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

BETWEEN

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

AND

REPUBLIC OF ZIMBABWE **…DEFENDANT**

JUDGMENT

[1] In this case, the Von Pezold family seeks recognition of ICSID arbitration awards against the Republic of Zimbabwe, a matter intertwining international law with sovereign interests. The heart of the dispute concerns expropriated properties, raising critical questions about the enforceability

of international arbitration awards in domestic courts. The Republic of Zimbabwe challenges this Court's jurisdiction, highlighting the complex interplay between international agreements and national laws. My task is to navigate these legal intricacies, ensuring a fair and just resolution in accordance with the principles of law. This judgment will not only resolve a specific dispute but also contribute to the broader dialogue on international law and state sovereignty.

Background facts

[2] The parties in this matter primarily consist of the Von Pezolds as the Plaintiffs, and the Republic of Zimbabwe as the Defendant.

[3] The Plaintffs originally held an 86.49% interest in three Zimbabwean companies - Border Timbers Limited, Border International (Private) Limited, and Hangani Development Co. (Private) Limited - collectively referred to as the "***Border Companies***." Both the Plaintffs and the Border Companies had substantial investments in three large agricultural estates in Zimbabwe: Forrester Estate, Border Estate, and Makandi Estate.

[4] Between 1980 and 2000, the Defendant carried out land reforms under its Land Reform Programme ("***the Land Reforms***"), aimed at modifying the ethnic distribution of land ownership. These reforms resulted in the expropriation

of various properties associated with the aforementioned estates between 2000 and 2007.

[5] Consequently, two separate but related arbitration cases were initiated. On 6.11.2010, the Plaintffs filed a Request for Arbitration against the Defendant with the International Centre for Settlement of Investment Disputes ("***ICSID***"). The arbitral tribunal was established pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("***ICSID Convention***"). This arbitration case is designated as ICSID Case No. ARB/10/15, on 6.11.2010. They invoked the Germany-Zimbabwe Bilateral Investment Treaty ("***German BIT***") signed on 29.9.1995, and the Switzerland-Zimbabwe BIT signed on 15.8.1996 ("***Swiss BIT***"). These arbitration proceedings will be referred to as the "***Von Pezold Arbitration"***.

[6] The Border Companies began the second arbitration, identified as ICSID Case No. ARB/10/25, on 3.12.2010 under the Swiss BIT ("***Borders Arbitration***"). Although the focus of both arbitrations was on identical losses related to the Border Estate, they were not formally consolidated.

[7] On 28.7.2015, an Arbitral Tribunal rejected the Defendant's jurisdictional arguments and ruled in favour of the Plaintffs, granting both pecuniary and non-pecuniary reliefs. The award handed down by the Arbitral Tribunal ("***the Award***") found the Defendant liable for breaching the treaties

through various expropriation and mistreatment measures damaging the Plaintffs' investments. It ordered the Defendant to pay amounts totaling over US$200 million in compensation and damages.

[8] The Defendant filed an Annulment Application on 21.10.2015 in respect of the Award, but this was dismissed by the ICSID Annulment Committee on 21.11.2018 ("***the Decision on Annulment***"). Notably, before the annulment application was made, the Plaintiffs had already divested their 86.49% stake in the Border Companies.

[9] Despite the Defendant issuing a "Letter of Assurances" earlier on 30.3.2016, pledging to honour the arbitral awards if not annulled, these awards remain unfulfilled.

[10] The case has now moved to Malaysian courts. On 27.7.2021, the Plaintiffs filed the Originating Summons in these proceedings and an Originating Summons No. WA-24NCC-323-07/2021 ("***OS 323***") - both referred to as "***the Originating Summonses***" - in an attempt to enforce the ICSID awards. OS 323 is in respect of the Award and this Originating Summons is in respect of the Decision on Annulment. The Plaintffs were granted Orders for Service Out of Jurisdiction by the Senior Assistant Registrar in respect of OS 323 and this Originating Summons respectively on 25.8.2021 ("***Orders for Service Out of Jurisdiction***"), enabling them to serve both OS 323 and this Originating Summons and affidavits on the Defendant

out of jurisdiction. The Defendant challenged the jurisdiction of the court on 17.1.2022 by filing Enclosure 11 in OS 323 and Enclosure 11 in this Originating Summons to set aside the Orders for Service Out of Jurisdiction respectively.

