UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VON PEZOLD et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 21-cv-2004 (APM)**
	)	
REPUBLIC OF ZIMBABWE,	)	
	)	
Defendant.	)	
	)	
BORDER TIMBERS LIMITED et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 21-cv-2428 (APM)**
	)	
REPUBLIC OF ZIMBABWE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

I.

In these related actions, Petitioners ask the court to recognize arbitration awards made in their favor against Respondent Republic of Zimbabwe by the International Centre for Settlement of Investment Disputes ("ICSID"). The Petitioners in the *von Pezold* action are Elisabeth Regina Marie Gabriele von Pezold (in her personal capacity and as executrix of her deceased husband's estate) and various heirs and assigns, who are German and Swiss nationals (collectively, the "*von Pezold* Petitioners"). The Petitioners in the *Border Timbers* action are Border Timbers Ltd. and

Hangani Development Co. (Private) Ltd., private limited liability companies incorporated under the laws of Zimbabwe (collectively, the "*Border Timbers* Petitioners").

The court previously found that Petitioners in both cases had failed to serve Zimbabwe pursuant to the strict requirements of the Foreign Sovereign Immunities Act ("FSIA") and granted Zimbabwe's motions to dismiss, but permitted Petitioners 60 days to perfect service. *See von Pezold v. Republic of Zimbabwe*, No. 21-CV-02004 (APM), 2022 WL 4078896, at *1 (D.D.C. Sept. 6, 2022). The court at that time declined to reach Zimbabwe's other arguments for dismissal. *Id.* Since that decision, Petitioners have served Zimbabwe as required by the FSIA.

Before the court, then, are Respondent's motions to dismiss, ECF Nos. 56 (*von Pezold*) and 47 (*Border Timbers*). For the reasons that follow, the motions are denied. Also, before the court is the *von Pezold* Petitioners' Request for Judgment on their Petition or, Alternatively, for a Summary Judgment Briefing Schedule, ECF No. 62 (*von Pezold*). The motion is granted insofar as it seeks entry of a briefing schedule.

II.

The International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") is "a multilateral treaty aimed at encouraging and facilitating private foreign investment in developing countries." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 100 (2d Cir. 2017). The ICSID Convention provides a legal framework and procedural mechanism to resolve disputes between private investors and governments. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States Preamble, Mar. 18, 1965, T.I.A.S. No. 6090, 17 U.S.T. 1270. The ICSID Convention establishes the International Centre for Settlement of Investment Disputes, or "ICSID," as an international institution that operates under the auspices of the World Bank.

See Mobil Cerro Negro, 863 F.3d at 101. ICSID convenes arbitration panels "to adjudicate disputes between international investors and host governments in 'Contracting States.'" *Id.* Zimbabwe, Germany, and Switzerland are all signatories to the ICSID Convention. So, too, is the United States. Furthermore, Zimbabwe's bilateral investment treaties ("BITs") with both Germany and Switzerland provide that disputes arising under the agreements can be submitted to ICSID. *See Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments* [hereinafter German BIT], Art. 11(2); *Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments* [hereinafter Swiss BIT], Art. 10(2).

"Any Contracting State or any national of a Contracting State" may ask ICSID to convene an arbitral tribunal to resolve a dispute. ICSID Convention art. 36. The tribunal adjudicates the dispute and, if warranted, issues a written award. *Id.* art. 48. A party may contest the tribunal's decision, as set forth in the ICSID Convention. *See id.* arts. 51–52. But the tribunal's ruling is "binding on the parties and shall not be subject to any appeal or to any other remedy" other than those afforded under the ICSID Convention. *Id.* art. 53.

The ICSID Convention does not, however, confer upon ICSID the power to enforce arbitral awards, as that power is left to the Contracting States. Article 54(1) of the Convention provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." *Id.* art. 54(1). Contracting States, like the United States, that have a federal system of government "may enforce such an award in or through [their] federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state." *Id.*

Furthermore, the ICSID Convention is not self-executing. *See Medellín v. Texas*, 552 U.S. 491, 505–06 (2008). Contracting States must "take such legislative or other measures as may be necessary for making the provisions of this Convention effective in [their] territories." ICSID Convention art. 69. In the United States, Congress gave the ICSID Convention domestic effect by passing the Convention on the Settlement of Investment Disputes Act of 1966. *See* Convention on the Settlement of Investment Disputes Act of 1966, Pub. Law 89–532, 80 Stat. 334 (1966) (codified at 22 U.S.C. §§ 1650 and 1650a). Section 3 of the Act addresses the enforcement of ICSID arbitration awards in the United States and provides in relevant part: "The pecuniary obligations imposed by [an ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Federal courts are vested with "exclusive jurisdiction over actions and proceedings" to enforce ICSID awards. *Id.* § 1650a(b).

