2024] EWCA Civ 1257 ¶ 60 (Eng.), leave to appeal granted, No. UKSC/2024/0155 (Nov. 20, 2024). The D.C. Circuit's reciprocity concern is not a basis to misconstrue the FSIA implied waiver exception.

B. The New York Convention Necessarily Contemplates Implied Waiver for Judgment Enforcement

1. The interpretation of a treaty, like the interpretation of a statute, begins with its text. *GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 590 U.S. 432, 439 (2020) (quotation omitted). As a matter of original meaning, "enforcement of awards" in the New York Convention naturally encompasses recognizing foreign judgments confirming awards.

A. Although not defined, the term "enforcement of awards" (along with the term "recognition . . . of awards") appears in the Convention's official name as well as repeatedly throughout the Convention's text. App.101a–102a; App.103a–106a (N.Y. Conv., Arts. I, III, IV, V, VIII). The Convention's text suggests that "enforcement" covers a broad range of procedures. Joining states must "enforce [awards] in accordance with the rules of procedure of the territory where the award is relied upon" and without any "more onerous

conditions . . . than are imposed on the . . . enforcement of domestic arbitral awards." App.103a (Art. III).

"Enforcement" is distinct from "recognition," although they often appear together. The Convention treats them as distinct obligations of a state. *E.g.*, App.103a (Art. III) ("Each Contracting State shall recognize arbitral awards as binding and enforce them . . ."). Commentators have long recognized this. "Under the Convention, there is a distinction between an obligation to recognize an arbitral award and an obligation to enforce it."[5] The academic consensus views "enforcement" as "the process of effectuating the operative part of the arbitral award," while "recognition" is "the process of considering an arbitral award as binding but not necessarily enforceable."[6]

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[5] Javier Rubinstein & Georgina Fabian, "The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries," 91, 93 in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Emmanuel Gaillard and Domenico Di Pietro, eds. 2008) ("Rubinstein & Fabian").

[6] *Id.*; *see also* Bernd Ehle, "New York Convention, Article I [Scope of Application]," ¶ 164 in *New York Convention: Article-by-Article Commentary* (Reinmar Wolff ed., 2d ed. 2019). Historical definitions confirm this distinction. When the Convention opened for signature, the English-speaking legal community understood "enforce" to mean "To put into execution; to cause to take effect; to make effective; as, to enforce a writ, a judgment, or the collection of a debt or fine; to compel obedience to." BLACK'S LAW DICTIONARY (4th ed. 1951). This is, importantly, distinct from "recognition," which meant "[r]atification; confirmation; an acknowledgment that something done by another person in one's name had one's authority." *Id.* at 1436. When the United States acceded, the definitions remained identical.

B. The Convention's language encompasses any procedure in a member country that carries an award into effect and compels obedience to it. This makes sense. The Convention is an international agreement designed to apply in broad array of legal regimes—whether civil or common law—that employ varying procedures. To serve its intended function, the term must reflect its intended breadth and flexibility.

An action to enforce a judgment confirming an arbitral award is one way to "effectuat[e] the operative part of the arbitral award." *See* Rubinstein & Fabian *supra*, n.5. History supports this understanding. The New York Convention borrowed the term "enforce" from its predecessor, the Geneva Convention of 1927, which it copied nearly verbatim in the provision addressing a member country's enforcement obligations.[7] Under the Geneva Convention, enforcement required double-exequatur, *i.e.*, the award had to be reduced to an executable judgment "in the country of origin before it could be enforced internationally." *Uniform Interp*. 7. While double-exequatur is no longer *required*, the New York Convention's preservation of the Geneva Convention's "enforce[ment]" language strongly suggests that its use of "enforce" and

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See BLACK'S LAW DICTIONARY ("Enforce"), ("Recognition") (4th rev. ed. 1968).

[7] *Compare* App.112a (Geneva Convention, Art. I: "an arbitral award . . . shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon . . .") *with* App.103a (NY Conv., Art. III: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . .").

"enforcement," at the very least, preserved the Geneva Convention's approach as an available option.

Leading commentators have long agreed: "[W]here enforcement was possible under the Geneva Convention, it should certainly be possible under the New York Convention." *Uniform Interp.* 7. The Restatement is also in accord. As its commentary recognizes, favorably citing *Seetransport II*, under the New York Convention, enforcement of a "foreign judgment confirming an award could be treated [among other things] . . . as an alternative vehicle to recognition and enforcement." Restatement (Third) of Int'l Comm. & Investor-State Arb. § 4.3, cmt g (2023).

The plain meaning of "enforcement" in the New York Convention, then, encompasses any "rules of procedure of the territory where the arbitration is relied upon" (App.103a (NY Conv., Art III))—including rules related to judgment recognition that render the foreign award into effect and compel obedience to it.

2. Post-ratification understandings of the New York Convention confirm this meaning. "Because a treaty ratified by the United States is an agreement among sovereign powers," this Court also "considere[s] as aids to its interpretation the negotiation and drafting history of the treaty as well as the postratification understanding of signatory nations." *GE Energy Power*, 590 U.S. at 441 (quotation omitted).

Zimbabwe's understanding, at the time of joining, would have included amenability to suit in the United States. It joined the New York Convention in 1994, just after the Second Circuit decided *Seetransport I*. Zimbabwe was on notice when it joined the Convention that signing and submitting to arbitration was

construed to waive immunity from judgment enforcement actions in the United States. (And it further waived by agreeing to the arbitral rules of the ICC.)

Subsequent international agreements lend weight to the conclusion that submitting to arbitration under the New York Convention also involves consent to a subsequent action to enforce a judgment confirming the arbitral award in another member country. Subsequent judgment conventions have given the New York Convention a wide berth to address all manner of enforcement of awards, including judgment enforcement. In particular, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters purports to provide comprehensive procedures governing recognition of judgments, yet explicitly carves out enforcement of arbitral awards entirely from its scope. Article II, Section 3 of that Convention specifically excludes "arbitration and related proceedings" from its coverage.[8] The Commentary explains that choice: "This exclusion should be interpreted widely to prevent the Convention from interfering with arbitration and international conventions on this subject, particularly the 1958 New York Convention."[9] The drafters thus

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[8] Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (July 2, 2019), https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

[9] Francisco Garcimartín & Geneviève Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* 69 (The Hague Conference on Private International Law, 2020), https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-

understood the New York Convention to "cover[] judgments declaring whether an arbitral award should be recognized or enforced"—and excluded those judgments to avoid encroaching upon the New York Convention's turf. Garcimartín-Saumier, *supra* n.9, at 69.

Although the panel below cited the 2019 Hague Convention (App.14a), it missed this point. According to it, the New York Convention "govern[s] the recognition and enforcement of arbitral awards, not of foreign judgments." App.2a. But the 2019 Hague Convention's explicit carveout of all arbitration proceedings, including enforcement of judgments confirming arbitral awards, evinces an international understanding that such judgment enforcement was within the purview of the New York Convention in the first place.

At the same time, the D.C. Circuit incorrectly found support for its reading of the New York Convention in a different international agreement, the Interamerican Convention on Territorial Effectiveness of Foreign Arbitration Awards, which says nothing—and certainly nothing dispositive—regarding the scope of the New York Convention. *See* App.14a. That regional Convention sought to comprehensively address all aspects of judgment recognition and arbitration enforcement in a single agreement. That it overlaps with the New York Convention says nothing as to what may be excluded from the New York Convention.

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b842534a120f.pdf. The United States has signed this, but Congress has not ratified it.

3. Thus, text, structure, and history confirm that the correct reading of "enforcement of awards" is that the New York Convention's discussion of "enforcement of awards" indicated an effectual *result*—without requiring any particular procedure.

The D.C. Circuit wrongly concluded otherwise. "As a general matter, a treaty is a contract, though between nations." *BG Group*, 572 U.S. at 37. The scope of any waiver should thus turn on the objectively-determined intent of the acceding country. *Id.* A sovereign joining the New York Convention would have understood that "enforcement of awards" encompassed recognition of a judgment confirming an award. Its intent to be bound by that language waives immunity as actions to obtain judgments confirming such award—whether through an action confirming the award or an action recognizing a judgment confirming the award. The D.C. Circuit's contrary, "hypertechnical reading" of the Convention elevates form over substance. *Davis*, 489 U.S. at 809.

C. Preserving Implied Waiver is Necessary to Avoid Complications Attendant in Enforcing Arbitral Awards Against Sovereigns

The decision below has negative unintended consequences. To begin, the panel's rule will make the United States a hideaway for misbegotten sovereign wealth. The FAA's three-year statute of limitations is short—much shorter than relevant statutes for judgment enforcement. Under the panel's rule, sovereigns subject to a foreign judgment confirming an arbitral award need only wait three years before moving money to the United States and effectively frustrating any recovery on the arbitral award.

Additionally, parties to arbitration agreements rely upon the ability to enforce foreign judgments on arbitral awards. "In the past, practitioners have navigated" the FAA's deadlines by seeking a foreign judgment to enforce when assets are discovered in (or moved to) the United States. Kry, *supra* n.3. But the decision below "may shut down an otherwise viable strategy" and "aggravate[]" the problem of finding and enforcing against assets of recalcitrant regimes. *Id.*

There are many reasons to obtain a foreign judgment before enforcing an award in the United States. For example, merely converting arbitral awards into enforceable judgments can take time. Here, as was the case in *Seetransport*, the challenges in Zambia had not even been completed before the FAA's statute of limitations ran. Additionally, litigants may not know assets are in the United States in time. Enforcing awards against state-owned entities is a "multi-year iterative process of investigation, lobbying, settlement negotiations, and legal proceedings around the globe." *See* Kry, *supra* n.3. Litigants must often chase assets across borders as they learn about transfers. *Id.* Litigants sometimes "reasonably prefer to wait until they learn about assets in the country" before attempting to enforce. *Id.* But the decision below "aggravates that problem [of needing to rush into U.S. court prematurely] in sovereign cases by eliminating one way to wait and see." *Id.* Further, litigants may be precluded from moving against sovereigns in time. For example, the government of Belize made it illegal to enforce arbitral rulings against it, punishable by fines and imprisonment. *See BCB Holdings Ltd.* v. *Gov't of Belize*, 110 F.Supp.3d 233 (D.D.C. 2015). As a result, enforce-

ment was delayed for years and then only possible because of extraordinary showing of equitable tolling.

Deciding the scope of "waive[r] . . . by implication" in the FSIA will clarify important questions of international import and prevent confusion from spreading.

III. THIS CASE PROVIDES A CLEAN VEHICLE TO ADDRESS THE QUESTION PRESENTED

The question presented was squarely decided below. It is a clean issue of law presented on the pleadings and is dispositive of subject matter jurisdiction. Further, as Petitioners have only brought an action to recognize a judgment, nothing prevents reaching the merits of implied waiver for such an action. The question is thus directly presented in a manner that permits the Court to decide it without distraction.

CONCLUSION

The Court should grant certiorari and reverse.

Respectfully submitted,

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DECEMBER 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A: Opinion of the United States Court of Appeals for the D.C. Circuit (July 15, 2025)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-7030

AMAPLAT MAURITIUS LTD. AND AMARI NICKEL HOLDINGS ZIMBABWE LTD.,

Appellees,

v.

ZIMBABWE MINING DEVELOPMENT CORPORATION, ET AL.,

Appellants.

Appeal from the United States District Court
for the District of Columbia
(No. 1:22-cv-00058)

Argued November 18, 2024 Decided July 15, 2025

Opinion for the Court filed by *Circuit Judge* CHILDS.

CHILDS, *Circuit Judge*: Two Mauritian mining companies bring this action against the Republic of Zimbabwe, the Zimbabwe Mining Development Corporation (ZMDC), and Zimbabwe's Chief Mining Commissioner, asking us to recognize and enforce a judgment of the High Court of Zambia that confirmed

an arbitral award issued in Zambia. Plaintiffs argue we have subject matter jurisdiction because Defendants waived their immunity under the Foreign Sovereign Immunities Act (FSIA), which sets out narrow exceptions to a sovereign's immunity from suit in U.S. courts.

Plaintiffs contend that the FSIA's arbitration exception, which waives immunity from an action to "confirm an award," also waives immunity from an action to recognize a foreign court judgment that confirmed an award. Plaintiffs also rely on the FSIA's implied waiver exception for jurisdiction. They argue that a foreign sovereign waives its immunity from an action to recognize a foreign court judgment that confirmed an arbitral award when the sovereign signs a treaty governing the recognition and enforcement of arbitral awards and agrees to arbitrate in a jurisdiction that has done the same.

Applying either exception here would require us to conflate two distinct concepts—arbitral awards and foreign court judgments. We cannot fit a judgment recognition action into a provision that mentions only award confirmation. Nor can we conclude that Defendants intended to waive their immunity by signing a treaty that governs only the recognition and enforcement of arbitral awards, not the court judgments confirming such awards. Because neither exception applies, we lack subject matter jurisdiction over this action.

Appendix A

I.

A.

The FSIA grants foreign sovereigns and their political subdivisions, agencies, and instrumentalities immunity from the jurisdiction of U.S. courts unless a specifically enumerated exception to immunity applies. *See* 28 U.S.C. §§ 1603, 1604. The FSIA has an "express goal of codifying the restrictive theory of sovereign immunity"—under which a sovereign has immunity for its "public but not its private acts"—and "[m]ost of the FSIA's exceptions . . . comport with th[at] overarching framework." *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 182-83 (2021).

Two FSIA exceptions are relevant to this appeal. The first is the arbitration exception, which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought[] either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration . . . or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6).

The second is the implied waiver exception. The implied waiver exception states: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity . . . by implication. . . ." 28 U.S.C. § 1605(a)(1). "[W]e have long held that implicit in § 1605(a)(1) is the requirement that the foreign state have *intended* to waive its sovereign immunity." *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 691 (D.C. Cir. 2022) (quotations omitted).

Because the FSIA governs the waiver of a sovereign's immunity in courts beyond its borders, we construe these exceptions narrowly, cognizant of the consequences for international relations and the risk of reciprocal expansions of liability over the U.S. government in courts abroad. *See NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1099, 1108 (D.C. Cir. 2024).

B.

Although the FSIA determines subject matter jurisdiction, it creates no independent cause of action here. *See McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012). The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*, provides a cause of action to confirm and enforce arbitral awards made pursuant to the New York Convention, a multilateral treaty governing the "recognition and enforcement of arbitral awards." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I(1), June 10, 1958, 21 U.S.T. 2517 (New

York Convention). Zimbabwe, Zambia, and the United States are all signatories to the New York Convention.[1]

This case, however, is not brought under the FAA, which has a three-year statute of limitations. *See* 9 U.S.C. § 207. Instead, this case is brought under the District of Columbia Uniform Foreign-Country Money Judgments Recognition Act (the D.C. Judgments Recognition Act). The D.C. Judgments Recognition Act provides a cause of action to recognize and enforce a foreign court judgment that "[g]rants or denies recovery of a sum of money" and is "final," "conclusive," and "enforceable" under the law of the country where it was rendered. D.C. Code § 15-363. Within fifteen years of a foreign judgment's issuance, a party may bring an action under the D.C. Judgments Recognition Act to turn the foreign judgment into a domestic judgment, rendering it enforceable in the United States. *See id.* §§ 15-367, 15-369.

II.

A.

This action under the D.C. Judgments Recognition Act originates with a contract dispute in Zimbabwe.[2]

1. *See Participant: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, United Nations Treaty Collection (last visited June 30, 2025), https://treaties.un.org/Pages/showDetails.as px?objid=080000028002a36b&clang=_en [https://perma.cc/U5HY-DXN9].

2. As the issues we reach concern only the legal sufficiency of the jurisdictional allegations, we assume the following facts

Appendix A

In the late 2000s, two Mauritian mining companies, Amaplat Mauritius Ltd. (Amaplat) and Amari Nickel Holdings Zimbabwe Ltd. (Amari), decided to develop nickel and platinum mines in Zimbabwe. To do so, they entered into memoranda of understanding (MOUs) to form joint ventures with ZMDC—a corporation established by Zimbabwean law to engage in activities in the development of mining industry. *See* Zimbabwe Mining Dev. Corp. Act, ch. 21:08, § 22.26 (1990) (Zim.). The MOUs contained provisions requiring any dispute to be resolved before the International Chamber of Commerce's International Court of Arbitration (ICC).

After a brief period of mining development, ZMDC tried to terminate the MOUs. Relying on the arbitration provisions, Amaplat and Amari initiated arbitration before the ICC, naming as respondents ZMDC and the Chief Mining Commissioner of Zimbabwe's Ministry of Mines. The ICC selected Zambia as the seat of the arbitration. ZMDC and the Commissioner initially agreed to participate in the arbitration, but eventually withdrew from the proceedings.

In 2014, the arbitral panel issued a final award finding ZMDC liable for breach in the amount of $42.9 million to Amaplat and $3.9 million to Amari, with 5% annual interest. The award also directed the respondents to pay the costs and expenses of the arbitration. Amaplat and Amari did not receive the amount due under the award.

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to be true on our review. *See Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 8 n.1 (D.C. Cir. 2017) (citing *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)).

Several years later, Amaplat and Amari sought and obtained a judgment from the Registrar of the High Court of Zambia registering the award pursuant to the New York Convention. The judgment empowers Amaplat and Amari to enforce the award "in the same manner as a judgment or order" of the High Court.

B.

In 2022, Amaplat and Amari filed this civil action in the District Court for the District of Columbia against ZMDC, the Commissioner, and—for the first time—the Republic of Zimbabwe itself. The Complaint sets forth one count to recognize and enforce the judgment of the High Court of Zambia pursuant to the D.C. Judgments Recognition Act. The Complaint also states that Defendants waived immunity from suit under the FSIA because this action falls within the arbitration and implied waiver exceptions to sovereign immunity. In response, Defendants filed motions to dismiss, arguing, as relevant to this appeal, that the two FSIA exceptions are inapplicable.

The district court ruled on the scope of both exceptions to immunity. It determined that the arbitration exception does not apply to waive Defendants' immunity because the exception covers actions to confirm arbitral awards, not actions to recognize and enforce foreign court judgments. The district court, however, held that the implied waiver exception does apply. In doing so, the district court considered the Second Circuit's decision in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993) (*Seetransport*). *Seetransport*

held that a foreign sovereign waived its immunity under the implied waiver exception from a claim to confirm an arbitral award *and* from a claim to recognize a foreign court judgment confirming the arbitral award because the sovereign both (1) signed the New York Convention and (2) agreed to arbitrate in a jurisdiction that had done the same. *See id.* at 578-79. Determining that *Seetransport* provided the best framework for this case, the district court reasoned that signing the New York Convention and agreeing to arbitrate in Zambia waived immunity from this action to recognize a foreign court judgment. After the district court determined that Defendants waived their immunity from suit and accordingly denied their motions to dismiss, Defendants filed this appeal.