Plaintiff's application in this Originating Summons (Enclosure 1)

[11] In this Originating Summons, the Plaintiff sought mainly for the following:

a) A declaration that the Decision on Annulment by the ad hoc Committee established pursuant to the ICSID Convention in ICSID Case No. ARB/10/15 be recognised as binding and enforceable in the same manner as if it is a final judgment of this Court; and

b) That the pecuniary obligations imposed by the Decision on Annulment be enforced as if it were a final judgment of this Court, including payment of specific sums as legal costs by the Defendant, with additional relief as deemed fit by the court.

Defendant's application to set aside service in Enclosure 11

[12] In Enclosure 11, the Defendant sought, inter alia, the following:

a) An order that the Order dated 25.8.2021 (Enclosure 6) giving leave to serve the Originating Summons dated 27.7.2021 out of jurisdiction on the Defendant be discharged and/or set aside;

b) An order that service on the Defendant of the Originating Summons dated 27.7.2021 be set aside;

c) A declaration that in the circumstances of this case, this Court has no jurisdiction over the Defendant in respect of the subject matter of the claim or the relief or remedy sought by the Plaintiffs in the Originating Summons dated 27.7.2021 against the Defendant;

d) A declaration that this Court should not assume jurisdiction over the Plaintiffs' action in the Originating Summons dated 27.7.2021; and

e) An order that the Originating Summons dated 27.7.2021 is hereby set aside or struck out.

Applications in OS 323

[13] In OS 323, via the originating summons, The Plaintiffs seek to have the Award recognised and enforced as a final court judgment, including the enforcement of substantial pecuniary obligations awarded for the Forrester, Makandi and Border Estates, costs, pre-award and post-award compound interest, and other reliefs such as moral

damages, with the costs of the application to be borne by the Defendant. The Defendant, via its application in Enclosure 11 therein mainly seeks to discharge or set aside the order allowing service OS 323 out of jurisdiction, contest the court's jurisdiction over the case, and requests the summons be set aside or struck out.

Scope of judgment

[14] In the context of this case, OS 323 and this Originating Summons were jointly heard, centring on fundamentally the same facts, issues and subject matter, although each pertains to distinct awards made by the Tribunal – OS 323 to the Award and this Originating Summons to the Decision on Annulment. The issues and subject matter of the Originating Summonses remain consistent as they emanate from the same arbitration proceedings, the Von Pezolds Arbitration. However, each originating summons involved two applications: one by the Plaintiff under the originating summons seeking recognition of the respective awards as binding and enforceable in the same manner as if it is a final judgment of this Court and the other by way of the Defendant's notice of application aiming to set aside the order of service out of jurisdiction for each of the Originating Summonses. Separate Grounds of Judgment have been written for OS 323 and this Originating Summons which are identical in reasoning and structure, differing only in their reference to either the Award (in OS 323) or the Decision on Annulment (in this Originating Summons). In these Grounds

of Judgment, I will address both the Award and Decision on Annulment for expediency but my decision will only be in respect of the Decision on Annulment which is the subject matter of this Originating Summons.

[15] These grounds relate to both my decisions in Enclosure 1 and Enclosure 11 save for those under the last two headings in paragraphs 120 to 142 below which relate specifically to my decision in Enclosure 11.

Plaintiffs' submissions

[16] The Plaintffs'submissions are summarised as follows:

a) The High Court is vested with jurisdiction to decide OS 323 and this Originating Summons, pursuant to the incorporation, by the Convention on the Settlement of Investment Disputes Act 1966 (Revised 1989) ("***the ICSID Act***"), of the ICSID Convention into Malaysian law, enabling the Court to enforce an arbitrator's award as a judicial order, supported by Section 23 of the Courts of Judicature Act 1964 ("***CJA***") and judicial interpretations asserting that international agreements, exemplified by the ICSID Convention, gain enforceability in Malaysia only through specific legislative actions, such as the enactment of the ICSID Act.

b) In recognising the Award and the Decision on Annulment under the ICSID Convention in Malaysia, it is crucial to consider the Convention's implementation, which introduced significant legal innovations like enabling non-State entities to sue States directly and restricting State immunity, and Malaysia's commitment to these principles through signing and ratifying the Convention and enacting the ICSID Act to incorporate these provisions into its national law.