A federal court's role in enforcing an ICSID award is "limited." *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 275 (D.D.C. 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020). A federal court is "not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award." *Mobil Cerro Negro*, 863 F.3d at 102, 118. Instead, the court "may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." *Id.* at 102, 121 (stating that the ICSID-award debtor can make "non-merits challenges" to an award, such as "the authenticity of the award presented for enforcement, the finality of the award, or the possibility that an offset might apply to the award that would make execution in the full amount improper"). This "reflects an expectation [under the Convention] that the courts of a member nation will treat the award as final." *Id.*

III.

Zimbabwe advances various arguments in its motions to dismiss, including that (1) the court lacks subject matter jurisdiction; (2) the doctrine of forum non conveniens makes venue improper in this court; (3) Petitioners fail to state a claim; and (4) Petitioner Elisabeth von Pezold has not demonstrated sufficient standing to seek recognition of the award.[1] *See* Motion to Dismiss & Supp. Statement of P & A, ECF No. 11 [hereinafter Respondent's *von Pezold* MTD]. None of Zimbabwe's arguments are convincing.

A.

The court begins with subject matter jurisdiction. The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in the courts of the [United States]." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)); *see also* 28 U.S.C. §§ 1605–1607. Pursuant to the FSIA, "a foreign state is presumptively immune from the jurisdiction of the United States courts[,] unless a specified exception applies." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Because "subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity" set forth in the FSIA, as a "threshold" matter in every action against a foreign state, a district court "must satisfy itself that one of the exceptions applies." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983); *see* 28 U.S.C. § 1605(a).

[1] Respondents also argue that the *Border Timbers* Petitioners have not pleaded a basis for attorney's fees and that they have failed to join a required party, Timber Products International (Private) Limited ("TPI"), to resolve Respondent's claim of set-off. *See* The Republic of Zimbabwe's Motion to Dismiss & Supp. Statement of P & A, ECF No. 47 [hereinafter *Border Timbers* Respondent's MTD], at 4. However, the court interprets *Border Timbers* Petitioners' request for attorney's fees not as a standalone claim, but as a demand for relief, of which there can be numerous alternatives. *See* FED. R. CIV. P. 8(a)(3). The court can take up the propriety of a fees award if the *Border Timbers* Petitioners prevail and seek such an award. Further, regarding the need to join TPI "in the future," the court interprets this as a courteous "alert[]" to the *Border Timbers* Petitioners of the potential need to join TPI should Zimbabwe make its anticipated set-off arguments following the motion-to-dismiss stage. *See* Motion to Dismiss and Supporting Statement of P & A, ECF No. 27 (*Border Timbers*), at 12.

Once a plaintiff establishes that an exception applies, "the burden of proof in establishing the inapplicability of these exceptions is upon the party claiming immunity." *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985).

Two exceptions are at issue in this matter. Under the FSIA's arbitration exception, U.S. federal courts have jurisdiction over actions "to confirm an award made pursuant to [] an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). Courts, including this one, have consistently "held that the FSIA's arbitration exception confers subject matter jurisdiction over petitions to enforce ICSID awards." *Micula*, 404 F. Supp. 3d at 277; *see Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 85 (2d Cir. 2013) ("[E]very court to consider whether awards issued pursuant to the ICSID Convention fall within the arbitral award exception to the FSIA has concluded that they do."); *Mobile Cerro Negro*, 863 F.3d at 104–05 (applying arbitration exception to ICSID enforcement proceeding); *Saint Gobain Performance Plastics Eur. v. Bolivarian Republic of Venezuela*, No. 20-cv-129 (RC), 2021 WL 6644369, at *4 (D.D.C. July 13, 2021) (same).

Further, under the FSIA's waiver provision, a foreign state "shall not be immune from the jurisdiction of courts of the United States or of the States" in cases "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." 28 U.S.C. § 1605(a)(1). Courts also have held that the "waiver exception" applies in ICSID enforcement actions. *See Blue Ridge Invs.*, 735 F.3d at 84 (holding "that Argentina waived its sovereign immunity by becoming a party to the ICSID Convention"); *Mobil Mobile Cerro*

Negro, 863 F.3d at 104–05 (same); *Saint Gobain Performance Plastics Eur.*, 2021 WL 6644369, at *4 (same). Petitioners thus have satisfied their initial burden under the FSIA. *See Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000).