III.

We have jurisdiction to review the denial of a foreign sovereign's assertion of sovereign immunity under the collateral-order doctrine. *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 104 F.4th 287, 292-93 (D.C. Cir. 2024). We review the district court's denial of Defendants' motions to dismiss *de novo*. *Zhongshan Fucheng Indus. Inv. Co. v. Fed. Republic of Nigeria*, 112 F.4th 1054, 1061 (D.C. Cir. 2024) (citing *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000)). "When a plaintiff asserts jurisdiction under the FSIA, the defendant foreign state bears the burden of proving that the plaintiff's asserted statutory exception to immunity does not apply." *Id.* (citing *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015)).

IV.

We begin with the arbitration exception.[3] We agree with the district court that the arbitration exception is inapplicable: there is a basic distinction between actions to confirm foreign arbitral *awards* and actions to domesticate foreign judicial *judgments*. The arbitration exception by its plain terms applies to the former, not the latter.

To fall within the arbitration exception, "the action" must be "brought[] either to enforce an agreement . . . to submit to arbitration . . . or to confirm an award made pursuant to such an agreement to arbitrate." 28 U.S.C. § 1605(a)(6). Plaintiffs do not argue that this is an action to enforce an agreement to arbitrate, as the MOUs' arbitration provisions were enforced when the arbitration took place. But this also is not an action to confirm an arbitral award. Plaintiffs filed such an action in Zambia and obtained confirmation of the award from the Zambian High Court. They did not file any such action in the United States within the three-year limitations period imposed by the FAA. *See* 9 U.S.C. § 207. Rather, this is an action to recognize and enforce a foreign court judgment.

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3. Defendants argue that the arbitration exception is not properly before us on appeal because the district court rejected the argument below and Plaintiffs did not cross-appeal. But "[p]arties who win in the district court may advance alternative bases for affirmance that are properly raised and supported by the record without filing a cross-appeal, even if the district court rejected the argument." *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1028 (D.C. Cir. 2020) (quotations omitted).

Nowhere does the arbitration exception mention foreign court judgments. And reading foreign court judgments into statutory text that references only award confirmation would require collapsing two concepts that we consistently have understood to be distinct. As we previously explained, we "have long recognized the conceptual difference between arbitral awards and foreign court judgments on arbitral awards." *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 330 (D.C. Cir. 2014) (*Comimpex*). An arbitral award typically arises from a contract, while a court judgment is an act of a sovereign. In accordance with these distinct factual predicates, "[a]s a matter of U.S. law, the mechanism for" recognizing and enforcing an arbitral award is different from the mechanism for recognizing and enforcing a foreign court judgment. *Id.* (quoting Amicus United States Br. 14). "Confirmation is the process by which an arbitration award is converted to a legal judgment," *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 875 (D.C. Cir. 2021), involving review of the arbitral award and arbitral process. By contrast, judgment recognition converts a foreign court judgment into a domestic court judgment, involving review of the foreign court order and judicial process. *See* D.C. Code § 15-367. In conducting these separate inquiries, courts apply federal law to award confirmation actions, *see, e.g.*, 9 U.S.C. §§ 1, *et seq.*, but state law to judgment recognition actions, *see, e.g.*, D.C. Code §§ 15-361, *et seq.*

Despite these well-established distinctions between award confirmation and judgment recognition, Plaintiffs propose two ways to interpret "confirm an award" in the

arbitration exception that they contend would cover this judgment recognition action. First, they argue that the phrase should be defined by "[t]he relief sought," namely "turning an award into a judgment." Appellee Br. 46. But here Plaintiffs do not seek to turn an award into a judgment; they seek to turn a foreign judgment into a domestic judgment. Second, Plaintiffs define "confirm" as "give . . . approval to," and argue that the function of this action is in effect to give approval to the underlying award. *See Confirm*, Black's Law Dictionary (5th ed. 1979). But this action ultimately asks us to review a foreign court judgment, not an arbitral award.

We therefore decline Plaintiffs' invitation to expand the reach of the arbitration exception beyond its plain terms.

V.

We next turn to the implied waiver exception. For similar reasons, the implied waiver exception also does not apply here. Plaintiffs argue that a foreign sovereign waives its immunity from an action to recognize a foreign court judgment that confirmed an arbitral award when the sovereign signs the New York Convention and agrees to arbitrate in a signatory state. We construe this exception narrowly and look for strong evidence of the sovereign's intent to waive immunity. The New York Convention governs the recognition and enforcement of arbitral awards, not of foreign judgments. Signing the New York Convention thus is insufficient to show Defendants' intent to waive immunity from judgment recognition actions.

Appendix A

A.

The implied waiver exception provides subject matter jurisdiction "in any case . . . in which [a] foreign state has waived its immunity . . . by implication." 28 U.S.C. § 1605(a)(1). "The FSIA does not specifically define what will constitute a waiver by implication, but our circuit has followed the virtually unanimous precedent construing the implied waiver provision narrowly." *Khochinsky v. Republic of Poland*, 1 F.4th 1, 8 (D.C. Cir. 2021) (quotations omitted). To waive immunity by implication, a foreign sovereign must have "at some point indicated its amenability to suit." *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994). For that reason, we have "consistently concluded that what matters . . . is the foreign sovereign's actual intent," *Wye Oak Tech., Inc.*, 24 F.4th at 697, and accordingly "rarely" find waiver "without strong evidence that this is what the foreign state intended," *Khochinsky*, 1 F.4th at 8 (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990)).

B.

Plaintiffs urge us to follow the Second Circuit's decision in *Seetransport* to conclude that the implied waiver exception applies. As described above, *Seetransport* applied the implied waiver exception both to a cause of action to confirm an award and a cause of action to recognize a foreign court judgment confirming an award. *See* 989 F.2d at 578-79. As the basis for the first waiver, the Second Circuit looked to the text of the New York Convention, emphasizing that it "expressly

permits recognition and enforcement" of arbitral awards in signatory states. *Id.* at 578. Accordingly, the Second Circuit reasoned that if a state that had signed the Convention later entered into an agreement consenting to arbitration in a jurisdiction that had done the same, it "logically . . . had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award." *Id.* at 579. Yet in extending this waiver a step further to also encompass the claim for judgment recognition, the Second Circuit did not rely on the text or scope of the New York Convention. Instead, it reasoned that the waiver extended merely because "the cause of action [to enforce a foreign judgment] is so closely related to the claim for enforcement of the arbitral award." *Id.* at 583.

Even assuming *arguendo* that a foreign sovereign intends to waive its immunity from actions to confirm arbitral awards when it signs the New York Convention and agrees to arbitrate, such conduct does not demonstrate an intent to waive immunity from judgment recognition actions. The New York Convention governs only the recognition and enforcement of arbitral awards. Its text makes clear that "[t]his Convention shall apply to *the recognition and enforcement of arbitral awards* made in the territory of a State other than the State where *the recognition and enforcement of such awards* are sought." New York Convention, Art. I(1) (emphasis added). The Convention says nothing about recognizing foreign court judgments after having sought recognition and enforcement of the award. Likewise, the FAA, as the statute that codifies the Convention in U.S. law, mentions only the confirmation and enforcement of awards. *See*

Comimpex, 757 F.3d at 327 ("Neither section 207 nor any other provision of Chapter 2 mentions foreign court judgments. Nor is there a reference to foreign court judgments in FAA Chapter 1, which has residual application.").

Plaintiffs contend that the Convention "expressly preserves . . . arbitral parties' right to rely upon domestic laws that are *more favorable* to award enforcement than are the terms of the Convention," *id.* at 328, which would include, Plaintiffs argue, the D.C. Judgments Recognition Act. But, here, signing the Convention is the purported expression of Defendants' intent to waive immunity by implication. The possibility of actions beyond the Convention's scope does not provide clear evidence of what the sovereign intended by signing the Convention.

Indeed, there are other international treaties that *do* govern the recognition and enforcement of foreign court judgments. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, No. 58036. At least one explicitly covers both judgments and awards, unlike the New York Convention. *See* Interamerican Convention on Territorial Effectiveness of Foreign Arbitration Awards, Art. 1, June 14, 1980, OAS T.S. 51 ("This Convention shall apply to *judgments and arbitral awards*. . . ." (emphasis added)). Zimbabwe, Zambia, and the United States have not signed those treaties.[4]

4. *See Participant: Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, United Nations Treaty Collection (last visited

In light of the scope of the New York Convention, asking only whether foreign court judgments are "closely related" to arbitral awards is too insubstantial a connection to establish strong evidence of a sovereign's intent to waive its immunity. Even when we have recognized that "an arbitral award and a court judgment enforcing an arbitral award are closely related," we have reaffirmed that "they are nonetheless distinct from one another . . . and that distinction has long been recognized." *Comimpex*, 757 F.3d at 330 (quotations omitted). We do not see the necessary evidence of intent to waive immunity by signing a treaty that governs arbitral awards, not foreign court judgments.

C.

Plaintiffs nevertheless argue that we should follow *Seetransport* based on two prior cases in which we referenced the decision. First, in 1999, we noted that the Second Circuit, "correctly we think," reasoned that a sovereign "must have contemplated" award-enforcement actions in other signatory states when it signed the New York Convention and agreed to arbitrate in another signatory state. *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999). We concluded, however, that a sovereign agreeing to arbitrate in a New York Convention jurisdiction was insufficient to show that it intended to waive immunity from award actions if

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June 30, 2025), https://treaties.un.org/Pages/showDetails.aspx?objid=08000002806 26108&clang=_en [https://perma.cc/77N9-7CEP]; *Signatory Countries: Interamerican Convention on Territorial Effectiveness of Foreign Arbitration Awards*, O.A.S. (last visited June 30, 2025), http://www.sice.oas.org/dispute/comarb/intl_conv/caicmoe.asp [https://perma.cc/N9DC-B2TA].

the sovereign itself had not also signed the Convention. *See id.* In a subsequent unpublished judgment, we relied on *Creighton* for the proposition that "a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states." *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (unpublished).

Neither case concerned a foreign court judgment; they both dealt with arbitral awards. And we have made clear that, even after *Creighton* and *Tatneft*, we have not yet "formally adopted" *Seetransport*'s conclusion that signing the New York Convention and agreeing to arbitrate is even sufficient to waive immunity from award actions. *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 774 (D.C. Cir. 2022); *NextEra*, 112 F.4th at 1100 (quoting *id.*). We once again leave that question "for another day." *NextEra*, 112 F.4th at 1100. But we resolve that such conduct is insufficient to establish the requisite intent to waive immunity from foreign judgment actions that are not governed by the Convention.

VI.

Because we conclude that neither the arbitration exception nor the implied waiver exception applies to waive Defendants' immunity, we need not reach the remaining issues presented on appeal.

The parties dispute whether ZMDC and Zimbabwe have an alter ego relationship and thus whether ZMDC's agreement to arbitrate can be attributed to Zimbabwe

for purposes of a waiver of immunity. *See TIG Ins. Co. v. Republic of Argentina*, 110 F.4th 221, 229 (D.C. Cir. 2024) (analyzing *alter ego* status to determine whether instrumentality's arbitration agreement binds foreign state for purposes of immunity waiver). We need not resolve this question because, even assuming ZMDC and Zimbabwe have an alter ego relationship, neither exception would apply to waive their immunity for the reasons described above.

The parties also dispute whether the Commissioner is sued as a state entity subject to the FSIA or as an individual subject to diplomatic immunity. *See Samantar v. Yousuf*, 560 U.S. 305, 315 (2010) (concluding that FSIA does not govern immunity of foreign officials). Again, even assuming Plaintiffs prevail in showing that the Commissioner is sued as a state entity, the Commissioner would be subject to our same analysis under the FSIA exceptions and thus immune from suit.

Finally, Defendants' contentions of inadequate service of process are outside the scope of this collateral appeal and, in any event, are superseded by the lack of subject matter jurisdiction. *See La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 840 (D.C. Cir. 2008).

VII.

For the foregoing reasons, neither the arbitration exception nor the implied waiver exception applies to waive Defendants' immunity from this action. Accordingly,

we reverse the district court's determination that it has subject matter jurisdiction, vacate the remainder of the district court's orders addressing the issues we do not reach in this appeal, and remand this case with instructions to dismiss for lack of jurisdiction.

So ordered.

APPENDIX B: Opinion of the United States District Court for the District of D.C. (Feb. 9, 2024)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 22-cv-58 (CRC)

AMAPLAT MAURITIUS LTD. *et al.*,

Plaintiffs,

v.

ZIMBABWE MINING DEVELOPMENT CORPORATION, *et al.*,

Defendants.

Filed February 9, 2024

MEMORANDUM OPINION AND ORDER

Mining companies Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. ("Plaintiffs") filed suit under the D.C. Uniform Foreign-Country Money Judgments Recognition Act. The suit seeks recognition of a foreign court judgment enforcing an arbitral award against the Republic of Zimbabwe, the Chief Commissioner of the Zimbabwean Ministry of Mines, and the Zimbabwe Mining Development Corporation

("ZMDC"). The Court has already ruled on one round of motions to dismiss. Teed up now are the Republic and ZMDC's ("Defendants") motion to dismiss the amended complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. All three grounds for dismissal turn on whether the Republic and ZMDC can be considered alter egos under the Foreign Sovereign Immunities Act ("FSIA"). Finding that Plaintiffs have established an alter-ego relationship between the Republic and ZMDC, the Court denies the motion to dismiss.

I. Background

The Court's previous opinion detailed the facts and procedural history of this case so the Court will pick up the thread where that opinion left off. *See Amaplat Mauritius Ltd. v. Zimbabwe Mining Dev. Corp.*, 663 F. Supp. 3d 11, 16–18 (D.D.C. 2023). After the Court dismissed the original complaint without prejudice, Plaintiffs filed an amended complaint and included new allegations detailing the Republic and ZMDC's purported alter-ego relationship. Am. Compl. ¶¶ 41–80. In turn, the Defendants moved to dismiss the amended complaint, contending that the Court lacks both subject matter and personal jurisdiction over them and that the complaint fails to state a claim. Plaintiffs also filed a conditional cross-motion for jurisdictional discovery, requesting an opportunity to explore the Republic and ZMDC's relationship should the Court find Plaintiffs' alter-ego allegations inadequate. Both motions are fully briefed.

II. Legal Standards

On a motion to dismiss for lack of subject matter jurisdiction or lack of personal jurisdiction, "[t]he plaintiff bears the burden of establishing, by a preponderance of the evidence, that the court has jurisdiction." *Cause of Action Inst. v. Internal Revenue Serv.*, 390 F. Supp. 3d 84, 91 (D.D.C. 2019) (quoting *Whiteru v. Wash. Metro. Area Transit Auth.*, 258 F. Supp. 3d 175, 182 (D.D.C. 2017)). Because this suit involves claims against a foreign nation, the FSIA provides the framework for determining subject matter jurisdiction. *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 121 (D.C. Cir. 1999). Under the FSIA, a federal district court has original jurisdiction over a civil suit against a foreign state only if the foreign state is not entitled to immunity under the statute. 28 U.S.C. § 1330(a). "[T]he FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). Once the plaintiff has made that threshold showing, however, "the sovereign bears the ultimate burden of persuasion to show that the exception does not apply." *Id.*; *accord Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) ("'In accordance with the restrictive view of sovereign immunity reflected in the FSIA,' the defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." (quoting *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985))).

If, on the one hand, "the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff." *Phoenix Consulting*, 216 F.3d at 40. On the other hand, if the motion to dismiss presents "a dispute over the factual basis of the court's subject matter jurisdiction under the FSIA" by contesting a jurisdictional fact or raising a "mixed question of law and fact," such as whether the "person alleged to have harmed [the] plaintiff was [an] agent of [the] sovereign," then "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged" but instead "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Id.* (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 448–49 (D.C. Cir. 1990)).

Defendants also move to dismiss under Rule 12(b)(6) for failure to state a claim. In reviewing a Rule 12(b)(6) motion, the Court must "accept all the well-pleaded factual allegations of the complaint as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," however, nor does the Court "assume the truth of legal conclusions." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,

to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).[1]

III. Analysis

Defendants' twin jurisdictional arguments—that the Court lacks subject matter and personal jurisdiction over them—overlap and both hinge on whether ZMDC is the Republic's alter ego. The two involve other considerations as well, but the Court will begin by conducting its alter-ego analysis in the context of the Republic's claim that the Court lacks subject matter jurisdiction over it.

A. Subject Matter Jurisdiction

Unless one of the FSIA's exceptions to sovereign immunity applies, the FSIA bars suit against foreign sovereigns. Plaintiffs rely on two such exceptions: § 1605(a)(1)'s waiver exception and § 1605(a)(6)'s arbitration exception. The Court has already rejected the application of the arbitration exception in this case, leaving just the waiver exception at issue. *See Amaplat*, 663 F. Supp. 3d at 31–33. Section 1605(a)(1) divests a sovereign of immunity when "the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." 28 U.S.C. § 1605(a)(1). Plaintiffs maintain,

1. As Plaintiffs' conditional cross-motion for jurisdictional discovery is moot in light of the Court's opinion, the Court need not address the standard for jurisdictional discovery.

and ZMDC does not dispute, that ZMDC waived its sovereign immunity under § 1605(a)(1) by agreeing to arbitrate disputes in the 2007 and 2008 Memoranda of Understanding ("MOUs") between Plaintiffs and ZMDC and by participating in the arbitration in Zambia. Am. Compl. ¶ 10. Plaintiffs allege that ZMDC's waiver is attributable to the Republic because the two are alter egos.

1. Alter-Ego Relationship

"A government instrumentality 'established as [a] juridical entit[y] distinct and independent from [its] sovereign should normally be treated as such,'" and therefore such entities are "presumed to have legal status separate from that of the sovereign." *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000) (alterations in original) (quoting *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 627 (1983)). "That presumption can be overcome," however, if the plaintiff demonstrates that the sovereign and instrumentality are alter egos. *Id.* at 847–48. The two are deemed alter egos in either of two circumstances: (1) the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or (2) "recognition of the instrumentality as an entity apart from the state 'would work fraud or injustice.'" *Id.* at 848 (quoting *Bancec*, 462 U.S. at 629).