c) Under the ICSID Act, an arbitrator's award made under the Convention is binding and enforceable like a court decree, with the Act defining “Court” as the High Court and incorporating the Convention, which mandates that awards are binding, not subject to appeal except as provided in the Convention, and must be recognised and enforced by Contracting States as if they were final court judgments, subject to each State's laws on judgment execution and state immunity.

d) Under Article 54(1) of the ICSID Convention, as incorporated into Malaysian law via the ICSID Act, this Court is both authorised and obligated to recognise the Award and the Decision on Annulment as binding and enforce its pecuniary obligations as if it were a final judgment of a High Court in Malaysia, a requirement fulfilled by the Plaintiffs by providing

certified copies of the Award and the Decision on Annulment, with their binding nature and non-appealability established under the Convention and its recognition distinct from execution, as per international legal interpretations.

e) The Plaintiff's applications for leave to serve out of jurisdiction, grounded in Order 11 rule 1(1)(M) of the Rules of Court ("***ROC 2012***"), is valid as the Originating Summonses aim to enforce the Award and the Decision on Annulment, recognised as equivalent to a final judgment of a Malaysian court under the ICSID Act.

f) The absence of assets does not detract from the Plaintiffs' right to seek recognition of the Award and the Decision on Annulment and the ancillary reliefs of enforcement and execution of the Award and the Decision on Annulment through their registration as Judgments of the High Court under the Originating Summonses filed pursuant to Sections 4, 5 and 6 of the ICSID Act 1966 and Order 69 rule 8 of the ROC 2012, which accords with Malaysia's obligations as a Contracting State that has ratified the ICSID Convention through the enactment of the ICSID Act 1966 to ensure recognition and enforcement of ICSID awards within its territories.

g) The Defendant cannot invoke sovereign immunity to avoid the jurisdiction of this Court in determining the Originating Summonses for recognition and enforcement of the Award and the Decision on Annulment under Articles 53(1) and 54(1) of the ICSID Convention and Section 3 of the Malaysian ICSID Act 1966, since state immunity only applies at the execution stage under Article 55 but not the recognition stage.

Defendant's submissions

[17] The Defendant's submissions are summarised as follows:

a) The Defendant as a sovereign state it is entitled to immunity from the jurisdiction of the Malaysian courts under the doctrine of sovereign immunity, notwithstanding the provisions of the ICSID Convention as implemented in Malaysia through the ICSID Act.

b) Under the restrictive doctrine of sovereign immunity, the Court only has jurisdiction over actions of a commercial or private nature, and in this case, the core dispute arises from the Land Reform Programme implemented by the Defendant, which are actions of a governmental or sovereign nature. Therefore, the Court should decline jurisdiction over the Defendant, as the Land Reforms do not

constitute a commercial act or transaction between the Plaintiffs and the Defendant.

c) The Defendant has not submitted to the jurisdiction of the Malaysian Courts by waiving its sovereign immunity or agreeing in writing to adjudication in Malaysia.

d) In seeking to enforce the “pecuniary obligations” of the Award and the Decision on Annulment in Malaysia, the Plaintiffs have not identified any enforceable assets or properties of the Defendant in Malaysia. As the Defendant’s assets in Malaysia are purely diplomatic, they are immune from jurisdiction and enforcement under international law, with no waiver of immunity against enforcement or execution of these assets.

e) In the absence of any procedural framework enacted by Parliament governing the enforcement of ICSID awards under the ICSID Act, the Court cannot on its own motion create or confer new jurisdiction to enforce such awards where no express jurisdiction currently exists.

f) Absent any legislation prescribing procedures for service of process on a foreign sovereign state, the Court cannot create or confer jurisdiction to effect service of the Originating Summonses out of

jurisdiction where no express jurisdiction currently exists under Malaysian law.

g) The High Court's discretionary power under Order 11 rule 1 of the ROC 2012 should not have been exercised to grant leave for serving the Originating Summonses outside of jurisdiction as this Order does not govern service on a sovereign state.

h) The Plaintiffs failed to fully disclose all relevant facts and documents, particularly the German and Swiss BITs during the Application for Leave. This lack of full and frank disclosure, coupled with the absence of evidence of the Defendant’s assets in Malaysia, warrants setting aside the Orders for Service Out of Jurisdiction.

i) The current proceedings should be stayed as the German BIT and Swiss BIT limit the enforcement of ICSID arbitration awards to Germany, Switzerland, and/or Zimbabwe. Malaysian courts should honour agreed jurisdiction clauses unless exceptional circumstances are proven. Unless the Plaintiffs can justify why they should not be bound by the specific articles of the German and Swiss BITs, which designate Zimbabwe as the jurisdiction for enforcement, the Court should grant a stay in accordance with these clauses.