To avoid these decisions, Zimbabwe urges the court to read its BITs with Germany and Switzerland to preserve its immunity. *von Pezold* MTD at 13–19. It points to an article in the German BIT, which states "[t]he award shall be enforced in accordance with the domestic law of the Contracting Party in the territory of which the investment in question is situated." German BIT, art. 11(3). The Swiss BIT contains a similarly worded article, which states that the "arbitral award shall be final and binding for the parties involved in the dispute and shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located." Swiss BIT, art. 10(6).

But these provisions do not help Zimbabwe. They are, by their plain terms, choice-of-law clauses that direct the state enforcing the ICSID award to apply the law of the territory where the investment is located. Zimbabwe reads "in the territory" in the German BIT as selecting a forum for enforcement. *von Pezold* MTD at 14 (asserting that "in the territory" means "where the award must be enforced"). But that reading is illogical. If "in the territory" were absent, the provision would make no sense; it would read: "the award shall be enforced in accordance with the domestic law of the Contracting Party . . . of which the investment in question is situated." As to the Swiss BIT, Zimbabwe concedes it is merely a choice-of-law provision but contends that such selection "is proof of the intent to limit possible enforcement jurisdictions." *von Pezold* MTD at 15. That cannot be. A choice-of-law provision is just that: a selection of the applicable law. It does not dictate a venue, let alone divest Contracting States' courts of jurisdiction to enforce an award that Zimbabwe agreed could be enforced elsewhere.

B.

Next, Zimbabwe asserts that the court should dismiss this action on the basis of forum non conveniens. *von Pezold* MTD at 23–27. That argument fails at the outset because it rests on the mistaken reading of the BITs as forum-selections clauses, which they are not.

In any event, the argument is "squarely foreclosed by [Circuit] precedent." *BCB Holdings Ltd. v. Gov't of Belize*, 650 F. App'x 17, 19 (D.C. Cir. 2016); *see TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303–04. (D.C. Cir. 2005) (holding that the doctrine of forum non conveniens does not apply to actions in the United States to enforce arbitral awards against foreign nations).

IV.

Zimbabwe also moves to dismiss for failure to state a claim. *von Pezold* MTD at 27–30. It contends that, because both sets of Petitioners are trying to enforce their respective Awards, they are "set on collecting more than they are owed." *von Pezold* MTD at 28. This argument is hard to follow. Neither set of Petitioners have received anything up to this point; they are simply attempting to enforce what the ICSID tribunal awarded them. If there is a concern over double-recovery, that issue can be resolved upon the entry of judgment. It is not a basis for dismissing the petitions.[2]

Lastly, Respondent argues that Elisabeth von Pezold has not demonstrated sufficient standing to seek recognition of the award. On a motion to dismiss, a plaintiff need only establish a plausible case of standing, based on the pleading's allegations. *See Arpaio v. Obama*, 797 F.3d

[2] Respondent also suggests that the *Border Timbers* action is redundant of the *von Pezold* action, as it alleges that the *Border Timbers* Petitioners are controlled by Heinrich von Pezold, a Petitioner in the *von Pezold* action. *Border Timbers* Respondent's MTD at 3–4. However, this is not a basis dismissal as it is akin to the arguments about double recovery. If the *Border Timbers* Petitioners are in fact one and the same as Heinrich von Pezold—which the *Border Timbers* Petitioners have disclaimed—the issue again can be resolved upon entry of judgment with respect to Heinrich von Pezold's share of the award.

11, 19 (D.C. Cir. 2015). That burden is easily met here. The *von Pezold* Petition names Elisabeth von Pezold as executor and heir to Bernhard Friedrich Arnd Rüdiger von Pezold. Petition to Recognize Arbitration Award Pursuant to 22 U.S.C. § 1650A, ECF No. 1 (*von Pezold*), at 4. The petition also states that the "award provides that the claimants could allocate among themselves what was awarded to them and an allocation from Bernhard Freidrich Arnd Rüdiger von Pezold to Elisabeth occurred by way of Mr. von Pezold's will upon his death." *Id.* n.1. Such representations in the Petition, taken as true, plausibly establish standing for Elisabeth von Pezold.

V.

For the foregoing reasons, Respondent's Motions to Dismiss, ECF Nos. 56 (*von Pezold*) and 47 (*Border Timbers*), are denied. The *von Pezold* Petitioners' Request for Judgment on their Petition or, Alternatively, for a Summary Judgment Briefing Schedule, ECF No. 62 (*von Pezold*), is granted insofar as the court will require the parties to confer and present the court with a briefing schedule for summary judgment motions. The parties shall submit a proposed schedule by August 16, 2023.

Dated: August 9, 2023

Amit P. Mehta
United States District Court Judge