To assess the presence of both circumstances, courts have "coalesced around [] five factors," dubbed the *Bancec*

factors: (1) whether the government exercises economic control over the entity, (2) whether government officials manage the entity or its daily affairs, (3) whether the entity's profits go to the government, (4) whether the government is the sole beneficiary of the entity's conduct, and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations. *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 210 (2018) (cleaned up).[2]

The first step in the alter-ego analysis is to define the relevant time period, which the parties dispute. *See*

2. The parties' briefing reflects understandable confusion about how the five *Bancec* factors fit into the two alter-ego inquiries, namely the principal-agent and fraud-or-injustice inquiries. *See* Pls.' Opp'n at 28–29; Defs.' Reply at 21–22. In *Rubin*, the Supreme Court suggested that the *Bancec* factors apply to both. 583 U.S. at 210. But the fit isn't perfect. Factors one through four bear more on the principal-agent inquiry. The fifth *Bancec* factor—whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations—does capture notions of fraud and injustice. But it is narrower than what courts have found relevant to the fraud-or-injustice prong. For example, the Supreme Court in *Bancec*, as well as the D.C. Circuit in subsequent cases, considered as part of the fraud-or-injustice analysis whether the state had undercapitalized the instrumentality or transferred money to avoid debtors. *See Bancec*, 462 U.S. at 633; *Transamerica*, 200 F.3d at 854. The Court will therefore use the framework of the five *Bancec* factors but incorporate other considerations into the equity factor. This flexible approach hews to the Supreme Court's guidance that the *Bancec* factors do not supply a "mechanical formula" for determining judicial separateness. *Rubin*, 583 U.S. at 210 (quoting *Bancec*, 462 U.S. at 633).

Mot. Dismiss at 16–17; Pls.' Opp'n at 29; Defs.' Reply at 4–5. Defendants urge the Court to consider only events that occurred between ZMDC's signing of the MOUs with Plaintiffs (2007 and 2008) and ZMDC's participation in the arbitration (2011). Mot. Dismiss at 16. Plaintiffs counter that the Court should also consider facts that post-date the commencement of the arbitration, including, for example, information in a 2017 Zimbabwe Parliamentary report. Pls.' Opp'n at 29–31, Third Declaration of Steven K. Davidson ("Third Davidson Decl.") Ex. F. The Court's approach falls somewhere between the parties' positions.

For the principal-agent analysis (roughly mapping onto *Bancec* factors one through four), the Court will consider only facts that bear on whether ZMDC was Zimbabwe's alter ego from 2007 to 2011. Of course, events that occurred soon before or after this period may be relevant to whether ZMDC acted as Zimbabwe's agent within this timeframe. But the pertinent question is whether ZMDC was Zimbabwe's agent between 2007 and 2011. This approach accords with the D.C. Circuit's guidance that jurisdiction over a sovereign cannot "necessarily" be maintained just because "a state and a state-owned corporation may in some circumstances be, respectively, principal and agent." *Transamerica*, 200 F.3d at 850. "[T]he agent's actions [must be] related to the substance of plaintiff's cause of action." *Id.* (cleaned up); *see also TIG Ins. Co. v. Republic of Argentina*, No. 18-mc-00129 (DLF), 2022 WL 1154749, at *9 (D.D.C. Apr. 18, 2022), *order corrected and superseded*, No. 18-mc-00129 (DLF), 2022 WL 3594601 (D.D.C. Aug. 23, 2022) (defining the "relevant time" for the principal-agent analysis as "when the contracts 'were made.'").

Events that pre-or post-date 2007 to 2011 are relevant, however, to the fraud-or-injustice prong. The Supreme Court adopted this approach in *Bancec* by considering the Cuban government's conduct after the plaintiff filed suit. 462 U.S. at 615–16. Namely, the Court found that because the government dissolved Bancec and transferred its assets to other entities, in order to insulate those assets from possible counterclaims, "adher[ing] blindly to the corporate form" "would cause [] an injustice." *Id.* at 632. The Court will therefore follow suit and assess the Republic's conduct beyond 2011 as part of the fraud-or-injustice inquiry.

With these guideposts in place, the Court now turns to the *Bancec* factors.

a. Economic Control and Day-to-Day Management

Plaintiffs have demonstrated that the Republic exercised significant economic control over ZMDC. ZMDC's organic statute, the ZMDC Act, vests the Republic with control over the instrumentality. Under the act, the government's Minister of Mines appoints ZMDC's board members. Third Davidson Decl., Ex. B ("ZMDC Act") § 5(1).[3] The act also mandates that the Republic hold

3. Defendants submit a declaration from Dominic Muzawazi, a Zimbabwean lawyer, explaining that subsequent legislation has superseded some of the ZMDC Act's provisions. Defs.' Reply, Declaration of Dominic Muzawazi ("Muzawazi Decl.") ¶ 3.2. Of relevance to the section cited above, Mr. Muzawazi notes that the Corporate Governance Act now requires the Minister of Mines

at least fifty-one percent of ZMDC's shares and conditions the sale of other shares on government ministers' approval. *Id.* §§ 27(2), (5). And from ZMDC's founding until at least September 2023, the Republic has owned 100 percent of ZMDC's shares. Am. Compl ¶ 45; Muzawazi Decl. ¶ 4. These factors alone do not establish an alter-ego relationship. *See Foremost-McKesson*, 905 F.2d at 448 ("Majority shareholding and majority control of a board of directors, without more, are not sufficient to establish a relationship of principal to agent under FSIA."). But the ZMDC Act also grants the Minister of Mines authority to give ZMDC "directions of a general character relating to the exercise . . . of its functions, duties and powers," and ZMDC is required, "with all due expedition, [to] comply with [these] direction[s]." ZMDC Act § 25. Moreover, under Zimbabwe's Public Finance Management Act, ZMDC must notify and seek approval from the government before "the acquisition or disposal of a significant asset," "the commencement or cessation of a significant business activity," or "participation to a significant extent . . . in a partnership, trust, unincorporated joint venture or similar arrangement." Defs.' Reply, Declaration of Quinn Smith ("Smith Decl."), Ex. Z ("PFM Act") § 48(3).[4]

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to consult with the president before appointing or terminating ZMDC's board members. *Id.* ¶ 4.1 ("[T]he President now has a close control on [Board] appointments."). The Corporate Governance Act went into effect only in 2018, however, and therefore would not have impacted the Republic's authority over ZMDC during the relevant period. *See* Date of Commencement: Public Entities Corporate Governance Act (Jun. 8, 2018), https://perma.cc/9AV8-PLSJ.

4. The Public Finance Management Act went into effect April 2, 2010. *See* PFM Act at 1.

The Republic's control is also "not merely aspirational." *See OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 172 (3d Cir. 2023) (finding Venezuela exercised economic control over a national oil company because "statements of authority [we]re not merely aspirational.") A 2010 news article documented that the Minister of Mines "brought in" a new chairperson for ZMDC's Board, and then "at the instigation of [the] Mines Minister" ZMDC's senior executives were placed on forced leave. Third Davidson Decl., Ex. J at 1.[5] *But see Transamerica*, 200 F.3d at 851 (finding no alter-ego relationship even when the Venezuelan government appointed members of an instrumentality's Board and "exercis[ed] its influence, through the Board of Directors, to put its own chosen manager in charge of a corporation.").

Plaintiffs have also submitted evidence that the Republic was involved in the "day-to-day operations" of

5. The Court hesitates to rely on unsubstantiated newspaper articles, but Defendants themselves cite to this 2010 article as evidence that ZMDC had a board. *See* Defs.' Reply at 19. Moreover, though courts must rely only on "evidence satisfactory to the court" in deciding motions for default judgment under the FSIA, *see* 28 U.S.C. § 1608(e), and courts in this district have therefore rejected inadmissible hearsay when ruling on those motions, *see, e.g., Strange v. Islamic Republic of Iran*, No. 14-cv-435 (CKK), 2017 WL 11670394, at *1 (D.D.C. Feb. 8, 2017), the same standard does not apply to evidence used to establish subject matter jurisdiction. In *TJGEM LLC v. Republic of Ghana*, for example, the D.C. Circuit considered information in "an internet news story" when analyzing the FSIA's commercial activity exception. No. 14-7036, 2015 WL 3653187, at *1 (D.C. Cir. June 9, 2015) (ultimately concluding the allegations in the news story did not establish subject matter jurisdiction).

ZMDC and its subsidiaries. *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995). In 2008, the U.S. Treasury Department's Office of Foreign Asset Controls ("OFAC") imposed sanctions against ZMDC and numerous other companies that supported the regime of former Zimbabwean President Robert Mugabe. Third Davidson Decl., Ex. BB (OFAC press release) at 2. In so doing, OFAC described ZMDC as "planning, coordinating and implementing mining projects on behalf of the Government of Zimbabwe." *Id.* at 1. And a 2013 Zimbabwe Parliamentary report noted that the Minister of Mines, not ZMDC's Board, controlled appointments to the boards of ZMDC's subsidiaries. *See* Third Davidson Decl., Ex. U at 15 ("The ZMDC Board was rendered powerless when it came to the selection and appointment of members who sit on its subsidiary companies. It[]s only function is to regulari[z]e [] appointments made by the Minister."). Though a government's appointment of members to an instrumentality's board does not alone create an alter-ego relationship, *see Transamerica*, 200 F.3d at 851, the report found the Republic used board appointments to exercise control over ZMDC's subsidiaries. As a result, the ZMDC Board "ha[d] little control and information over its subsidiary companies." *Id.* at 15–16.[6]

6. Plaintiffs also cite a 2017 Zimbabwe Parliamentary report about Zimbabwe's diamond industry. Pls.' Opp'n at 25. The Court will not rely on the report because, as it describes, the Republic's level of control over the diamond industry shifted in 2015. Previously, the Republic had "issue[d] multiple licenses to various investors." Third Davidson Decl., Ex. F at 5. In 2015, however, the government "centrali[zed] all diamond mines" in the Zimbabwe Consolidated Diamond Company, a subsidiary of ZMDC. *Id.* at

b. *Profits and Beneficiaries*

Plaintiffs have also shown that the Republic took ZMDC's profits and was the beneficiary of its conduct during the relevant time period. The Republic owns ZMDC shares (indeed, all of its shares) and therefore receives profits in the form of dividends. Again, stock ownership does not alone create an alter-ego relationship. *See Transamerica*, 200 F.3d at 849 ("A sovereign does not create an agency relationship merely by owning a majority of a corporation's stock. . . ."). But Plaintiffs have also offered evidence that, as early as 2008, government officials illegally diverted ZMDC's revenue to their own coffers. OFAC placed ZMDC on its sanctions list that year because "Robert Mugabe, his senior officials, and regime cronies ha[d] used [ZMDC and other] entities to illegally siphon revenue and foreign exchange from the Zimbabwean people." Third Davidson Decl., Ex. BB at 1. And, in 2013, the State Department's Acting Assistant Secretary in the Bureau of African Affairs testified before Congress about similar misuse of mining funds. Third Davidson Decl., Ex. MM (June 18, 2013 testimony). He stated that the State Department was "concerned about ongoing reports that diamond mining entities in Zimbabwe

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5–6. Analysis in the 2017 report therefore has limited relevance to the 2007 to 2011 time period. Likewise, the Court will not rely on the 2017 to 2023 State Department Investment Climate Impact Reports cited by Plaintiffs. *See* Third Davidson Decl. Exs. FF–LL. The 2017 to 2022 reports all noted that "recent[ly]" the "government allow[ed] [ZMDC] to function without [a] board[]." *See, e.g.*, Third Davidson Decl. Ex. LL at 13. Recently is likely not 2011.

[we]re being exploited by people in senior government and military positions for personal gain, that revenues from those enterprises [we]re being diverted for partisan activities that undermine democracy, and that proceeds from diamond sales [we]re enriching a few individuals and not the Treasury and people of Zimbabwe." *Id.* at 2.

As other courts have found, officials' use of an instrumentality's funds for personal gain or policy goals contributes to the creation of an alter-ego relationship. In *Transamerica*, the D.C. Circuit held that an alter-ego relationship exists when the "affairs of the [instrumentality] [are] so intermingled that no distinct corporate lines are maintained" and cited as an example a company's use of its subsidiary's "profits for its own purposes." 200 F.3d at 849 (cleaned up). Likewise, in *OI Eur. Grp. B.V.*, the Third Circuit held that Venezuela and a state instrumentality were alter egos because, among other things, Venezuela "committed [the instrumentality] to sell oil to [] allies at steep discounts" and senior officials used the instrumentality's "aircraft[s] for state purposes." 73 F.4th at 173. *See also McKesson*, 52 F.3d at 352 (finding an alter-ego relationship because the instrumentality's "policy was not commercial" and instead was guided by "government representatives"). Plaintiffs' evidence here is of a similar vein.

c. Fraud and Injustice

Under a narrow application of the fifth *Bancec* factor—whether adherence to separate identities would entitle the foreign state to benefits in U.S. courts while avoiding its obligations—Plaintiffs have not demonstrated

that the Republic seeks any benefits from the U.S. legal system. But, more broadly, "recognition of [ZMDC] as an entity apart from the state 'would work fraud or injustice.'" *Transamerica*, 200 F.3d at 848 (quoting *Bancec*, 462 U.S. at 629). When a government shields its instrumentality from creditors—for example, by "thinly capitaliz[ing]" the instrumentality or transferring its "assets to separate juridical entities"—this conduct supports an alter-ego finding. *See id.* at 854; *Bancec*, 462 U.S. at 633.

And there is evidence that the Republic did exactly that. According to a 2022 Zimbabwean news article, as legal judgments against ZMDC began to pile up, the Republic started "selling off parts" of the company. Third Davidson Decl., Ex. NN at 3. In 2018, the Republic issued a tender offer for six mines held by ZMDC. *Id.* In early 2022, the Minister of Mines then ordered that two of ZMDC's few remaining assets—the Kamativi and Todal mining projects—"be spirited away into a new government company, Defold," even though ZMDC's board expressed concern that the asset transfer was "illegal and against [ZMDC's] interest." *Id.* at 2–3. According to the article, the government made the transfer to "stave off US$467 million in claims from [ZMDC's] creditors." *Id.* at 1.[7] In April of that year, the Secretary for Finance and

7. Again, the Court is cautious not to put too much stock in news articles. But Plaintiffs' other evidence—namely, the record indicating that the government authorized ZMDC to sell its shares in the Kamativi and Todal mining projects to Defold—substantiates the 2022 article. Third Davidson Decl., Ex. OO. And, though Defendants take issue with Plaintiffs' citations to news articles and the government record, they do not deny that ZMDC's assets were diverted to Defold or offer countervailing evidence. *See* Defs.' Reply at 22.

Economic Development approved the transfer of ZMDC's shares to Defold. Third Davidson Decl., Ex. OO (April 14, 2022 approval letter). The fraud-or-injustice inquiry therefore supports a finding that the Republic and ZMDC are alter egos.

In light of Plaintiffs' evidence, the Court finds that the Republic was ZMDC's alter ego and can therefore be subject to this Court's jurisdiction. Moreover, because Plaintiffs seek to take jurisdictional discovery only "to prove that the Amended Complaint's alter ego allegations are true," the Court denies that motion as moot. Pls.' Opp'n at 31.

2. Remaining Subject Matter Jurisdiction Arguments

The subject matter jurisdiction analysis does not end with the alter-ego determination. Defendants suggest that, even if ZMDC is the Republic's alter ego, § 1605(a)(1)'s implied-waiver exception is still not satisfied. *See* Mot. Dismiss at 24–27; Defs.' Reply at 22–23. Defendants offer two supporting theories, but neither is availing. First, Defendants contend that a foreign state that "was not a party to the arbitration agreement" could not have impliedly waived its immunity to suit. Mot. Dismiss at 25; Defs.' Reply at 23. But the D.C. Circuit has rejected this argument; indeed, that is the whole point of the alter-ego exception. *See Transamerica*, 200 F.3d at 848 (the principal-agent and fraud-or-injustice alter-ego theories are "exceptions to the rule that a foreign sovereign is not amenable to suit based upon the acts of such an instrumentality").

Second, Defendants renew their argument that the waiver exception does not apply because the New York Convention governs enforcement of arbitration awards, not enforcement of foreign judgments confirming arbitral awards. Mot. Dismiss at 26–27. This theory would deprive the Court of jurisdiction over both the Republic and ZMDC, but the Court has already rejected it. *See Amaplat*, 663 F. Supp. 3d at 35–36. When a sovereign (or its instrumentality) waives immunity by signing on to the New York Convention and agreeing to arbitrate in another signatory's jurisdiction, "the cause of action to enforce [a] foreign judgment is within the scope of [that] implicit waiver of sovereign immunity." *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 582 (2d Cir. 1993).[8] "The cause of action is within the scope of the waiver because the cause of action is so closely related to the claim for enforcement of the arbitral award." *Id.* at 583.[9]

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8. Although the Court adopted *Seetransport*'s implicit-waiver rule in its ruling on Defendants' prior motion to dismiss, it cautioned that a panel of the D.C. Circuit recently signaled concerns about the rule's application. *Amaplat*, 663 F. Supp. 3d at 33–35; *see also Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771 (D.C. Cir. 2022).

9. Defendants' Reply also seems to suggest that ZMDC could not have waived its immunity to suit because it was improperly served in the Zambian award enforcement proceeding. Defs.' Reply at 23. Putting aside whether Zambian service issues are properly considered at this stage of proceedings, *see Amaplat*, 663 F. Supp. 3d at 39-40, as the Second Circuit explained in *Seetransport*, it was ZMDC's agreement to arbitrate and its participation in the

The Court finds, accordingly, that it has subject matter jurisdiction over the Republic and ZMDC.

B. Personal Jurisdiction

1. The Republic

Under the FSIA, personal jurisdiction exists over a foreign state if the district court has subject matter jurisdiction and service has been effected. 28 U.S.C. § 1330(b). In other words, a simple equation governs: "[S]ubject matter jurisdiction plus service of process equals personal jurisdiction." *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 811 (D.C. Cir. 2012) (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95 (D.C. Cir. 2002)).

The Republic does not dispute that it was properly served. Thus, because the Court may exercise subject matter jurisdiction over the Republic, it also has personal jurisdiction.