Analysis and findings of the Court

Jurisdiction

[18] I am satisfied that this Court has the jurisdiction to determine OS 323 and this Originating Summons seeking recognition of the Award and the Decision on Annulment respectively.

[19] The legal basis for this Court's jurisdiction arises from the ICSID Act. Section 2 and Section 3 of the ICSID Act provide:

> *"2. Interpretation*
>
> *In this Act, unless the context otherwise requires—*
>
> *"award" means an award given by the arbitrator appointed under the Convention;*
>
> *"Convention" means the Convention on the Settlement of Investment Disputes appearing in the Schedule;*
>
> *"Court" means the High Court.*
>
> *3. Confinement of award*
>
> *An award made by an arbitrator under the Convention shall be binding and may be enforced in the same manner as if it is a decree judgment or order of the Court."*

[20] Section 3 of the ICSID Act clearly stipulates that an ICSID award "shall be binding and may be enforced in the same manner as if it is a decree judgment or order of the Court." The terms "Court", "award" and "Convention" are clearly

defined in Sections 2 and 3 of the ICSID Act to refer specifically to the High Court of Malaya and arbitral awards rendered under the ICSID Convention.

[21] Therefore, Parliament has expressly vested jurisdiction on this Court through the ICSID Act to recognise ICSID awards and give effect to the same. The ICSID Act makes the provisions of the ICSID Convention effective in Malaysia and designates the High Court as the Court for the recognition and enforcement of ICSID awards. The designated Court is required to recognise the Award and the Decision on Annulment which is considered an "award" for recognition purposes.

[22] I am fortified in this view by the Federal Court's elucidation in *Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd* [2011] 5 MLJ 629 that the High Court possesses original jurisdiction where it is expressly provided for under written law. The Federal Court observed:

> *"[47] Meanwhile, s 23(2) of the CJA stipulates the original jurisdiction of the High Court. It states that:*
>
> *(ii) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction. (Emphasis added.)*
>
> *[48] Thus, it is established that the High Court possesses original jurisdiction where it is expressly provided for by written law. One instance of a written law giving such jurisdiction is s 28(5) of the*

> *Act. As such when a decision of a registrar of trademarks is being appealed against, the High Court is in fact exercising its original jurisdiction and not an appellate jurisdiction.*
>
> *[49] The foregoing proposition is also supported by O 5 5 of the RHC which is entitled 'Appeals to the High Court from the Subordinate Courts and Statutory Bodies'. Relying the heading as an aid to interpreting the section (see Foo Loke Ying & Anor v Television Broadcasts Ltd [1985] 2 MLJ 35 (SC); Public Prosecutor v Tan Tatt Eek & other appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713) therein, a distinction is made between decisions of subordinate courts being appealed against and that of statutory bodies (which includes tribunals and administrative officers).*

[23] Here, the ICSID Act satisfies this requirement as it is the legislation giving effect to Malaysia's commitments under the ICSID Convention.

[24] For the next part of this analysis, Section 23 of the CJA is produced below for reference:

> *"(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where -*
>
> *(a) the cause of action arose;*
>
> *(b) the defendant or one of several defendants resides or has his place of business;*
>
> *(c) the facts on which the proceedings are based exist or are alleged to have occurred; or*
>
> *(d) any land the ownership of which is disputed is situated,*
> *within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.*

> *(2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction."*

[25] The Defendant puts forward a contention which revolves around the inherent jurisdiction of the High Court and the application of Section 23 of the CJA and Order 11 rule 1 of the ROC 2012. The Defendant leans on the premise that for the High Court to have jurisdiction, especially in cases involving extra-territorial elements, specific procedural and jurisdictional thresholds must be met, as highlighted in *Goodness For Import And Export v Phillip Morris Brands Sarl* [2016] 5 MLJ 171 (Federal Court).

[26] However, I find that Section 23(2) CJA is directly applicable in this case. This provision states that that the High Court shall also have "...such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction." As elucidated above, the ICSID Act constitutes that very written law vesting jurisdiction on this Court to recognise the Award and the Decision on Annulment in accordance with Malaysia's treaty commitments. Section 23(2) CJA is satisfied on the facts through the operation of the ICSID Act.