2. ZMDC

The personal jurisdiction analysis is a bit more complicated for ZMDC. "Whenever a foreign sovereign controls an instrumentality to such a degree that a

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arbitration proceeding—not its participation in the Zambian award proceeding—that waived its immunity in this suit, *see Seetransport*, 989 F.2d at 582 ("Navimpex, a Romanian agency or instrumentality, had implicitly waived its sovereign immunity because it was a signatory to the Convention and had proceeded to arbitration in the I.C.C.").

principal-agent relationship arises between them, the instrumentality receives the same due process protection as the sovereign: none." *GSS*, 680 F.3d at 815. In that situation, the simple equation for personal jurisdiction over a state—"subject matter jurisdiction plus service of process equals personal jurisdiction"—also applies to the instrumentality. But, when an instrumentality is not the sovereign's alter ego, "the instrumentality [] enjoy[s] all the due process protections available to private corporations," including the requirement of "minimum contacts" with the relevant forum. *Id.* at 815, 817. Plaintiffs have opted for the alter-ego route, contending that ZMDC is not entitled to due process protections due to the Republic's substantial control over it. The Court agrees. Since ZMDC and the Republic are alter egos, personal jurisdiction over ZMDC is satisfied by subject matter jurisdiction and service.[10] As the Court has already concluded it may exercise subject matter jurisdiction over ZMDC, all that is left to consider is service.[11] And the Court finds service was

10. Defendants claim Plaintiffs "cannot rely on contradictory arguments" to establish jurisdiction and therefore cannot contend ZMDC is an "instrumentalit[y] [or] agenc[y]" after arguing it is Zimbabwe's "alter ego." Defs.' Reply at 24. The two theories offered by Plaintiffs are not contradictory: ZMDC can be both an instrumentality and an alter ego of the Republic. In fact, the D.C. Circuit defined the alter-ego doctrine as applying to a "sovereign" that dominates its "instrumentality." *See Transamerica*, 200 F.3d at 848 ("A sovereign is amenable to suit based upon the actions of an instrumentality it dominates because the sovereign and the instrumentality are in those circumstances not meaningfully distinct entities; they act as one.").

11. As noted above, Defendants made, and the Court rejected, the contention that subject matter jurisdiction over ZMDC does

proper: Plaintiffs served ZMDC pursuant to the "special arrangement" in the 2007 and 2008 MOUs. *See* 28 U.S.C. § 1608(b)(1).

The FSIA creates a "hierarchical regime for the appropriate methods of service" on agencies or instrumentalities of a foreign state. *Est. of Hartwick v. Islamic Republic of Iran*, No. 18-cv-1612, 2021 WL 6805391, at *8 (D.D.C. Oct. 1, 2021). The first-choice method in the hierarchy, and the one Plaintiffs used, allows a party to effect service by "deliver[ing] [] a copy of the summons and complaint in accordance with [a] special arrangement for service between the plaintiff and the agency or instrumentality." 28 U.S.C. § 1608(b)(1). The MOUs contain the following "special arrangement":

> The Parties choose the following physical addresses at which documents in legal proceedings or any written notices in connection with this MOU may be served. . . . Any notice given in terms of this MOU shall be in writing and shall if delivered by hand to a responsible person during ordinary business hours at the physical address chosen as its *domicilium citandi et executandi* be deemed to have been duly received by the addressee.

Am. Compl. Ex. B §§ 12.8.1–2 (emphasis added); Am. Compl. Ex. D §§ 10.9.1–2 (emphasis added). The MOUs further provide that "a written notice or communication

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not lie because service in the Zambian award proceedings was allegedly improper and because ZMDC's waiver does not extend to this suit.

actually received by one of the Parties from the other Party shall be adequate written notice or communication to such Party." Am. Compl. Ex. B § 12.8; Am. Compl. Ex. D § 10.9.

Plaintiffs complied with the special arrangement in the MOUs: They hand delivered copies of the summons, complaint, and notice of suit to Theresa Kanengoni, "a secretary for Zimbabwe Mining Development Corporation," who "stated that she was authorized to accept service" for ZMDC. Return of Service [ECF No. 24] ¶¶ 2–4.[12]

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12. As Plaintiffs acknowledge, they hand delivered the papers to a different address than the one listed for ZMDC in the MOUs. *See* Pls.' Opp'n at 37; Return of Service ¶ 3. ZMDC does not suggest that this change rendered service improper, and, in any event, service was still proper for several reasons. First, prior to the date of service, ZMDC notified Plaintiffs that its address had changed. *See* Second Declaration of Steven K. Davidson, Ex. 1 [ECF No. 32–2]. And, as other courts have noted, it would be "senseless" to attempt service at a location plaintiffs know the defendant does not occupy. *Int'l Rd. Fed'n v. Embassy of the Democratic Republic of the Congo*, 131 F. Supp. 2d 248, 251 (D.D.C. 2001). Second, the MOUs allow some wiggle room; they provide that "a written notice or communication *actually received* by one of the Parties from the other Party shall be adequate written notice or communication to such Party." Am. Compl. Ex. B § 12.8 (emphasis added); Am. Compl. Ex. D § 10.9 (emphasis added). Finally, 28 U.S.C. § 1608(b) also permits some flexibility: "[S]ection 1608(b) may be satisfied by technically faulty service that gives adequate notice to the foreign state." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153, 308 U.S. App. D.C. 86 (D.C. Cir. 1994); *see also Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 798 F. Supp. 2d 260, 267 (D.D.C. 2011) (applying a "substantial compliance" standard to service of agencies or instrumentalities under § 1608(b)).

ZMDC contends that Plaintiffs cannot rely on the MOUs' special service provision for two reasons: (1) the MOUs were terminated as a result of the arbitration proceedings and (2) even if the MOUs' service provisions survived contract termination, they do not apply in a proceeding to enforce an arbitration award. Defs.' Reply at 24–25.

As to the first contention, other district courts, including at least one in this district, have held that service under the FSIA can be effected pursuant to a special service provision in a terminated contract. In *G.E. Transp. S.P.A. v. Republic of Albania*, for example, petitioners sought confirmation of an arbitral award against the Republic of Albania. 693 F. Supp. 2d 132, 133 (D.D.C. 2010). Even though the arbitral tribunal determined the underlying contract was no longer in effect (in fact, the tribunal determined the contract never "enter[ed] into force" because Albania "prevented [its] reali[z]ation"), the district court still held the petitioners could rely on the contract's special service provision. *Id.* at 136–37; Petition, Ex. A at 60, *G.E. Transp. S.P.A. v. Republic of Albania*, 693 F. Supp. 2d 132, 133 (D.D.C. 2010) (No. 08-cv-2042), ECF No. 1–1. Likewise in *Arbitration Between Space Systems/Loral, Inc. v. Yuzhnoye Design Office*, the court found "[t]he fact that [the plaintiff] purported to terminate the contract at some point before serving its petition [did] not prohibit it from using the special arrangement established" in the contract. 164 F. Supp. 2d 397, 403 (S.D.N.Y. 2001).

This view—that special service provisions can survive contract termination—accords with the Supreme Court's holding in *Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionary Workers Union*. 430 U.S. 243 (1977). There, the Supreme Court considered whether a mandatory arbitration clause (and not a special service provision) survived contract termination and therefore governed the parties' dispute over severance pay. *Id.* at 244. The arbitration clause at issue provided that "'any grievance' arising between the parties was subject to binding arbitration." *Id.* at 245. The Supreme Court found the arbitration clause governed: A contract provision "survive[s] contract termination when the dispute [i]s over an obligation arguably created by the expired agreement." 430 U.S. 243, 252 (1977) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 552 (1964)); *see also Livingston*, 376 U.S. at 553 (a provision requiring arbitration for any disputes "arising out of or relating to [the] agreement, or its interpretation or application, or enforcement" survived termination).

The same is true here for MOUs' special service provisions. Though the arbitral panel considered a number of arguments, the core of the dispute was whether ZMDC illegally cancelled the MOUs. *See* Am. Compl. Ex. A ¶¶ 7–8, 92, 179. A dispute about whether a contract can be cancelled—or, put differently, whether a contract remains binding—is a dispute "over an obligation [] created" by the contract. The special service provision therefore survived contract termination.

Second, ZMDC contends that the service provisions do not cover actions to enforce arbitral judgments. This comes down to contract interpretation. As noted above, the MOUs' service provisions provide (1) that "documents in legal proceedings or any written notices in connection with this MOU may be served" at listed addresses and (2) that "[a]ny notice given in terms of this MOU . . . shall[,] if delivered by hand to a responsible person . . . at the physical address chosen as its *domicilium citandi et executandi*[,] be deemed to have been duly received." Am. Compl. Ex. B §§ 12.8.1–2 (emphasis added); Am. Compl. Ex. D §§ 10.9.1–2 (emphasis added).

The MOUs' service provisions extend to the current case. *Domicilium citandi et executandi* is a term in Zimbabwean and South African law that refers to the address for service of process. *See* Pls.' Opp'n at 36; Christian Schulze, *Practical Problems Regarding the Enforcement of Foreign Money Judgments*, 17 S. Afr. Mercantile L. J. 125, 131 (2005) ("[A] domicilium citandi et executandi" refers to a "domicile for the purpose of facilitating service of process and levying execution."). Because the MOUs used this term of art, it is clear the parties intended for hand-delivery to the chosen location to satisfy service of process in legal proceedings.

Defendants nevertheless contend that the service provisions' phrase "in connection with this MOU" renders the provisions inapplicable to actions to enforce arbitral judgments. See Defs.' First Reply [ECF No. 34] at 9–10 ("Under section 12.8 and section 10 of MOUs, ZMDC only agreed to accept service of 'documents in legal

proceedings or any written notices in connection with the' MOUs. . . . Plaintiffs are not seeking relief under the MOUs, such as a finding of a breach of the MOUs. Rather, the Complaint is connected to the Zambian High Court's order."). Yet the D.C. Circuit has held that the phrase "in connection with" is "quite broad." *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 877 (D.C. Cir. 2019). It is equivalent to the phrase "in relation to," and a dispute arises "in relation to" an agreement so long as "the origin of the dispute is related to that agreement, meaning it has some logical or causal connection to the agreement." *Id.* (cleaned up). Applying these definitions, the D.C. Circuit rejected the notion that a claim "is 'in connection with' a contract only when 'the dispute occurs as a fairly direct result of the performance of contractual duties.'" *Id.* at 878. Though the current suit is now several steps removed from the original arbitration, it still has a direct "logical or causal connection" to the MOUs. Plaintiffs won an arbitration award finding Defendants illegally terminated the MOUs, a Zambian court confirmed that award, and now Plaintiffs seek to have it enforced.

Moreover, the MOUs specifically contemplated that the parties might dispute the confirmation or enforcement of awards. *See* Am. Compl. Ex. B § 11 ("[A]ny Party may submit [a] dispute to ICC International Court of Arbitration in Paris for arbitration . . . , the award of which shall be final and binding upon all Parties."); Am. Compl. Ex. D § 9 (same). *See also Yuzhnoye Design Off.*, 164 F. Supp. 2d at 403 (finding a special service provision applied to arbitration enforcement actions because the parties' contract "specifically contemplate[d] that 'disputes

between the [p]arties arising out of [the contract]' [would] be submitted to arbitration and that the parties [could] apply for judicial confirmation of an arbitration award"). "If [ZMDC] had wished to mark a narrower boundary for th[e] [service] clause[s], [it] could have easily done so." *Azima*, 926 F.3d at 878.. It did not, so it cannot now claim that service pursuant to the special arrangements was improper.

The personal jurisdiction equation is therefore solved: The Court has subject matter jurisdiction over ZMDC and Plaintiffs properly served ZMDC, ergo the Court has personal jurisdiction over ZMDC.

C. Failure to State a Claim

Finally, Defendants contend that Plaintiffs have failed to plead facts sufficient to establish an alter-ego relationship. As Defendants acknowledge, however, the standard under Rule 12(b)(6) is "more forgiving than that applicable to allegations for establishing personal and subject-matter jurisdiction." Mot. Dismiss at 31. *See also Citizens for Resp. & Ethics in Washington v. Pruitt*, 319 F. Supp. 3d 252, 256 (D.D.C. 2018) ("The standard to survive a motion to dismiss under Rule 12(b)(1) is less forgiving" than Rule 12(b)(6)'s standard.) Thus, for the reasons explained above, the Court finds Plaintiffs have pled facts sufficient to establish that the Republic and ZMDC are alter egos.

The Court therefore denies Defendants' motion to dismiss. To avoid juggling two complaints and because

the Amended Complaint reincorporates the original complaint's allegations against the Chief Mining Commissioner, the Amended Complaint shall be the operative complaint for all three defendants.

IV. Conclusion

For these reasons, it is hereby

ORDERED that [ECF No. 42] Defendants' Motion to Dismiss is DENIED. It is further

ORDERED that [ECF No. 46] Plaintiffs' Cross-Motion for Jurisdictional Discovery is DENIED as moot. It is further

ORDERED that the Amended Complaint shall be the operative complaint in this case. It is further

ORDERED that the Republic, ZMDC, and the Chief Mining Commissioner are directed to file an answer to Plaintiffs' Amended Complaint by March 11, 2024.

SO ORDERED.

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: February 9, 2024

APPENDIX C: Opinion of the United States District Court for the District of D.C. (Mar. 22, 2023)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 22-cv-58 (CRC)

AMAPLAT MAURITIUS LTD. *et al.*,

Plaintiffs,

v.

ZIMBABWE MINING DEVELOPMENT CORPORATION *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

In this case, two Mauritian mining companies seek recognition of a foreign court judgment enforcing an arbitral award against the Republic of Zimbabwe, the Chief Mining Commissioner of the Zimbabwean Ministry of Mines, and the Zimbabwe Mining Development Corporation ("ZMDC"), a corporation that is majority-owned by the government of Zimbabwe. All three Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. The Court will grant the motions as to ZMDC and the Republic. Plaintiffs' theory for the Court's subject matter jurisdiction over the

Republic and their theory for personal jurisdiction over ZMDC are both premised on the allegation that ZMDC is the Republic's alter ego. But, for the reasons explained below, the Court is not convinced that Plaintiffs have adequately pleaded that alter ego relationship. Because Plaintiffs might remedy that omission with more developed factual allegations, the Court will permit them to amend their complaint accordingly. As for the claims against the Chief Mining Commissioner, the Court concludes that it has jurisdiction and will deny the Commissioner's motion to dismiss.

I. Background

Plaintiffs Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. (collectively, "Plaintiffs") are two mining companies incorporated under the laws of the nation of Mauritius. Compl. ¶¶ 13-14. In 2007 and 2008, Plaintiffs each entered into memorandums of understanding ("MOUs") with Defendant ZMDC, which is majority-owned by the Republic of Zimbabwe ("the Republic"), to incorporate as joint ventures to prospect for nickel and platinum deposits and develop mines. *Id.* ¶¶ 18-22. Both MOUs included arbitration clauses, which provided that the parties must submit disputes arising out of or in relation to the MOUs to the ICC International Court of Arbitration in Paris for final and binding arbitration. *Id.* ¶¶ 24-25.

In 2010, ZMDC purported to cancel the MOUs. *Id.* ¶ 23. In 2011, Plaintiffs initiated arbitration proceedings consistent with the MOU arbitration clauses, and the

ICC Court determined that arbitration would occur in Zambia. *Id.* ¶ 28; Compl. Ex. A (ICC Arbitral Award) ¶¶ 8-9. Plaintiffs named both ZMDC and the Chief Mining Commissioner of the Zimbabwean Ministry of Mines (the "Commissioner") as respondents in the arbitration. Compl. Ex. A ¶ 2. The parties participated in the arbitration proceedings for about a year and a half, during which they filed amended pleadings, conducted discovery, prepared expert reports, served various written submissions, and otherwise prepared for arbitration. *Id.* ¶¶ 12-46. The parties also signed Terms of Reference which, among other things, provided that the parties "acknowledge[d] that they agree to submit to this arbitration and expressly waive any procedural objections they may have with respect to known events." Declaration of John Peter Sangwa ISO Pls' Opp. ("Sangwa Decl.") Ex. 1 § 8.1. At multiple points during this time period, ZMDC and the Commissioner asked the panel to hear a challenge to its jurisdiction as a preliminary matter, but the panel deferred hearing the jurisdictional challenge on the ground that it was inextricably linked to the merits. Compl. Ex. A ¶¶ 28, 45. In August 2012, the arbitral panel began hearing evidence, including testimony from a number of witnesses for Plaintiffs, and ZMDC and the Commissioner cross-examined at least one of Plaintiffs' witnesses. *Id.* ¶¶ 47-51.

After that cross examination, however, ZMDC and the Commissioner indicated that they wished to challenge the arbitral tribunal under Article 11 of the ICC International Court of Arbitration Rules and applied for the arbitration to be adjourned in the interim. *Id.* ¶ 51. The panel denied

that request, at which point the respondents sought a short adjournment and, shortly thereafter, withdrew from the proceedings, although the panel continued to provide them with submissions and transcripts of the proceedings. *Id.* ¶ 51-56. After ZMDC and the Commissioner withdrew from the arbitration, their appointed arbitrator likewise tendered his resignation. *Id.* ¶ 57. Proceedings continued through October 2012, when the now-absent respondents obtained an ex parte order from the Zambian High Court temporarily enjoining the proceeding. *Id.* ¶¶ 58-67. Eventually, the arbitration panel was reconstituted, and after some further delays and changes of personnel (which were challenged by the respondents), the panel in January 2014 issued an award ordering ZMDC and the Commissioner to pay damages, costs, and expenses, totaling about $50 million. *Id.* ¶¶ 68-88, 227.[1]

After post-award litigation in Zambian courts, in which ZMDC and the Commissioner again challenged the composition and authority of the panel, the High Court of Zambia issued a judgment in Plaintiffs' favor in August 2019. Compl. ¶ 34 & Ex. E (Ex Parte Order for Leave to Register and Enforce the Final Arbitration Award). The Judgment provided that ZMDC and the Commissioner had 30 days after service to move to set aside the Judgment. *Id.* ¶ 35. Plaintiffs allege that they served the Judgment

1. A few months later, in June 2014, the Zambian High Court issued an opinion stating that ZMDC and the Chief Mining Commissioner had "suppressed material facts and laws" in their ex parte injunction application, concluding that the court lacked jurisdiction, and dissolving the injunction that had stayed the arbitration proceedings. Sangwa Decl. Ex. 3 at R24-R25.

on October 23, 2019. *Id.*[2] The parties negotiated for a time, but after Defendants refused to pay the Judgment, Plaintiffs filed their complaint in this Court against ZMDC, the Commissioner, and the Republic of Zimbabwe. *Id.* ¶¶ 38-40.

The complaint alleges a cause of action under the D.C. Uniform Foreign-Country Money Judgments Recognition Act, D.C. Code § 15-361 *et seq.*, and asks this Court to enter an order recognizing and enforcing the Judgment, finding that the Republic of Zimbabwe is the alter ego of ZMDC and the Commissioner, and entering a money judgment against Defendants. *Id.* at 10.

Defendants have filed two separate motions to dismiss—one by the Republic and the Commissioner, and the other by ZMDC. The Republic and Commissioner contend that the Court lacks subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") because the Republic did not sign the MOUs containing an arbitration agreement, did not participate in the

2. Defendants contend that they were never served with the Zambian judgment, citing an expert declaration from a Zambian lawyer stating that there is no evidence from the Zambian court docket that Plaintiffs sought leave of the court to serve documents outside the jurisdiction. *See* Zimbabwe Motion to Dismiss ("Zimbabwe MTD") at 18-19; Expert Declaration of Likando Kalaluka ISO Zimbabwe MTD ("Kalaluka Decl.") ¶¶ 27-30, ECF No. 23-3. In their opposition, Plaintiffs state that they served Defendants' Zambian counsel in Zambia, explaining why they did not need to serve elsewhere. Opp. to Zimbabwe MTD at 31; Sangwa Decl. ¶¶ 23-25, ECF No. 28-1. In any event, the complaint pleads that Plaintiffs served the Zambian judgment on Defendants.

Zambian arbitration, is not an alter ego of ZMDC, and therefore retains its sovereign immunity. *See* Zimbabwe MTD at 6-12. The motion also maintains that the Court lacks jurisdiction as to the claims against the Commissioner because he is an individual, not an agency or instrumentality of Zimbabwe. *Id.* at 8-9. In any event, the Republic and the Commissioner further contend that neither the FSIA's waiver exception nor arbitration exception to sovereign immunity applies in this case. *Id.* at 9-12. Next, the motion contends that the Court lacks personal jurisdiction over both the Republic and the Commissioner. *Id.* at 13-14. Finally, the Republic and Commissioner maintain (1) that Plaintiffs have failed to state a claim because they are seeking to enforce the arbitration award judgment past the three-year statute of limitations under the New York Convention, (2) that Plaintiffs have failed to allege sufficient facts to support their claim that ZMDC is an alter ego of the Republic, (3) that Plaintiffs have not pleaded an entitlement to fees and interest, and (4) that the Zambian High Court lacked jurisdiction to issue the Judgment. *Id.* at 15-25. In addition to reiterating many of the same arguments raised by the Republic and the Commissioner, ZMDC separately maintains that it was not properly served under the FSIA and that the Court lacks personal jurisdiction over it because the complaint does not allege minimum contacts with the District of Columbia. ZMDC MTD at 7-9.

Both motions are fully briefed and ripe for decision.

II. Legal Standards

On a motion to dismiss for lack of subject matter jurisdiction or lack of personal jurisdiction, "[t]he plaintiff bears the burden of establishing, by a preponderance of the evidence, that the court has jurisdiction." *Cause of Action Inst. v. IRS*, 390 F. Supp. 3d 84, 91 (D.D.C. 2019) (quoting *Whiteru v. Wash. Metro. Area Transit Auth.*, 258 F. Supp. 3d 175, 182 (D.D.C. 2017)); *see Burman v. Phoenix Worldwide Indus., Inc.*, 437 F. Supp. 2d 142, 147 (D.D.C. 2006). Because this suit involves claims against a foreign nation, the FSIA provides the framework for determining subject matter jurisdiction. *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 121 (D.C. Cir. 1999). Under the FSIA, federal district courts "have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state" as defined by the FSIA "with respect to which the foreign state is not entitled to immunity" under the statute. 28 U.S.C. § 1330(a). As the statute's text suggests, "the FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). Once the plaintiff has made that threshold showing, however, "the sovereign bears the ultimate burden of persuasion to show that the exception does not apply." *Id.*; *accord Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) ("'In accordance with the restrictive view of sovereign immunity reflected in the FSIA,' the defendant bears the

burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." (quoting *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985))).

If, on the one hand, "the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff." *Phoenix Consulting*, 216 F.3d at 40. On the other hand, if the motion to dismiss presents "a dispute over the factual basis of the court's subject matter jurisdiction under the FSIA" by contesting a jurisdictional fact or raising a "mixed question of law or fact," such as whether the "person alleged to have harmed [the] plaintiff was [an] agent of [the] sovereign," then "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged" but instead "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Id.* (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 448-49 (D.C. Cir. 1990)).

Defendants also move to dismiss under Rule 12(b)(6). In reviewing a motion to dismiss for failure to state a claim, the Court must "accept all the well-pleaded factual allegations of the complaint as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," however, nor

does the Court "assume the truth of legal conclusions." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

III. Analysis

District courts have jurisdiction over "any nonjury civil action against a foreign state as defined in" 28 U.S.C. § 1603(a) as to any claim "with respect to which the foreign state is not entitled to immunity" under §§ 1605-07 of the FSIA or an international agreement. 28 U.S.C. § 1330(a). For purposes of the FSIA, § 1603(a) defines a foreign state as a state, any political subdivision of a state, or an agency or instrumentality of a state. *Id.* § 1603(a). The statute defines agency or instrumentality, in turn, as "any entity" which "is a separate legal person, corporate or otherwise," "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and "which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.* § 1603(b).

Section 1605 of the FSIA sets forth general exceptions to foreign sovereign immunity. Plaintiffs assert that either of two possible exceptions apply in this case. First, Plaintiffs point to § 1605(a)(1)—the waiver exception—which divests a sovereign of immunity when "the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver

which the foreign state may purport to effect except in accordance with the terms of the waiver." *Id.* § 1605(a)(1). Alternatively, Plaintiffs rely on § 1605(a)(6), which, as relevant here, waives sovereign immunity when an "action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit [certain disputes] to arbitration" or "to confirm an award made pursuant to such an agreement to arbitrate" if "the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." *Id.* § 1605(a)(6).

Plaintiffs maintain that ZMDC waived its sovereign immunity under §§ 1605(a)(1) and (a)(6) by agreeing to arbitrate disputes in the 2007 and 2008 MOUs and that the Commissioner, although not a party to those agreements, waived immunity by participating in the Zambian arbitration and by signing Terms of Reference agreeing to submit to the arbitration. As for the Republic, Plaintiffs allege that ZMDC is the Republic's alter ego under *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983), and that ZMDC's actions relating to the arbitration and MOUs are therefore attributable to the Republic. In turn, Plaintiffs maintain that personal jurisdiction exists over ZMDC, despite the absence of any alleged minimum contacts with the United States, because ZMDC is the Republic's alter ego, and under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 811 (D.C. Cir. 2012) (quoting *Price v. Socialist People's Libyan Arab*

Jamahiriya, 294 F.3d 82, 95 (D.C. Cir. 2002)). With these frameworks for analysis in mind, the Court will proceed to assess the motions to dismiss as to each defendant, beginning with the Republic.

A. The Republic

Plaintiffs contend that ZMDC's agreement to arbitrate disputes in the 2007 and 2008 MOUs, combined with the fact that Zimbabwe, Zambia, and the United States are all signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), satisfies either the waiver exception or arbitration exception to sovereign immunity under § 1605(a). But ZMDC's conduct is relevant for jurisdiction over the Republic only if ZMDC is the Republic's alter ego, such that the company's actions may be attributed to the Republic. Accordingly, the Court begins by addressing Plaintiffs' central contention that ZMDC is the Republic's alter ego.

"A government instrumentality 'established as [a] juridical entit[y] distinct and independent from [its] sovereign should normally be treated as such,'" and therefore such entities are "presumed to have legal status separate from that of the sovereign." *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000) (alterations in original) (quoting *Bancec*, 462 U.S. at 627).[3] "That presumption can be

3. Plaintiffs maintain, and Defendants do not dispute, that ZMDC is an "agency or instrumentality" of the Republic of Zimbabwe as that term is defined in the FSIA. *See* Compl. ¶ 15 (alleging that the

overcome," however, "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or "where recognition of the instrumentality as an entity apart from the state 'would work fraud or injustice.'" *Id.* at 847-48 (quoting *Bancec*, 462 U.S. at 629). The existence of those conditions serves as an "exception[] to the rule that a foreign sovereign is not amenable to suit based upon the acts of such an instrumentality." *Id.* at 848.

Whether a state instrumentality is so closely tied to the sovereign that it may be the state's alter ego depends on a number of factors, including the level of the government's economic control over the entity, whether the entity's profits go to the government, the degree to which government officials manage the entity or its daily affairs, whether the government is the real beneficiary of the entity's conduct, and whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018) (quoting *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992)). The sovereign's degree of control over the instrumentality must, however, "significantly exceed[] the normal supervisory control exercised by any corporate parent over its subsidiary." *Transamerica*, 200 F.3d at

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Republic owns a majority of ZMDC); *see* 28 U.S.C. § 1603(b) (defining "agency or instrumentality of a foreign state" as any entity "which is a separate legal person, corporate or otherwise," "a majority of whose shares or other ownership interest is owned by a foreign state," and "which is neither a citizen of a State of the United States . . . nor created under the laws of any third country").

848. Under such circumstances, the sovereign and the instrumentality are "not meaningfully distinct entities; they act as one." *Id.*; *see also id.* at 849 ("[C]ontrol is relevant when the sovereign exercises its control in such a way as to make the instrumentality its agent. . . . The relationship of principal and agent depends, however, upon the principal having 'the right to control the conduct of the agent with respect to matters entrusted to [the agent].'" (last alteration in original) (quoting Restatement (Second) of Agency § 14 (1958))).

Plaintiffs offer two grounds for finding that ZMDC is the Republic's alter ego. First, they rely on the allegations in the complaint, which in relevant part state that ZMDC "was created by the Zimbabwe Mining Development Corporation Act, and by law the Republic of Zimbabwe appoints its Board of Directors, approves significant actions, has the power to direct its actions, [sic] pays the debts of the Republic of Zimbabwe, and must be majority-owned by the Republic of Zimbabwe." Compl. ¶ 15; Opp. to Zimbabwe MTD at 9. Second, Plaintiffs maintain that the Southern District of New York's decision in *Funnekotter v. Agricultural Development Bank of Zimbabwe*, No. 13 CIV.1917(CM), 2015 WL 9302560 (S.D.N.Y. Dec. 17, 2015), which found that ZMDC was the Republic's alter ego, is dispositive here under the doctrine of issue preclusion. Opp. to Zimbabwe MTD at 9-10, 21-23. The Court concludes that neither of these theories suffices to show that ZMDC is the Republic's alter ego.

First, the single paragraph of alter ego allegations in Plaintiffs' complaint is inadequate to displace the

presumption of juridical separateness. Plaintiffs allege that the Republic, by law, must be a majority owner of ZMDC and is empowered to appoint ZMDC's Board of Directors. But "[a] sovereign does not create an agency relationship merely by owning a majority of a corporation's stock or by appointing its Board of Directors." *Transamerica*, 200 F.3d at 849; *accord Foremost-McKesson*, 905 F.2d at 448 ("Majority shareholding and majority control of a board of directors, without more, are not sufficient to establish a relationship of principal to agent under FSIA."). Moreover, the fact that ZMDC was created by Zimbabwean statute does not distinguish it from what *Bancec* described as the "typical government instrumentality" entitled to separate juridical status, which is "created by an enabling statute that prescribes the powers and duties of the instrumentality." 462 U.S. at 624; *see also Transamerica*, 200 F.3d at 846 (describing instrumentality there as a state-owned shipping company created by the sovereign). The complaint further alleges that the Republic approves or has the power to direct "significant actions" by ZMDC. But "it is not uncommon for a government—as regulator, not as shareholder—to require approval for certain transactions" in certain sectors. *Transamerica*, 200 F.3d at 851. The complaint does not describe what "significant actions" the Republic must approve, how extensive that alleged approval authority is, or whether that authority "represents the exercise of [the Republic's] authority as shareholder rather than its exercise of governmental power in the ordinary course of regulation." *Id.*; *see id.* at 849 ("[T]he parent [must] exercise[] its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors.").

That leaves the complaint's allegation that ZMDC pays the Republic's debts. Compl. ¶ 15. Plaintiffs attempt to bolster their argument of financial interdependence with a few news articles appended to their briefing, which suggest that ZMDC has had some involvement in a joint venture with a Russian military-industrial firm and that ZMDC has sold off mineral rights to the Zimbabwean military and other entities. *See* Declaration of Steven K. Davidson ISO Opp. to Zimbabwe MTD ("Davidson Decl."), Exs. 1-3. Although these allegations are relevant to the extent that they suggest some share of ZMDC's profits may go to the Republic, the complaint and Plaintiffs' handful of news articles do not support the inference that ZMDC's and the Republic's finances are "so intermingled that no distinct corporate lines are maintained." *See Transamerica*, 200 F.3d at 849 (quoting *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 403 (1960)); *id.* at 848 (noting that a separate entity may functionally be "operated as a division of another" if the subsidiary does "not handle any funds" and pays "all profits to parent" (citing *Joseph R. Foard Co. v. Maryland*, 219 F. 827, 829 (4th Cir. 1914))); *see also Bancec*, 462 U.S. at 614 (observing that Cuba's government "supplied all of [Bancec's] capital and owned all of its stock," and that the "General Treasury of the Republic received all of Bancec's profits, after deduction of amounts for capital reserves"). In short, the sparse allegations in Plaintiffs' complaint, combined with a few newspaper articles, are insufficient to overcome the presumption that ZMDC has "legal status separate from that of the sovereign." *Transamerica*, 200 F.3d at 847.[4]

4. Although Plaintiffs emphasize that "*either* extensive control *or* fraud or injustice will suffice" to displace the presumption, they

Aside from the allegations in the complaint, Plaintiffs largely rely on the Southern District of New York's decision in *Funnekotter*. *Funnekotter* concerned a declaratory judgment action brought by Dutch nationals seeking to satisfy a judgment against the Republic of Zimbabwe with the assets of several Zimbabwean corporations, including ZMDC. 2015 WL 9302560, at *1. Ruling on the plaintiffs' motion for summary judgment, the court concluded that ZMDC, as well as the other corporations, were sufficiently dominated by the Republic to be considered its alter egos under *Bancec*. *Id*. at *5-6. Plaintiffs here, who were not a party to that case, contend that the Court should apply the doctrine of offensive non-mutual collateral estoppel to give *Funnekotter* preclusive effect concerning ZMDC's alter ego status in this case. Opp. to Zimbabwe MTD at 21-23; Opp. to ZMDC MTD at 22-23.

"Under the doctrine of offensive collateral estoppel, or issue preclusion, a defendant may be prevented from relitigating identical issues that the defendant litigated and lost against another plaintiff." *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 31 (D.D.C. 2007). A district court, "in its discretion, may only apply preclusive effect to a judgment if (1) the issue was actually litigated, that is, contested by the parties and submitted for determination by the court; (2) the issue was actually and necessarily determined by a court of competent jurisdiction in the first trial; and (3) preclusion

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do not elaborate on a theory of fraud or injustice beyond asserting that one of the newspaper articles shows that ZMDC "may dissolve" and "transfer its assets to a different state-owned entity." Opp. to Zimbabwe MTD at 10, 20. This allegation is not enough to satisfy Plaintiffs' burden of establishing jurisdiction.

in the second action would not work an unfairness." *Id.* at 31-32 (citing *Jack Faucett Assocs., Inc. v. AT&T*, 744 F.2d 118, 125 (D.C. Cir. 1984)); *see Smith v. District of Columbia*, 387 F. Supp. 3d 8, 21 (D.D.C. 2019) ("[T]he party against whom estoppel is [offensively] asserted [must] ha[ve] litigated and lost in an earlier action." (alterations in original) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979))). "The doctrine is detailed, difficult, and potentially dangerous," and "[w]here offensive estoppel is involved, the element of 'fairness' gains special importance." *Jack Faucett*, 744 F.2d at 124-25.

For several reasons, the Court will not exercise its discretion to give *Funnekotter* preclusive effect here. First, although the Republic was a named defendant in *Funnekotter*, Defendants point out that the Republic itself never actually made an appearance in the case. *See* Zimbabwe Reply at 12; *see also* Docket, *Funnekotter v. Agric. Dev. Bank of Zimbabwe*, No. 13-cv-1917 (S.D.N.Y.); *Funnekotter v. Agric. Dev. Bank of Zimbabwe*, No. 13 CIV. 1917 CM, 2015 WL 3526661, at *2 (S.D.N.Y. June 3, 2015). To be sure, as a named party, the Republic had the opportunity to litigate the alter ego issue in *Funnekotter*. *Jack Faucett*, 744 F.2d at 127 (issue preclusion applies only against a party who had "a 'full and fair' opportunity to litigate the issue to be precluded"). But the fact that the Republic did not, in fact, participate in the *Funnekotter* litigation makes the Court hesitate to give *Funnekotter* preclusive effect here.

Even if the Republic's prior opportunity to litigate alone was sufficient, it is unclear whether the question decided in *Funnekotter* is sufficiently "identical" to the one

here. *Id.* at 124. For instance, there may be "a lack of total identity between the matters involved" in two proceedings when "the events in suit took place at different times." Restatement (Second) of Judgments § 27 cmt. c (Am. L. Inst. 1982). Here, the question relevant to subject matter jurisdiction is whether ZMDC was the Republic's alter ego either when it entered into the MOUs with Plaintiffs in 2007 and 2008 or when it actually participated in the Zambian arbitration starting in 2011. It is not apparent during what time period the *Funnekotter* court determined ZMDC was functionally the Republic's alter ego. The *Funnekotter* decision was rendered in 2015, and the conduct that gave way to the underlying arbitration in *Funnekotter* occurred between 1992 and 2001, when the Zimbabwean government expropriated a number of commercial farms in which the plaintiffs held investments. *Funnekotter*, 2015 WL 9302560, at *1. If, as appears to be the case, *Funnekotter* may have addressed ZMDC's relationship with the Republic at a different period of time than the period relevant here, there may be "a difference in pertinent facts" here "sufficient to substantially change the issue" and "render[] the doctrine of issue preclusion inapplicable." *Safadi v. Novak*, 574 F. Supp. 2d 52, 55-56 (D.D.C. 2008) (quoting 18 James W. Moore, et al., Moore's Federal Practice § 132.02[2][3], at 27-29 (3d ed. 2008)). In light of these considerations, the Court is not convinced that this is an appropriate case for the application of non-mutual offensive collateral estoppel.[5]

5. Additionally, although not dispositive, the Republic correctly observes that the decision in *Funnekotter* was based partially on that court's application of adverse-inference discovery sanctions against ZMDC and the other defendants in that case. *Funnekotter*, 2015

Because Plaintiffs' allegations that the Republic has waived its sovereign immunity are premised on the allegation that ZMDC acted as the Republic's alter ego, and because the complaint lacks sufficient factual allegations to overcome the presumption of juridical separateness between the Republic and ZMDC, the Court accordingly concludes that Plaintiffs have not met their burden of establishing that one of FSIA's exceptions to sovereign immunity applies in this case. *See Foremost-McKesson*, 905 F.2d at 447 (explaining that plaintiff "bears the burden of asserting facts sufficient to withstand a motion to dismiss regarding the agency relationship").