[27] Conversely, I accept the Plaintiffs' submission that Section 23(1) CJA does not apply here as none of the limbs under that provision govern the present situation where the Award and the Decision on Annulment have already been

rendered, conclusively determining the lis between the parties. There is no cause of action still pending before any court or tribunal. The arguments canvassed by the Defendant that under Section 23(1) CJA are therefore irrelevant for establishing jurisdiction in this case. Section 23(2) CJA is the applicable provision instead.

[28] The binding nature of ICSID awards against Contracting States is expressly set out in Articles 53, 54 and Article 55 of the ICSID Convention, which is the Schedule to the ICSID Act. These are laid down below:

> *"Article 53*
>
> *(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*
>
> *(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.*
>
> *Article 54*
>
> *(1) Each Contracting State shall recognise 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. A Contracting State with a federal constitution may enforce such an award in or through its 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.*
>
> *(2) A party seeking recognition or enforcement in the territories of a Contacting State shall furnish to*

a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

[29] The Plaintiffs have exhibited certified copies of the Award and the Decision on Annulment in accordance with Article 54(2). It is clear that this Court, as the designated "competent court", is mandated to recognise the Award and the Decision on Annulment by virtue of the ICSID Act implementing the ICSID Convention in Malaysia.

[30] Additionally, I also accept the Plaintiffs' contention that Order 11 ROC 2012 does not confer jurisdiction independently in this case. As held by the Federal Court in *Petrodar Operating and Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424, once the court is clothed with extra-territorial jurisdiction under Section 23 CJA, Order 11 becomes a mere procedural formality for enabling the plaintiff to effect service abroad. Here, jurisdiction already exists by law through Section 23(2) CJA

read with the ICSID Act. Recourse to Order 11 ROC 2012 is therefore unnecessary.

[31] In light of the above analysis, I find that the Plaintiffs have satisfactorily established the jurisdiction of this Court over the present proceedings. The originating summons is properly before this Court and I shall proceed to deliberate on this matter.

Sovereign immunity

[32] At the outset, it must be emphasised that the Plaintiffs presently seek recognition, and not yet execution, of the Award and the Decision on Annulment under the Originating Summonses.

[33] The Defendant contends that it is immune from both the present proceedings on the enforcement of the Award and the Decision on Annulment as well as any eventual execution measures, due to its status as a sovereign state. It argues that it has not submitted to the jurisdiction of the Malaysian Court or waived its sovereign immunity. Specifically, the Defendant submitted that it is immune from the proceedings to recognise the Award and the Decision on Annulment, as well as their enforcement and/or execution against its assets and/or properties in Malaysia, because it has not submitted to the jurisdiction of the Malaysian Court or waived its immunity as a sovereign state.

[34] With due consideration, I respectfully find that the Defendant's claim of sovereign immunity is not applicable in this context.

[35] In *Sodexo Pass International SAS v Hungary* [2021] NZHC 371, the New Zealand High Court considered the interplay between the ICSID Convention and sovereign immunity. Sodexo had investments in Hungary which were impacted when Hungary introduced tax reforms in 2010. Unhappy with the tax changes, Sodexo commenced ICSID arbitration against Hungary in 2014 alleging the reforms unlawfully expropriated its investment. In January 2019, the ICSID tribunal issued a €72 million award in Sodexo's favour. Hungary's annulment bid failed in May 2021, finalising the award. Sodexo then sought recognition and enforcement of this ICSID award in the New Zealand High Court against Hungary. Hungary contested the court's jurisdiction.

[36] The New Zealand High Court held that by acceding to the ICSID Convention, states have agreed that ICSID awards can be recognised domestically as binding judgments, but they maintain immunity for subsequent execution processes. Recognition enables the domestic court to later apply immunity laws on execution. Cooke J stated:

> *"[25] The meaning of these articles appears clear. Their terms overtly apply to enforcement against state parties as well as investor parties to the awards. Sodexo is entitled to have the award recognised in New Zealand as if it were a judgment*

> *of the New Zealand Court in order that it may be enforced under New Zealand's laws. The High Court of New Zealand is obliged to so recognise the award as if it were a judgment. But Hungary is able to claim state immunity under New Zealand law in relation to any execution processes. That immunity does not prevent the award from first being recognised, however. Hungary has agreed that the award may be so recognised, and has waived any adjudicative immunity it had in relation to recognition. It is only after recognition of the award in the New Zealand judicial system that New Zealand law can be applied to assess the claims to immunity in relation to execution steps. It is agreed that the New Zealand Court has jurisdiction to make such decisions.*
>
> *[26] I do not accept Hungary's argument that enforcement and execution are synonymous and that the preservation of state immunity in art 55 concerning execution contemplates immunity from all the steps contemplated in art 54, including recognition. Enforcement is a more general term. The concepts of recognition in art 54(1), and execution in arts 54(3) and 55, are the more technical and precise concepts. To enforce an award one needs to take these more technical steps. First the award is recognised and then execution steps may be taken. The immunity applicable to execution is not an immunity from the prior step involved in having the award recognised in domestic law. Indeed, it is only possible to apply the domestic laws on immunity from execution if the domestic courts first have jurisdiction. So, for this reason art 55 does not make Hungary immune from the jurisdiction. Recognition of the award is necessary in order to allow such domestic law to be applied. The protest to jurisdiction needs to be set aside on that basis."*

[37] I respectfully adopt this interpretation.

[38] The Plaintiffs seek for the reliefs in OS 323 and this Originating Summons premised upon the ICSID Act and the ICSID Convention, which provide for recognition and

enforcement of ICSID awards in the same manner as a Court judgment.

[39] The ICSID Convention has different terms for the recognition and execution of Tribunal awards. Article 54 of the ICSID Convention requires each Contracting State to recognise Tribunal awards, while Article 55 states that this recognition does not affect the law in force relating to the immunity of the state from execution. Therefore, according to the ICSID Convention, the consideration of sovereign immunity is limited to the execution stage after the recognition of Tribunal awards as final judgments of the relevant Contracting State.

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

[41] The Court accepts the view stated by the learned authors Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair of The ICSID Convention: A Commentary who commented on Article 54(3) of the ICSID Convention. They observe that state immunity cannot be used to prevent the recognition of an ICSID award, and

state immunity only applies when concrete measures of execution are taken to enforce the award's pecuniary obligations. It was observed:

> *"Under Art. 54(3) only execution but not recognition is governed by the law of the forum State. Art. 55, by its own terms, refers to execution but not to recognition.* ***Therefore, State immunity cannot be used to thwart proceedings for the recognition of an award.*** *In addition, State immunity does not affect the res judicata effect of an award once it has been recognized (see Art. 54, paras. 43-46).* ***State immunity only comes into play when concrete measures of execution are taken to enforce the award's pecuniary obligations typically after recognition has been granted****."*
>
> (emphasis added)

[42] Therefore, when acceding to the ICSID framework under this Convention, the Defendant agreed to recognition of ICSID Awards and annulment decisions by domestic courts in all Contracting States, including Malaysia. However, at the execution phase, the Defendant can still invoke state immunity under local laws.

[43] I am fortified in this view by the reasoning of the Australian Federal Court in *Kingdom of Spain v Infrastructure Services Luxembourg SARL* [2021] FCAFC 3. In this case, the respondents invested EUR139.5 million into solar energy projects in Spain under a subsidy scheme. Spain withdrew the subsidies in 2010. The respondents filed an ICSID claim alleging this breached the Energy Charter Treaty. In June 2018, the ICSID tribunal awarded the respondents EUR101

million plus interest. The respondents then sought recognition and enforcement of this award in the Australian Federal Court against Spain. Spain pleaded state immunity. This appeal arose from the primary judge's decision to reject that immunity claim and assume jurisdiction.

[44] Allsop CJ emphasised the “unequivocal” obligation under Article 54 to recognise ICSID awards, unaffected by Article 55 immunity from execution. He held that proceedings to recognise an award give it equal status to a domestic court judgment as a preliminary measure before any execution. This remains an act of recognition unprotected by immunity. It was observed:

> *“3 Recognition and enforcement of an arbitral award are distinct, but related concepts. The linguistic debate as to whether execution is synonymous with enforcement or is a concept within it need not, it seems to me, be debated or resolved as a question of fixed content, for all purposes. We are dealing here with Arts 54 and 55 of the ICSID Convention.*
>
> *….*
>
> *6 The obligation to recognise an award under article 54 was unequivocal and unaffected by questions of immunity from execution. As the reasons of Perram J and as the discussion of Professor Schreuer (op cit pp 1128-1134) both show, sovereign immunity from execution (Arts 54(3) and 55) does not arise at the point of recognition.”*

[45] Accordingly, the Defendant cannot claim immunity to resist or prevent recognition of the Award and Decision by this Court. Considerations of immunity are premature at this

juncture and can only be pursued if and when execution is attempted. The Plaintiffs have only applied for recognition under the ICSID framework thus far.