WL 9302560, at *5. Because the defendants there failed to produce certain documents in response to discovery orders, specifically "minutes and resolutions of their boards of directors," the court drew an "adverse inference about the contents" of those documents to support the plaintiffs' argument that the defendants there were alter egos of the Republic. *Id.* at *3, *5. To be sure, this is not a situation in which issue preclusion is inappropriate because the defendant "was unable to engage in full scale discovery" in the prior proceeding. *Parklane Hosiery*, 439 U.S. at 331 n.15. But at least when combined with the other considerations just discussed, the fact that adverse-inference discovery sanctions apparently played an important role in the *Funnekotter* decision gives the Court pause about the fairness of applying non-mutual issue preclusion here. Restatement (Second) of Judgments § 29 cmt. g (Am. L. Inst. 1982) ("The circumstances attending the determination of an issue in the first action may indicate that it could reasonably have been resolved otherwise if those circumstances were absent."); *cf. Jack Faucett*, 744 F.2d at 126 (preclusion inappropriate where "important, material evidence can be introduced in the current trial that was unavailable in the previous trial"); *but see id.* (noting that this factor is most relevant when evidence was not previously available to party "without fault of his own" (quoting *Blonder-Tongue Lab'ys v. Univ. of Ill. Found.*, 402 U.S. 313, 333 (1971))).

Plaintiffs ask for leave to amend their complaint so that they may bolster their alter ego allegations. *See* Opp. to Zimbabwe MTD at 36-37; Opp. to ZMDC MTD at 4 n.1. Leave to amend should be freely granted when justice requires it, provided that amendment would not be futile. *Wilson v. Geithner*, 968 F. Supp. 2d 275, 280 (D.D.C. 2013). Plaintiffs propose that they could amend their complaint to include the facts identified in *Funnekotter* as well as other developments that reinforce their theory of financial interdependence between ZMDC and the Republic. *See* Opp. to Zimbabwe MTD at 36.

As described above, Plaintiffs proposed amendment would need to do more than show merely that the Republic owns a majority of ZMDC, appoints its Board of Directors, regulates its activities, and created it by statute. *See Transamerica*, 200 F.3d at 847-53. The Court could, nevertheless, envision factual allegations that might tip the balance in Plaintiffs' favor. The current pleadings, for example, offer no factual allegations to support or describe the extent to which the Republic "approves significant actions" of ZMDC or requires ZMDC to function as its piggy bank. *See Compl.* ¶ 15. But if Plaintiffs can plead non-conclusory factual allegations that the Republic has exercised "day-to-day" control over ZMDC's operations above and beyond its role as a regulator or that the affairs of the two entities are "so intermingled that no distinct corporate lines are maintained," then the Court may yet find a basis to conclude that ZMDC's actions here were attributable to the Republic. *Transamerica*, 200 F.3d at 849-51 (quoting *Deena Artware*, 361 U.S. at 403). The Court therefore will dismiss Plaintiffs' complaint as to the Republic without prejudice so that Plaintiffs may have

the opportunity to bolster their factual allegations along the lines described in this opinion.[6]

B. ZMDC

The Court's conclusion that the complaint's alter ego allegations are insufficient also warrants dismissal as to ZMDC, although for a different reason: personal jurisdiction. *See Forras v. Rauf*, 812 F.3d 1102, 1105 (D.C. Cir. 2016) (explaining that a court may "turn[] directly to personal jurisdiction" when that issue is "straightforward" and "present[s] no complex question" but resolving subject matter jurisdiction would be complicated (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999))).

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6. Although they rely heavily on *Funnekotter*, the Court reminds Plaintiffs that they must heed this Circuit's explanations in *Foremost-McKesson, Transamerica*, and other cases concerning what allegations are sufficient and insufficient to displace the presumption of juridical separateness. Additionally, the Court acknowledges Plaintiffs' request for jurisdictional discovery on ZMDC's alter ego status. See Opp. to ZMDC MTD at 21 n.8. "[C]arefully controlled and limited" jurisdictional discovery along the lines set forth in that request may well be appropriate after Plaintiffs have had the opportunity to amend their complaint. *Phoenix Consulting*, 216 F.3d at 40. Whether to permit such discovery now is a close question. But the "court should allow for limited jurisdictional discovery" only if "a plaintiff shows a nonconclusory basis for asserting jurisdiction and a likelihood that additional supplemental facts will make jurisdiction proper." *Intelsat Glob. Sales & Mktg., Ltd. v. Comm'ty of Yugoslav Posts Tels. & Tels.*, 534 F. Supp. 2d 32, 34 (D.D.C. 2008). Because in its present form, the complaint does not allege sufficient facts "upon which jurisdiction could be found after discovery is completed," *id.* (citation omitted), the Court will refrain from imposing the burden of jurisdictional discovery until after Plaintiffs have filed amended pleadings, should they so choose.

"Whenever a foreign sovereign controls an instrumentality to such a degree that a principal-agent relationship arises between them, the instrumentality receives the same due process protection as the sovereign: none." *GSS*, 680 F.3d at 815. In that situation, the personal jurisdiction rule that applies to sovereigns applies to the instrumentality as well—"subject matter jurisdiction plus service of process equals personal jurisdiction." *Id.* at 811 (quoting *Price*, 294 F.3d at 95). "On the other hand, if an instrumentality does not act as an agent of the state, and separate treatment would not result in manifest injustice" under *Bancec*, then "the instrumentality will enjoy all the due process protections available to private corporations," including the requirement of "minimum contacts" with the relevant forum. *Id.* at 815, 817. Plaintiffs' theory for personal jurisdiction over ZMDC is premised on their alter ego theory. That is, because ZMDC is the Republic's alter ego, Plaintiffs assert, no showing of minimum contacts is necessary.

For the reasons just explained, the Court cannot say that Plaintiffs' current complaint adequately alleges the existence of an alter ego relationship between ZMDC and the Republic. Because the complaint includes no other allegations to support personal jurisdiction over ZMDC, *see* Compl. ¶ 11, the Court must dismiss the complaint against it as well. As with the Republic, however, the Court will dismiss the complaint as to ZMDC without prejudice, with the understanding that more fulsome alter ego allegations may create a basis to conclude that ZMDC was, in fact, the Republic's alter ego.[7]

7. Although unlike the Republic, ZMDC did actually litigate the alter ego issue in *Funnekotter*, the Court still declines to give that decision preclusive effect here, for the other reasons discussed above.

C. The Chief Mining Commissioner

Last, the Court comes to the allegations against the Chief Mining Commissioner. Because the Commissioner actually participated in the arbitration against Plaintiffs in Zambia, Plaintiffs' subject matter jurisdiction theory as to the Commissioner does not turn on whether ZMDC was the Commissioner's alter ego. The Court, therefore, will begin by deciding whether an exception to sovereign immunity under the FSIA applies to the Commissioner and will then address Defendants' arguments concerning personal jurisdiction and failure to state a claim.

1. The Commissioner's Governmental Status

As a preliminary matter, the Court must determine how to characterize the Chief Mining Commissioner's status and relationship to the sovereign in this case—the Republic of Zimbabwe. The Commissioner contends that it is an individual, not a state entity, and thus falls entirely outside the scope of the FSIA's definition of a "foreign state" under § 1603(a), which does not include individuals sued in their personal capacity. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010); *see also* Zimbabwe MTD at 8-9. Plaintiffs, in contrast, maintain that the "Commissioner is an office in the Ministry of Mines and Mining Development" and that under *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), which sets out the test for distinguishing between a foreign state (and its political subdivisions) and the state's agencies or instrumentalities, the Commissioner "*is* the foreign state—a political organ like a ministry—rather than a commercial agency or instrumentality." Opp. to Zimbabwe MTD at 24-25. The

Commissioner responds that the *Transaero* test, which asks whether an entity's "core functions" are inherently governmental or commercial, does not apply and that the Court should instead analyze this question under the *Bancec* framework. Zimbabwe Reply at 4-5, 15.

Whether the *Transaero* "core functions" test or the *Bancec* framework applies here is a somewhat murky question. On the one hand, the Court disagrees with the Commissioner that the *Transaero* test is limited strictly to interpreting the FSIA's service of process provisions. Zimbabwe Reply at 4-5. *Transaero* "interpreted the FSIA's *general definition* of 'agency or instrumentality,'" *Jacobsen v. Oliver*, 451 F. Supp. 2d 181, 196 (D.D.C. 2006) (quoting *Crist v. Republic of Turkey*, 107 F.3d 922, 1997 WL 71739, at *2-3 (D.C. Cir. 1997)), and the D.C. Circuit has since applied *Transaero* to determine "the legal status" of foreign government ministries, such as Iran's Ministry of Foreign Affairs, under other provisions of the FSIA, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003). What's more, by its own terms, the *Bancec* analysis seems intended to apply only to "government instrumentalities" that exist outside of the government itself. *Bancec*, 462 U.S. at 623; *see id.* (describing the entities at issue there as "separately constituted juridical entities" with "independent status"). Unlike a government itself or one of its political subdivisions, the instrumentalities to which *Bancec* accorded a presumption of juridical separateness are government-controlled commercial organizations "run as a distinct economic enterprise," "created by an enabling statute," "managed by a board selected by the

government," "with the powers to hold and sell property," and "primarily responsible for [their] own finances." *Id.* at 624. In other words, the government instrumentalities discussed in *Bancec* appear to overlap with the "public commercial enterprises" that *Transaero* held are separate from "the state itself." *Transaero*, 30 F.3d at 152-53. It would thus seem appropriate to ask first whether, under *Transaero*, the Commissioner is a political subdivision of the Republic—and thus part of "the state itself"—and then, only if the answer to that first question is no, to ask whether the presumption of juridical separateness set forth in *Bancec* applies. *See Foremost-McKesson*, 905 F.2d at 446 (explaining that the "FSIA applies to instrumentalities and agencies of the foreign sovereign, as well as to the state itself," but that "instrumentalities and agencies are accorded a presumption of independent status" under *Bancec*).

Although this approach seems sensible, there is some basis to believe that the *Bancec* framework should govern. The Commissioner maintains, for instance, that it is a person with separate legal status who receives due process protections for purposes of personal jurisdiction, Zimbabwe MTD at 13-14, and the Circuit has explained that *Bancec*, not *Transaero*, "guides our way" in determining whether an entity "is a 'person' within the meaning of the due process clause." *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 301 (D.C. Cir. 2005). Additionally, some courts in this district have applied the *Bancec* analysis to determine whether an entity is entitled to a presumption of separateness from the sovereign even with regard to cabinet-level ministries

which, under *Transaero*, would appear to be political subdivisions of the state. *See Entes Indus. Plants, Constr. & Erection Contracting Co. Inc. v. Kyrgyz Republic*, No. CV 18-2228 (RC), 2020 WL 1935554, at *2-6 (D.D.C. Apr. 22, 2020) (applying *Bancec* analysis to Kyrgyz Ministry of Transport and Communications).

Here, the Court believes that the correct framework is likely the *Transaero* "core functions" test, as the heart of the parties' dispute is whether the Commissioner falls within a component of § 1603's definition of "foreign state." *Transaero*, 30 F.3d at 151 (asking whether the Bolivian Air Force was a "separate legal person, corporate or otherwise," under § 1603(b)(1)). But, in any event, the Court is confident both that the Commissioner is a "political subdivision" of the Republic, and thus a component of the state itself under *Transaero*, and that the *Bancec* presumption of juridical separateness does not apply to the Commissioner.

To determine whether an entity "counts as a 'foreign state' or rather as an 'agency or instrumentality'" under the FSIA, *Transaero* took a categorical approach of asking "whether the core functions of the foreign entity are predominantly governmental or commercial." *Id.* This approach requires the Court to ask whether the entity "is an integral part of a foreign state's political structure" or, instead, "an entity whose structure and function is predominantly commercial." *Id.* (quoting *Segni v. Com. Off. of Spain*, 650 F. Supp. 1040, 1041-42 (N.D. Ill. 1988)). Citing the Zimbabwe Mines and Minerals Act of 1961, which governs the office of the Commissioner,

Plaintiffs maintain that the Chief Mining Commissioner has "broad administrative duties, including registering mining claims, issuing regulations, and inspecting mines, and even judicial or quasi-judicial duties, including resolving mining disputes and issuing injunctions enforceable by contempt." Opp. to Zimbabwe MTD at 25. The statute bears out Plaintiffs' characterization of the Commissioner's functions. Section 343 of the statute creates a "Chief Mining Commissioner" as well as mining commissioners for each mining district in the country. *See* Zimbabwe Mines and Minerals Act of 1961, Ch. 21:05 § 343 (updated Dec. 31, 2017), https://zimlii.org/akn/zw/act/1961/38/eng%402016-12-31#. Commissioners are supervised by the Secretary of the Ministry of Mines and are charged with carrying out the Mines and Minerals Act. *See id.* § 341. According to other provisions of the Act, commissioners may, among other things, hold court and exercise judicial powers, levy fines and jail sentences for contempt, investigate and adjudicate claims and disputes arising under the statute, order parties to conduct surveys of mining areas, issue injunctions, approve applications to prospect land for mining, register and reserve land against mining, and approve and revoke mining licenses. *See, e.g., id.* §§ 15, 20, 35, 52, 177, 346, 354, 359.

In light of these duties, which include acting as a governmental administrator, investigator, and adjudicator, the Court concludes the Commissioner is properly understood as a political subdivision of the Republic. "Any government of reasonable complexity must act through men [and women] organized into offices and departments," *Transaero*, 30 F.3d at 153, and the Commissioner is just

one such office. Commissioners are appointed by the Secretary of the Ministry of Mines and fall neatly within "the governmental hierarchy." *de Csepel v. Republic of Hungary*, 10-cv-1261 (ESH), 2020 WL 2343405, at *9 (D.D.C. May 11, 2020). Although the Commissioner's duties unquestionably touch upon commercial activity—namely mining—the office does so as a government regulator and adjudicator, not as a market participant or commercial entity. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992) ("[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA. . . . Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party."). The Commissioner's authority to approve licenses, assess fines, order jail terms, and issue injunctions are all powers "so closely bound up with the structure of the state" that the Commissioner must be considered "as the 'foreign state' itself." *Transaero*, 30 F.3d at 153.

For similar reasons, the Commissioner is not entitled to a presumption of juridical separateness under *Bancec*. To determine whether that presumption applies, the Court asks whether the Commissioner bears "the hallmarks of independent instrumentalities identified by the Supreme Court in *Bancec*," namely "creation by an enabling law that prescribes the instrumentality's powers and duties; establishment as a separate juridical entity with the capacity to hold property and to sue

and be sued; management by a government-selected board; primary responsibility for its own finances; and operation as a distinct economic enterprise that often is not subject to the same administrative requirements that apply to government agencies." *DRC, Inc. v. Republic of Honduras*, 71 F. Supp. 3d 201, 209 (D.D.C. 2014); *accord Entes*, 2020 WL 1935554, at *3. What distinguishes independent instrumentalities under *Bancec* from the state itself is that instrumentalities are empowered "to manage their operations on an enterprise basis" with "a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies." *Bancec*, 462 U.S. at 624-25.

Here, although the office of the Commissioner was created by the Mines and Minerals Act, "the specific text of that enabling law [is] what matter[s]." *Entes*, 2020 WL 1935554, at *4; *see id.* at *3 ("[T]he Court does not think that an 'enabling law that prescribes the instrumentalit[y's] powers and duties' counts for much if that establishing law prescribes powers and duties that are strictly controlled by the Government."). The Commissioner does not have its own "legal personality, its own patrimony and . . . administrative, technical, and financial autonomy." *Id.* (quoting *DRC*, 71 F.3d at 210). Rather, it is an office appointed by and subject to the close supervision of the Secretary of the Ministry of Mines; under the statute, the Secretary is "vested with authority generally to supervise and regulate the proper and effectual carrying out of this Act by mining commissioners" and "may at his discretion assume all or any of the powers, duties and functions by this Act vested

in any mining commissioner, and may lawfully perform all such acts and do all such things as a mining commissioner may perform or do." Zimbabwe Mines and Minerals Act of 1961, Ch. 21:05 § 341. The Commissioner is not managed by a government-selected board, like a corporation, but rather directly supervised by the Secretary of the Ministry of Mines. Far from being free to manage its own operations "on an enterprise basis," the Commissioner lacks any "independence from close political control." *Bancec*, 462 U.S. at 624-25. Although the Mines and Minerals Act does not specify how Commissioners are paid or funded, there has been "no suggestion that the [Commissioner] raises funds on its own." *Entes*, 2020 WL 1935554, at *5. And, although the Commissioner has the power to sue for license fees, royalties, fines, and other duties payable to the office, and to be sued, Zimbabwe Mines and Minerals Act of 1961, Ch. 21:05 § 366, as with other governmental subdivisions, that fact alone, in the face of close supervision by the Secretary of the Ministry of Mines and an entire statute setting forth in detail the Commissioner's duties and authority, "adds little, if anything, when it comes to the [Commissioner's] autonomy or degree of separation from the state," *Entes*, 2020 WL 1935554, at *4. In view of the Commissioner's duties and close supervision by the state, the Court concludes that, under either *Transaero* or *Bancec*, the Commissioner is a political subdivision of the Republic, not an agency or instrumentality entitled to the presumption of juridical separateness.[8]

8. In their reply, Defendants assert that the argument that the Commissioner is a part of the state itself is inconsistent with Plaintiffs' complaint, citing paragraph six, which describes the

The foregoing analysis largely forecloses the Commissioner's argument that it is an individual, not a state entity, and thus falls entirely outside the scope of the FSIA's definition of a "foreign state" under § 1603(a). *See* Zimbabwe MTD at 8-9. The Commissioner's argument in this respect is based on *Samantar v. Yousuf*, 560 U.S. 305 (2010). There, the Supreme Court held that "[r]eading the FSIA as a whole, there is nothing to suggest we should read 'foreign state' in § 1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted." *Id.* at 319. The Court observed, however, that notwithstanding that rule, "it may be the case that some actions against an official *in his official capacity* should be treated as actions against the foreign state itself, as the state is the real party in interest." *Id.* at 325 (emphasis added). Accordingly, although a plaintiff may not under the FSIA sue a foreign official in his personal capacity "and seek damages from his own pockets," *id.*, the Court may look to whether the foreign state itself, and not the official personally, is "the real party in interest" and, in that case, apply the FSIA, *Odhiambo v. Republic of Kenya*, 930 F. Supp. 2d 17, 34-35 (D.D.C. 2013); *see Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is *not* a suit against the official personally, for the real party in interest is the entity.").