[46] Further, I find that the Defendant has already submitted to the jurisdiction of Malaysian courts for recognition purposes and simultaneously waived any claim to immunity in that regard.

[47] In its own “Reply on the Stay of Enforcement of Awards” which was filed on 1.7.2016 for the purposes of the stay proceedings before the ad hoc Committee prior to the Decision on Annulment, the Defendant stated that the Plaintffs had the right to enforce the Award in any ICSID Contracting State which the Defendant promised to comply with if it remained intact after annulment proceedings. This clearly displays the Defendant's submission to domestic court jurisdiction and waiver of immunity for recognition and potential enforcement measures in foreign Contracting States.

[48] By ratifying the ICSID Convention and making such representations, the Defendant has acquiesced to Contracting States including Malaysia recognising the Award and the Decision on Annulment as a binding domestic court judgment pursuant to Article 54 without claiming immunity.

[49] Further, the Defendant contends that the Land Reforms underlying the Tribunal's Award were governmental acts forming part of its sovereign functions. It claims immunity on that basis since common law only allows suits against foreign states for private and commercial acts, citing the rule in *Rahimtoola v H.E.H. The Nizam of Hyderabad* [1958] AC 379 (House of Lords) and applied in *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors* [2018] 7 MLJ (High Court). Specifically, the Defendant submitted that the Court has no jurisdiction over it as the Land Reforms implemented by the Defendant in Zimbabwe giving rise to alleged breaches of the German BIT and the Swiss BIT and forming the core of the dispute between the Plaintiffs and the Defendant were actions of a governmental or sovereign nature, whereas the Court only has jurisdiction over actions of a commercial or private nature of a foreign sovereign state.

[50] With respect, this argument fails to apprehend that the ICSID Convention represents an international agreement modifying common law immunity. In any case, the Tribunal has already determined in the Award and the Decision on Annulment that it has jurisdiction over the Defendant's acts leading to the dispute, which awards are now final and binding. As a signatory to the ICSID Convention, the Defendant is precluded from reopening the question of the Tribunal's jurisdiction or the character of the Land Reforms underlying the dispute. The Award is now res judicata as between the parties. By virtue of Articles 53(1) and 54(1) of

the ICSID Convention, the Award and the Decision on Annulment are binding on the Contracting States to the ICSID Convention, including the Defendant. As such, the Defendant is obliged to recognise the Award and the Decision on Annulment in accordance with its obligations under Article 54 of the Convention, as implemented in Malaysia via the ISCID Act. The Defendant cannot resist recognition or enforcement of the Award and the Decision on Annulment on grounds pertaining to jurisdiction, nor sustain any reference to the impugned Land Reforms and their implementation as acts of a sovereign and governmental nature at this stage.

[51] I also dismiss as premature the Defendant's contention regarding immunity for its diplomatic assets in Malaysia and the lack of identified local assets for enforcement. Here, the Defendant argues that since it only has diplomatic assets in Malaysia which are immune from execution, and the Plaintiffs have not identified any commercial assets for enforcement, the Court lacks jurisdiction. These considerations may apply at the execution stage later on but are presently inapplicable. The Plaintiffs have not attempted execution thus far. At this point, only recognition is sought pursuant to Malaysia's commitments under the international ICSID mechanism.

[52] In light of the foregoing analysis, I dismiss in entirety the Defendant's invocation of sovereign immunity as it clearly falls within the agreed mechanism for recognition under the

ICSID Convention implemented in Malaysian law through the ISCID Act. Contracting States understandably maintain immunity at the execution phase later, but no immunity applies against proceedings simply seeking recognition of ICSID Awards and annulment decisions. That is the operative scheme adopted by state parties. The Originating Summonses merely seek such recognition. Accordingly, the Defendant's claim for sovereign immunity at this stage fails.

Lack of procedural framework

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

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

[55] The Defendant also contrasted the position in Malaysia with that of other jurisdictions such as the United Kingdom and Singapore where specific laws and rules have been enacted to govern the registration and enforcement of ICSID awards. In the UK, ICSID arbitration awards are governed by the Arbitration (International Investment Disputes) Act 1966 and the Civil Procedural Rules 1998 whereas in Singapore this is governed by the Arbitration (International Investment Disputes) Act 1968 and the Arbitration (International Investment Disputes) Rules 2002 Chapter 11, Section 6.