Commissioner as "an agency or instrumentality of, and an alter ego of, the Republic of Zimbabwe." Compl. ¶ 6. But the complaint's description of the Commissioner elsewhere, in the "parties" section of the complaint, alleges also that the Commissioner "is a governmental office or governmental corporation sole existing under the laws of the Republic of Zimbabwe." Compl. ¶ 16.

Especially in light of the Court's conclusion that the Commissioner is an office established as a political subdivision of the Republic, the Court reads Plaintiffs' claims against the Commissioner not as a suit against a particular commissioner in his personal capacity but rather as a suit against the office. In fairness to the Commissioner, the complaint does not, in so many words, expressly state that the Commissioner is sued in its official capacity. But the complaint identifies no particular individual being sued; instead, it identifies the defendant as the office of the "Chief Mining Commissioner, Ministry of Mines of Zimbabwe," and locates the Commissioner at the address of the Ministry of Mines and Mining Development, not the address of any particular mining commissioner. *See* Compl. at 1; *Ministry of Mines Directory*, https://www.miningrb.co.zw/business-directory/industry-bodies/regulatory-stautory-bodies/ministry-of-mines-hq.html (last visited Mar. 22, 2023); *see Nnaka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 30-31 (D.D.C. 2017) (treating suit containing allegations "concerning the conduct of at least three different Nigerian Attorneys General" during different time periods as brought against the office, not any individual, under *Samantar*). Plaintiffs also explain in their briefing that they seek money out of the public fisc, not out of a particular commissioner's pocket. *See Samantar*, 560 U.S. at 325. Because, as just explained, the office of the Commissioner is a political subdivision of the Republic and thus a component of the state itself, and because the complaint identifies no individual to be held personally liable, the Court construes Plaintiffs' suit as not brought against the Commissioner personally but

rather against the governmental office of Chief Mining Commissioner.

2. Subject Matter Jurisdiction

Having concluded that the Commissioner falls within § 1603's definition of a foreign state, the Court will have subject matter jurisdiction only if one of the FSIA's exceptions to sovereign immunity applies. 28 U.S.C. § 1330(a). Citing the Commissioner's active participation in the Zambian arbitration and agreement to the arbitrators' Terms of Reference, which confirmed its submission to the arbitration, Plaintiffs contend that either § 1605(a)(1)'s waiver exception or § 1605(a)(6)'s arbitration exception applies here. The waiver exception applies when "the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." *Id.* § 1605(a)(1). The arbitration exception applies when an "action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit [certain disputes] to arbitration" or "to confirm an award made pursuant to such an agreement to arbitrate" if "the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." *Id.* § 1605(a)(6). The Court will begin by addressing the applicability of the arbitration exception but will ultimately apply the waiver exception.

Appendix C

a. The Arbitration Exception

At first blush, § 1605(a)(6)'s arbitration exception seems like a prime candidate for establishing subject matter jurisdiction in this case. Plaintiffs' claims arise from their enforcement of the arbitration agreements contained in the MOUs signed with ZMDC in 2007 and 2008. The Zambian judgment they seek to enforce under the D.C. Judgments Recognition Act was made "pursuant to [the parties'] agreement to arbitrate," 28 U.S.C. § 1605(a)(6), and both sides agree that the Zambian arbitration and award were governed by the New York Convention, an international treaty that applies "to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought," New York Convention, art. I(1); *see id.* art. III (signatory states "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the" Convention). All three countries implicated in this case—Zimbabwe, Zambia, and the United States—are signatories to the New York Convention. *See* Contracting States, New York Arbitration Convention, https://www.newyorkconvention.org/countries (last visited Mar. 22, 2023).

Plaintiffs' invocation of the arbitration exception runs into a textual roadblock, however. As the Commissioner points out, § 1605(a)(6) covers only actions brought "either to enforce an agreement" to arbitrate or "to confirm an award made pursuant to such an agreement." 28 U.S.C.

§ 1605(a)(6). But Plaintiffs' action is not one to enforce the MOUs or to confirm the Zambian arbitral award through the relevant provision of the Federal Arbitration Act ("FAA"), which implements the New York Convention and permits the filing of applications to confirm arbitral awards falling under it. *See* 9 U.S.C. § 207. Rather, Plaintiffs have brought an action under the D.C. Judgments Recognition Act to recognize and enforce the Zambian judgment, which itself confirms the underlying arbitral award.

Although this may seem like a fine distinction, the D.C. Circuit has held otherwise. *See Commissions Import Export S.A. v. Republic of the Congo (Comimpex)*, 757 F.3d 321 (D.C. Cir. 2014). In *Comimpex*, the court held that the three-year statute of limitations on bringing actions to confirm arbitral awards under Chapter 2 of the FAA did not preempt the longer statute of limitations of the D.C. Judgments Recognition Act to recognize a foreign court judgment. *Id.* at 333. In so holding, *Comimpex* repeatedly emphasized that courts "have long recognized the conceptual difference between arbitral awards and foreign court judgments on arbitral awards." *Id.* at 330. "Although an arbitral award and a court judgment enforcing an award are 'closely related,'" the Court explained, "they are nonetheless 'distinct' from one another," as are the causes of action relating to them. *Id.* While actions to confirm arbitral awards and actions to enforce foreign judgments that themselves confirm arbitral awards both advance the "federal policy in favor of arbitral dispute resolution," *id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)), the court concluded that the "text of the Foreign Arbitral Awards

Convention Act and the circumstances of its enactment" indicated that "Congress did not intend to speak beyond the recognition and enforcement of arbitral awards," leaving judgment recognition actions untouched, *id.* at 329. Here, although the Court is interpreting § 1605(a)(6), not § 207 of the FAA, both provisions refer only to actions to "confirm" arbitral awards, not to a distinct cause of action to recognize foreign judgments. For the reasons explained in *Comimpex*, the Court cannot cast aside the distinction between those two types of actions merely because they involve a similar subject matter.[9]

Plaintiffs provide no basis to disregard C*omimpex*. Instead, they cite only one case to support their argument that the FSIA's arbitration exception covers the recognition of foreign judgments—*Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, 697 F. Supp. 2d 46 (D.D.C. 2010)—which they contend held that § 1605(a)(6) provided jurisdiction in an action under the D.C. Judgments Recognition Act, Opp. to Zimbabwe MTD at 12. *Continental Transfert*, however, did not hold that § 1605(a)(6) provides jurisdiction for a claim solely to enforce a foreign judgment. Rather, the complaint there included both a claim to confirm an arbitral award under the FAA—which plainly falls within the text of § 1605(a)(6)—and a separate claim to enforce a foreign judgment on the same underlying arbitral award. *Cont'l Transfert*, 697 F. Supp. 2d at 53-54. In a single paragraph concerning

9. The potential applicability of the arbitration exception did not come up in *Comimpex* because the defendant there has issued commitment letters that "contained an irrevocable waiver of immunity from legal proceedings" and a "commitment to submit all disputes to ICC arbitration in Paris." 757 F.3d at 324-25.

§ 1605(a)(6), in the portion of the opinion concerning the FAA claim, the court stated that Nigeria could not "invoke the defense of sovereign immunity to prevent the enforcement of the arbitral award," citing a decision concerning an action to enforce an arbitral award. *Id.* at 56 (citing *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 123-24 (D.C. Cir. 1999)). The court did not separately address whether the arbitration exception independently applied to the D.C. Judgments Recognition Act claim. Indeed, on appeal, the D.C. Circuit, while agreeing with the district court that § 1605(a)(6) supplied jurisdiction over the plaintiff's FAA claim, noted that it did not need to "decide whether Section 1605(a)(6) or some other provision of law also provides jurisdiction over" the Recognition Act claim, as the court lacked appellate jurisdiction over that claim. *Cont'l Transfert Technique Ltd. v. Fed. Government of Nigeria*, 603 F. App'x 1, 3 n.2 (D.C. Cir. 2015) (unpublished). The Circuit's express reservation of that question, although not precedential, at least casts some doubt about whether the arbitration exception applies to judgment recognition claims.

In light of *Comimpex*, and without any countervailing authority to suggest that an action to enforce a foreign judgment falls within the text of § 1605(a)(6), the Court concludes that the arbitration exception does not apply in this case.

b. The Waiver Exception

Alternatively, Plaintiffs rely on the FSIA's waiver exception, which provides an exception to sovereign

immunity in any case "in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1); *see Creighton*, 181 F.3d at 122 (waiver must be intentional).

As Plaintiffs note, this Court in another case has endorsed the theory that a foreign sovereign's entry into the New York Convention, "combined with its agreement to arbitrate in the territory of another Convention signatory," may suffice to make out an intentional, implicit waiver of sovereign immunity under § 1605(a)(1). *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria (P&ID I)*, No. 18-CV-594 (CRC), 2020 WL 7122896, at *7-8 (D.D.C. Dec. 4, 2020) (Cooper, J.), *aff'd on other grounds*, 27 F.4th 771 (D.C. Cir. 2022). In *P&ID I*, this Court adopted the Second Circuit's reasoning in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993), which held that Navimpex, a company owned by the Romanian government, had implicitly waived its immunity under the FSIA because—"knowing that Romania, France, and the United States were all New York Convention signatories—it agreed to an arbitration clause with a German company, then participated in the arbitration in France," *P&ID I*, 2020 WL 7122896, at *7 (citing *Seetransport*, 989 F.2d at 574-76, 578-79). *Seetransport* reasoned that "when Navimpex entered into a contract with" the plaintiff "that had a provision that any disputes would be submitted to arbitration, and then participated in an arbitration in which an award was issued against it, logically, as an instrumentality or agency of the Romanian

Government—a signatory to the Convention—it had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award." *Seetransport*, 989 F.2d at 578-79.

Although the D.C. Circuit had not (and still has not) expressly adopted *Seetransport*'s holding as binding Circuit law, this Court noted in *P&ID I* that it "has come close," referring to *Seetransport*'s reasoning as "correct[]" in dicta in one case and concluding in an unpublished disposition that Ukraine had waived its immunity "from arbitration-enforcement actions in other" New York Convention signatory states by signing the Convention. *P&ID I*, 2020 WL 7122896, at *7-8 (first citing *Creighton*, 181 F.3d at 123; and then quoting *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam)). And this Court further explained why recognizing an implicit waiver when a New York Convention signatory has agreed to arbitrate disputes in another signatory would support the fundamental policy of the New York Convention, noting that the "Convention's effectiveness as a stimulant for international commerce would be reduced if states could avail themselves of the Convention's benefits, then assert immunity from award-enforcement actions that the Convention expressly contemplates." *Id.* at *9; *see also id.* at *9-10 (explaining why applying *Seetransport* would not be inconsistent with Supreme Court and Circuit precedent[10] and would not render the arbitration exception

10. For instance, this Court explained why *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), did not preclude the *Seetransport* theory, because, "[i]n contrast to the agreements at issue" there, the "New York Convention does

superfluous). Accordingly, this Court held that Nigeria had waived its sovereign immunity under § 1605(a)(1) by signing the New York Convention and subsequently agreeing to arbitrate within the territory of another Convention signatory. *Id.* at *11.

In response to Plaintiffs' reliance on *P&ID I*, Defendants (fairly) observe that the D.C. Circuit indicated some caution about the *Seetransport* theory on appeal in *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria (P&ID II)*, 27 F.4th 771 (D.C. Cir. 2022). Specifically, the assigned panel "requested additional briefing by the United States as amicus curiae, inviting it to provide its views on whether the United States, as a party to the New York Convention, impliedly waives sovereign immunity from actions seeking recognition and enforcement of foreign arbitral awards in the courts of other New York Convention states by becoming a party to the Convention and agreeing to arbitrate a dispute in a Convention state." 27 F.4th at 775 n.3. The United States responded with an amicus brief arguing that, because the more specific arbitration exception applied in *P&ID*, applying the more general waiver exception would run counter to canons of statutory construction and could render superfluous subparagraph (D) of the arbitration exception, which permits application of the arbitration exception in cases to confirm arbitral awards in which the waiver exception "is otherwise applicable." Brief of the United States as Amicus Curiae at

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contemplate the availability of a cause of action in U.S. courts," a difference the D.C. Circuit recognized in *Creighton. P&ID*, 2020 WL 7122896, at *9.

10-11, *P&ID II*, 27 F.4th 771 (D.C. Cir. 2022) (No. 21-7003), 2022 WL 190972, at *10-11; *see id.* at 13 (theorizing that one "plausible construction" of § 1605(a)(6)(D) "is that it reflects Congress' intent to require that a court exercising jurisdiction to enforce an arbitration agreement or arbitral award on the basis of implied or express waiver do so only where the threshold requirements of the arbitration exception have been met"). As to the possible implications of the *Seetransport* implicit-waiver rule, the United States acknowledged its "interest in the vitality of the New York Convention and in the ability of its courts to enforce covered arbitral awards" but expressed some concern that not all foreign courts might "exercise restraint in construing implied waivers." *Id.* at 14-15. Noting these concerns "and the ready applicability of the arbitration exception" in that case, the Circuit found "it unnecessary to wade into the murky waters of the waiver exception" and affirmed on the basis of the arbitration exception alone. *P&ID II*, 27 F.4th at 775 n.3.

The Court acknowledges the concerns of the United States expressed in *P&ID II* and therefore wades into the waiver exception's murky waters with due caution. But here, because the Court has concluded that Plaintiffs' claim falls outside the arbitration exception, many of the statutory interpretation concerns raised by the United States in *P&ID*, which were premised on the overlapping availability of the arbitration exception there, are not present. For instance, the United States voiced a concern that "[t]raditional canons of statutory construction suggest that the arbitration exception was intended to displace

the waiver exception" as to "arbitration agreements and arbitral awards *that come within its ambit*." Brief of the United States as Amicus Curiae at 10, 2022 WL 190972, at *10 (emphasis added). If the Court is correct that judgment-recognition actions, as a rule, fall outside the arbitration exception's ambit, then this statutory construction problem is avoided. Additionally, although *P&ID II* opted to apply the arbitration exception rather than the waiver exception, nothing in that decision purported to abandon the Circuit's favorable citations to *Seetransport* in other cases. *See Creighton*, 181 F.3d at 123; *Tatneft*, 771 F. App'x at 10.

Accordingly, the Court sees no present impediment to concluding that the waiver exception applies here. As in *Seetransport*, the Republic of Zimbabwe, of which the Commissioner is a political subdivision, is a signatory to the New York Convention. And although the Commissioner did not sign the 2007 and 2008 MOUs which contained an arbitration agreement, the Commissioner subsequently "participated in an arbitration in which an award was issued against it" in another New York Convention signatory, Zambia. *Seetransport*, 989 F.2d at 579. And, if the Commissioner's participation in the arbitration alone was insufficient, Plaintiffs add that the Commissioner also agreed to the Terms of Reference governing the arbitration, acknowledging that it "agree[d] to submit to this arbitration and expressly waive any procedural objections [it] may have with respect to known events, including the appointment of the Tribunal." Sangwa Decl., Ex. 1 § 8.1. Lest there be any doubt, the Terms of Reference themselves state that "[e]ach original of

the Terms of Reference forms an original arbitration agreement for the purposes of Articles II and IV(1) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards." *Id.* § 10.3. The Commissioner's agreement to arbitrate in the territory of another Convention signatory, combined with Zimbabwe's entry in the Convention, "is strong evidence that [the Commissioner] intended to subject itself to the jurisdiction of U.S. courts in an action such as this one." *P&ID I*, 2020 WL 7122896, at *8. The Court therefore holds that it has subject matter jurisdiction under the FSIA's waiver exception.

Defendants briefly contend that the wavier exception does not apply because "the New York Convention governs enforcement of arbitration awards, not enforcement of foreign judgments," citing *Comimpex.* Zimbabwe MTD at 11. Although that distinction was sufficient to take this case outside of the arbitration exception, which is expressly limited to cases brought to enforce arbitration agreements or confirm arbitral awards, it does not preclude the application of the waiver exception. Indeed, *Seetransport* applied under exactly these circumstances. Although *Seetransport* involved both a claim to enforce an arbitration award and a claim to recognize a foreign judgment enforcing the award, 989 F.2d at 575, the court determined that the claim seeking enforcement of the award under FAA § 207 was time-barred, *id.* at 581. Even after the § 207 claim was dismissed, however, the court held that it had subject matter jurisdiction over the judgment-recognition claim under the FSIA's waiver exception. *Id.* at 582-83. The court noted "that unlike

the recognition of arbitral awards, which is governed by federal law, the recognition of foreign judgments is governed by state law" at least "as to most substantive aspects." *Id.* at 582. The "cause of action to enforce the foreign judgment" nevertheless fell "within the scope of Navimpex's implicit waiver of sovereign immunity" because "the cause of action is so closely related to the claim for enforcement of the arbitral award." *Id.* at 582-83.

That the waiver exception might capture a cause of action to enforce a foreign judgment, even if the arbitration exception does not, makes sense. Although Plaintiffs bring a claim to enforce a foreign judgment, this is a "case . . . in which the foreign state has waived its immunity . . . by implication" by being a New York Convention signatory and agreeing to arbitrate in the territory of another signatory. 28 U.S.C. § 1605(a)(1). The arbitration exception's textual limit to actions "to enforce an" arbitration agreement "or to confirm an award made pursuant to such an agreement" is absent. *Id.* § 1605(a)(6).

In sum, although the arbitration exception to sovereign immunity does not apply in this case to enforce a foreign judgment, the Court concludes that the waiver exception of § 1605(a)(1) does apply. Because the Commissioner waived its sovereign immunity, the Court has subject matter jurisdiction over Plaintiffs' claims against it pursuant to the FSIA.[11]

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11. The Court observes that this conclusion, combined with the conclusion that the Commissioner is a political subdivision, and thus a part of, the Republic itself, might suggest an alternate theory for finding subject matter jurisdiction over the Republic. If there is no presumption of juridical separateness between the

3. Personal Jurisdiction

Having found that the Commissioner is not entitled to a presumption of juridical separateness from the Republic, and having found subject matter jurisdiction under § 1605(a)(1), the Court also necessarily has personal jurisdiction over the Commissioner. As already explained, in the context of foreign sovereigns and their political subdivisions, "subject matter jurisdiction plus service of process equals personal jurisdiction." *GSS*, 680 F.3d at 811 (quoting *Price*, 294 F.3d at 95). Here, Plaintiffs served the Commissioner pursuant to 28 U.S.C. § 1608(a)(3) by "sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state," by international carrier "to the head of the ministry of foreign affairs of the foreign state concerned."[12] The Court rejects Defendants'

Commissioner and the Republic, then perhaps the Commissioner's conduct supporting a waiver of sovereign immunity might also be attributed to the Republic. For whatever reason, however, Plaintiffs premised their argument for subject matter jurisdiction over the Republic exclusively on the Republic's alleged alter ego relationship with ZMDC, discussed above. Because it is Plaintiffs' burden to plead subject matter jurisdiction, and because the parties have not briefed this question, the Court will not sua sponte find subject matter jurisdiction over the Republic based on its relationship with the Commissioner.

12. Defendants suggest this service was improper because the affidavit of service was addressed to "the Ministry of Mines" rather than the Chief Mining Commissioner. Zimbabwe MTD at 14. But Plaintiffs' affidavit of service shows that the service was made to the Ministry of Mines "c/o Chief Mining Commissioner" to the address of the Zimbabwean Foreign Minister. *See* Return of Service Ex. 1, ECF No. 20-1. That was sufficient to effect proper service on the Commissioner.

contention that the Commissioner must have minimum contacts with this forum, as that argument is premised on the idea, rejected above, that the Commissioner is a person rather than a governmental entity.

4. Failure to State a Claim

Finally, the Court will briefly address Defendants' arguments that the complaint fails to state a claim as to the Commissioner under Rule 12(b)(6).

First, Defendants maintain that Plaintiffs are bound by the New York Convention's three-year statute of limitations under the FAA because the theory for Defendants' waiver of sovereign immunity is in part premised on their New York Convention membership. Zimbabwe MTD at 15-19. This argument fails in light of *Comimpex*. There, as discussed above, the D.C. Circuit held that the FAA's three-year statute of limitations for bringing an action to confirm an arbitral award under 9 U.S.C. § 207 does not preempt the longer limitations period to recognize a foreign judgment under the D.C. Judgments Recognition Act. *Comimpex*, 757 F.3d at 333; *see also Seetransport*, 989 F.2d at 582-83 (permitting judgment recognition action to go forward after dismissing related FAA § 207 action as time-barred). Accordingly, Defendants' contention that if "Plaintiffs seek this Court's jurisdiction under the New York Convention, then they get all of it, including section 207," is plainly incorrect. Zimbabwe MTD at 16. Defendants attempt to distinguish *Comimpex* on the grounds that the foreign state there expressly, rather than implicitly, waived its sovereign

immunity and that the arbitral award there had been subjected to scrutiny in other New York Convention jurisdictions as well. But those considerations had no bearing on the Circuit's conclusion that neither the text nor the legislative history of FAA § 207 "indicate that Congress intended Chapter 2 of the FAA to govern not only arbitral awards but the recognition of judgments as well." *Comimpex*, 757 F.3d at 328.

Next, Defendants maintain that Plaintiffs have failed to plead entitlement to post-judgment interest at the Zambian statutory rate and entitlement to attorneys' fees. Zimbabwe MTD at 21-23. Plaintiffs addressed only Defendants' arguments regarding entitlement to attorneys' fees in their opposition. Opp. to Zimbabwe MTD at 37. Defendants may be correct that, if Plaintiffs prevail, the Zambian statutory post-judgment interest rate will not apply here. *See Cont'l Transfert Technique Ltd. v. Fed. Government of Nigeria*, 850 F. Supp. 2d 277, 286-87 (D.D.C. 2012) (applying rate set forth in 28 U.S.C. § 1961(a)); *see also* D.C. Code §§ 15-367, 28-3302 (stating that a foreign judgment recognized under the D.C. Code is enforceable in the same manner as a judgment rendered in the District of Columbia, and setting forth the District of Columbia post-judgment interest rate). But the Court has identified some contrary authority as well. *See BCB Holdings Ltd. v. Government of Belize*, 110 F. Supp. 3d 233, 251 (D.D.C. 2015) (awarding post-judgment interest at rate specified by foreign judgment); *United Steelworkers, Loc. 1-1000 v. Forestply Indus., Inc.*, No. 2:08-CV-281, 2011 WL 1210131, at *1 (W.D. Mich. Apr. 1, 2011) (applying post-judgment interest rate specified in Canadian judgment

in Michigan Judgments Recognition Act case). There is also at least some support for Plaintiffs' contention that they should be entitled to attorneys' fees, which were incorporated into the arbitral award underlying the Zambian judgment. *See Tahan v. Hodgson*, 662 F.2d 862, 867 n.20 (D.C. Cir. 1981) (enforcing a foreign judgment that included an award of attorneys' fees); *D'Amico Dry D.A.C. v. Primera Mar. (Hellas) Ltd.*, 433 F. Supp. 3d 576, 578 (S.D.N.Y. 2019) (permitting award of attorneys' fees in judgment recognition action because fees were provided for in the English judgment being recognized).

In any event, the Court declines to rule definitively on these issues at this stage. Whether Plaintiffs are entitled to attorneys' fees and/or post-judgment interest at all may depend on other factors to be determined later, such as the validity and enforceability of the Zambian judgment. *See Harpole Architects, P.C. v. Barlow*, 668 F. Supp. 2d 68, 80 (D.D.C. 2009) (noting that "[a]t this early stage of the litigation, [defendant's] motion to strike [plaintiffs'] attorneys' fees request is premature, as later developments may provide a legitimate basis for an attorneys' fees award." (alterations in original) (quoting *Pinnacle Airlines, Inc. v. Nat'l Mediation Bd.*, No. 03-1642, 2003 WL 23281960, at *3 (D.D.C. Nov. 5, 2003))).

Last, Defendants maintain that the Zambian High Court, which issued the judgment enforcing the arbitral award in Plaintiffs' favor, did not have personal or subject matter jurisdiction over Defendants. Zimbabwe MTD at 23-25. For instance, they assert that Plaintiffs have not sufficiently alleged that the Commissioner had minimum contacts with Zambia and that there is insufficient

evidence that the Commissioner was served. *Id.* Citing an expert report, they also maintain that, had Defendants contested the Zambian judgment, the Zambian court likely would have found that the Commissioner was immune there. *Id.* at 24. Based on the argument that the Zambian High Court lacked jurisdiction, Defendants also maintain that enforcement would be repugnant to D.C. public policy. *Id.* at 24-25.

These contentions are inappropriate for resolution at this stage. To state a claim under the D.C. Judgments Recognition Act, Plaintiffs must plead—and here have pleaded—that the foreign country judgment grants or denies recovery of a sum of money and, under the law of that country, is final, conclusive, and enforceable. D.C. Code § 15-363(a); *see* Compl. ¶¶ 35-37, 41-46. Defendants' arguments that the foreign court lacked personal or subject matter jurisdiction over the controversy or that the judgment is repugnant to public policy are affirmative defenses, on which Defendants bear the burden of proof. D.C. Code 15-364(b)-(d); *see also Mohammad Hilmi Nassif & Partners v. Republic of Iraq*, No. 117CV02193KBJGMH, 2021 WL 6841848, at *22 (D.D.C. July 29, 2021) (explaining that repugnancy to public policy is an affirmative defense). A plaintiff is "not required to anticipatorily negate" affirmative defenses in its pleadings. *McNamara v. Picken*, 866 F. Supp. 2d 10, 17 (D.D.C. 2012). Rather, "[a]n affirmative defense may be raised by pre-answer motion under Rule 12(b) when the facts that give rise to the defense are clear from the face of the complaint." *Greer v. Bd. of Trs. of Univ. of D.C.*, 113 F. Supp. 3d 297, 306 (D.D.C. 2015) (quoting *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998)). That is, the "face of the

complaint must conclusively indicate" that the affirmative defense applies. *Newland v. Aurora Loan Servs., LLC*, 806 F. Supp. 2d 65, 70 (D.D.C. 2011).

The complaint in this case alleges that the Zambian judgment is final, valid, and enforceable and that it was served on Defendants on October 23, 2019. Compl. ¶¶ 35-37. Defendants' arguments about the propriety of service abroad go beyond the face of the complaint and are based on conjecture that Plaintiffs never sought leave to serve Defendants with the Zambian High Court's judgment outside of the country. Kalaluka Decl. ¶ 15. (Plaintiffs, for their part, reply that service was made *inside* the country to Defendants' Zambian counsel. Sangwa Decl. ¶¶ 23-24.) And Defendants' conclusory arguments that the Zambian court lacked personal and subject matter jurisdiction both go beyond the face of the complaint and misunderstand that Defendants, not Plaintiffs, bear the burden of showing that the foreign court lacked jurisdiction under the D.C. Code. *See* D.C. Code § 15-364(b)-(d). These arguments, if they have any merit, are better addressed at summary judgment, "after further briefing and development of the record." *Mohammad*, 2021 WL 6841848, at *23 n.18.[13]

13. *Kaupthing ehf. v. Bricklayers & Trowel Trades International Pension Fund Liquidation Portfolio*, 291 F. Supp. 3d 21 (D.D.C. 2017), does not require a contrary conclusion. There, the court granted a motion to dismiss a D.C. Judgments Recognition Act claim partially on the basis that the foreign court lacked personal jurisdiction over the defendant. *Id.* at 30-33. The plaintiff objected that it did not need to plead with specificity the foreign court's jurisdiction, but based on cases interpreting a similar New York statute, the court concluded that the party seeking enforcement of the judgment "bears the burden of making a *prima facie* showing

IV. Conclusion

For these reasons, it is hereby

ORDERED that [Dkt. No. 23] Defendant Chief Mining Commissioner and Defendant Republic of Zimbabwe's Motion to Dismiss is GRANTED as to the Republic of Zimbabwe and DENIED as to the Chief Mining Commissioner. It is further

ORDERED that [Dkt. No. 30] Defendant ZMDC's Motion to Dismiss is GRANTED. It is further

ORDERED that the Complaint is DISMISSED WITHOUT PREJUDICE as to Defendants ZMDC and the Republic of Zimbabwe. It is further

ORDERED that Plaintiffs are granted leave to file an amended complaint by April 24, 2023.

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that the mandatory grounds for nonrecognition" such as lack of personal jurisdiction "do not exist." *Id.* at 32-33 (quoting *Wimmer Canada, Inc. v. Abele Tractor & Equipment Co.*, 299 A.D.2d 47, 750 N.Y.S.2d 331, 332 (2002)). But Plaintiffs here correctly point out that the D.C. Judgments Recognition Act expressly places on the party resisting enforcement the burden of proving that the foreign court lacked jurisdiction, and the New York statute, at the time of the cases cited in *Kaupthing*, lacked such an allocation of burden (which has since been added). *See* Opp. to Zimbabwe MTD at 30 n.9; N.Y. C.P.L.R. § 5304(c); 2021 N.Y. Sess. Laws Ch. 127 (McKinney) (adding burden provision). *Kaupthing*, therefore, is not persuasive.

SO ORDERED.

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: March 22, 2023

APPENDIX D: 28 U.S.C. § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take

place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

* * *

APPENDIX E: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed hy the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Appendix E

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying: for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Appendix E

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was

not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Appendix E

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Appendix E

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional

reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Appendix E

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the nineteenth day after deposit by such State of its instrument of ratification or accession.

Article XIII

l. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Appendix E

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally

authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

APPENDIX F: The Geneva Convention on the Execution of Foreign Awards of 1927

Article I.

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called " a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration

or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2.

Even if the conditions laid down in Article I hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) That the award does not deal with the differences contemplated by or falling within the terms

of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3.

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article I *(a)* and *(c),* and Article 2 *(b)* and *(c),* entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4.

The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article I *(d),* in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article I, paragraph I and paragraph 2 *(a)* and *(c),* have been fulfilled.

A translation of the award and of the other documents mentioned in the Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5.

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6.

The present Convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923.

Appendix F

Article 7.

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8.

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9.

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

Appendix F

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto,* the denunciation of the present Convention.

Article 10.

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, applies, can be affected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

Appendix F

Article 11.

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

In faith whereof the above-named Plenipotentiaries have signed the present Convention.

Done at Geneva, on the twenty-sixth day of September one thousand nine hundred and twenty-seven, in a single copy, of which the English and French texts are both authentic, and which will be kept in the archives of the League of Nations.

APPENDIX G: Order, *Amaplat Mauritius Ltd et al. v. Zimbabwe Min-ing Development Corp. et al.* Case No. CV-22-00684792-00CL (Can. Ont. Super. Ct. J., June 30, 2025)

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ ENDORSEMENT FORM

COURT FILE NO.: CV-22-00684792-00 CL **DATE: JUNE 30, 2025**

NO. ON LIST: 3

TITLE OF PROCEEDING: AMAPLAT MAURITIUS LTD. et al v. ZIMBABWE MINING DEVELOPMENT CORPORATION et al

BEFORE: JUSTICE W.D. BLACK

PARTICIPANT INFORMATION

For Applicants:

Name of Person Appearing	Name of Party	Contact Info
Lawrence E. Thacker	Counsel for Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd.	lthacker@litigate.com
Arash Nayerahmadi		anayerahmadi@litigate.com
Derek Hooper		dhooper@litigate.com

Appendix G

For Respondents:

Name of Person Appearing	Name of Party	Contact Info
Virginia Mabiza Fortune Chimbaru Jacqueline Munyonga (all not present)	The Mining Commissioner	virgiemabiza@gmail.com fchimbaru@yahoo.com jacquelinemunyonga@gmail.com
Tinashe Collins Chiparo (not present)	Zimbabwe Mining Development Corporation	tchiparo@zmdc.co.zw

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE W.D. BLACK:

[1] This was an application by Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. (the "Applicants") seeking to have this court recognize and enforce the January 12, 2014 ICC International Court of Arbitration award against the Respondents (the "Arbitral Award"); and to recognize and enforce the foreign judgment recognizing that Arbitral Award.

[2] There is a long history to this matter, the details of which I will not attempt to replicate here (those details are set out in the Applicants' materials).

[3] For present purposes, it is enough to understand that the Applicants and the corporate Respondent were once partners in joint mining ventures, as confirmed in two memoranda of understandings (MOUs) entered into in 2007 and 2008. The parties sought, through the MOUs, to develop mining claims in the Republic of Zimbabwe.

[4] Pursuant to the MOUs, which provided that all disputes were to be resolved and finally determined by way of arbitration submitted to the ICC International Court of Arbitration, the Applicants submitted a request for arbitration on February 2, 2011.

[5] An arbitration (the "Arbitration") commenced in 2012. The Respondents initially participated but, mid-way through the hearing, unilaterally attempted to terminate the Arbitration. When those attempts failed, the Respondents unilaterally abandoned the process and refused to participate any further.

[6] The Arbitral Award was rendered in 2014. The panel found in favour of the Applicants and awarded damages and legal costs to the Applicants of approximately $50 million (USD) plus interest.

[7] On August 9, 2019, after years of the Respondents' repeated and consistently unsuccessful challenges

of the Arbitral Award in the Zambian courts, the Applicants successfully applied to the Zambian High Court to have the Arbitral Award registered and enforced.

[8] Despite the years that have passed since the Arbitral Award was rendered over a decade ago, and the over five years since the Zambian judgment was entered, the Applicants have received no payment from the Respondents (despite the fact that the Republic of Zimbabwe has repeatedly represented that it will assume the amounts owing as a public debt, and that payment is forthcoming).

[9] Accordingly the Applicants have commenced the current application to recognize and enforce the Arbitral Award and the Zambian Judgment.

[10] In that regard, I note that the evidence before me confirms that the Applicants have complied with the requirements for recognition and enforcement of the Arbitral Award under the *International Commercial Arbitration Act*, 2017 (the "ICA"), and that the Respondents, who bear the onus to challenge the Application, have led no tenable or persuasive evidence. I note as well that there exists a real and substantial connection between the parties and Zambia based on the agreed terms of reference (for the Arbitration) as well as the Respondents' attornment to Zambia's jurisdiction through active proceedings before the Zambian courts relating to the Arbitral Award.

[11] The ICA provides that both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration (the "Convention"), and the Model Law on International Commercial Arbitration (the "Model Law"), both of which are schedules to the ICA, have the force of law in Ontario. Both Zambia and Zimbabwe have signed and ratified the Convention and Model Law.

[12] The Convention requires each Contracting State (as defined, and including Ontario), to recognize and enforce arbitral awards made in the territory of another State. Article IV of the Convention provides that to obtain recognition and enforcement of an arbitral award, the Applicant shall supply a duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof.

[13] The Applicants have provided a certified true copy of the Arbitral Award and a certified true copy of the arbitration agreement (the Agreed Terms of Reference) in satisfaction of Article IV of the Convention.

[14] The Respondents have provided no evidence to meet the limited enumerated grounds under the Convention and/or Model Law to oppose the recognition and enforcement of the Arbitral Award, and, despite proper service, did not attend to oppose the Application.

[15] Accordingly, having reviewed the Applicants' materials, and relevant case law cited by the Applicants, and in the absence of any opposition before me, I grant an order:

(a) Recognizing and enforcing the Arbitral Award;

(b) Recognizing and enforcing the Zambian Judgment; and,

(c) Requiring the Respondents to pay amounts in Canadian currency sufficient to purchase in USD the full amounts awarded in the Zambian Judgment and/or the Arbitral Award plus accrued interest at a bank in Ontario listed in Schedule 1 to *The Bank Act* at the close of business on the first day on which the bank quotes a Canadian Dollar rate for the purchase of the foreign currency before the day payment of the obligation is received by the Applicants.

/s/ [Illegible]
W.D. BLACK J.

DATE: JUNE 30, 2025

APPENDIX H: Excerpts of Doc. 23-1 (ICC Rules of Arbitration), *Amaplat Mauritius Ltd. v. Zimbabwe Mining Develop-ment Corp.*, 1:22-cv-58-CRC (D.D.C. Aug. 19, 2022)

EXHIBIT 1

ICC
International Chamber of Commerce
The world business organization

Rules of Arbitration
in force as from 1 January 1998

Cost scales effective as of 1 May 2010

International Chamber of Commerce
International Court of Arbitration
38, Cours Albert 1er
75008 Paris
France
Tel. +33 1 49 53 29 05
Fax +33 1 49 53 29 33
E-mail arb@iccwbo.org
www.iccarbitration.org

* * *

Article 28
Notification, Deposit and Enforceability of the Award

1
Once an Award has been made, the Secretariat shall notify to the parties the text signed by the Arbitral Tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.

2
Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.

3
By virtue of the notification made in accordance with Paragraph 1 of this Article, the parties waive any other form of notification or deposit on the part of the Arbitral Tribunal.

4
An original of each Award made in accordance with the present Rules shall be deposited with the Secretariat.

5
The Arbitral Tribunal and the Secretariat shall assist the parties in complying with whatever further formalities may be necessary.

6

Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

* * *