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

[57] I find the Defendant's submissions to be unpersuasive upon careful evaluation.

[58] The lack of a procedural framework in the ICSID Act does not preclude this Court’s substantive jurisdiction to allow the

Originating Summonses seeking recognition of the Award and the Decision on Annulment.

[59] As the authorities cited demonstrate, procedure is but the handmaid of justice. The absence of prescribed procedures does not fetter the Court where jurisdiction has been substantively conferred. This Court remains imbued with powers intrinsic and inherent to it, as a superior court of law, to adapt existing procedures to the extent required in service of the ends of justice. Indeed, the Privy Council in *Board v Board* [1919] A.C. 956 (on appeal from Alberta, Canada) held that "If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice." Similarly, in *Re King & Co.'s Trade Mark* [1892] 40 W.R. 580, the English Court of Appeal held that "The jurisdiction of the Court is, to my mind, incontestable. The procedure is nowhere fixed. Any procedure which comes up to an Englishman's standard of justice is enough to satisfy this Act." Other authorities of note include the Australian case *R v Rawson, exparte Moore* [1976] Qd R 138, which held that a statute conferring substantive jurisdiction impliedly empowers procedural adaptability; the New Zealand Court of Appeal case of *New Zealand Baking Trades Employees Industrial Union of Workers v General Foods Corporation (NZ) Ltd* BC8560136 which held that substantive jurisdiction can be exercised using flexible procedures as needed; and the case of *Rashidah Bte Mohammad v Mayban Finance Bhd*

[2003] 5 MLJ 529 which held that statutory powers remain operative pending formalisation of rules.

[60] Applying these cardinal principles, I find that Section 3 of the ICSID Act substantively empowers this Court, as the designated competent court, to recognise ICSID awards as "binding and enforceable in the same manner as if it is a decree, judgment or order of the Court." It bears restating that Section 3 remains fully operative notwithstanding the lack of attendant or ancillary procedural rules. This Court by implication can formulate the appropriate procedures for exercising the jurisdiction substantively granted by Parliament. As the Supreme Court stressed in *NKM Holdings* "The duty of the Court, and its only duty is to expound the language of the Act in accordance with the settled rules of construction." Here, the language of Section 3 is clear – this High Court can recognise ICSID awards. That substantive power and duty abides irrespective of absent procedures.

[61] Contrary to the Defendant's contention, I do not find that Parliament deliberately omitted attendant procedures by confining such regimes only to analogous legislation like the AA 2005 and REJA whilst enacting the ICSID Act bereft of the same. As the Court of Appeal stated clearly in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, Parliament must always be assumed cognisant of existing law when legislating on any subject. Accordingly, when substantively empowering recognition of ICSID

awards under Section 3, Parliament is legally presumed cognisant that substantive jurisdiction carries the inherent capacity for Courts to adapt and adopt requisite procedures to fulfil the judicial role. This presumption holds special significance in respect of international treaties like the ICSID Convention which compel domestic incorporation and compliance. Parliament understands Courts will act purposively to achieve substantive justice utilising inherent powers where needed.

[62] The argument that absent legislated procedures, judicial innovation transgresses the principle of separation of powers must therefore fail. Courts act legitimately not only within domains demarcated by legislative words but also deploying powers intrinsic to delivery of justice when discharging constitutional roles, for substance must always prevail and direct the judicial function. As jurisprudence from various Commonwealth jurisdictions demonstrates, courts routinely adapt their processes to substantively exercise unfamiliar jurisdictions like the ICSID Act. Indeed, in *Freeman*, the Supreme Court of Canada confirmed that whilst territorial jurisdiction is generally circumscribed, legislative authority creating the Court can expressly confer extra-territorial jurisdiction to be substantively exercised utilising the Court's incidental powers necessary to fulfil that jurisdiction. Similarly, in *Surinder Singh v Central Government & Ors* 1986 AIR SC 2166, the Indian Supreme Court held that powers statutorily granted expressly and unconditionally remain fully operational pending

formalisation of rules, thereby underscoring that substantive capacities imply interim procedural dispensations.

[63] On that basis, anchoring OS 323 and this Originating Summons on Section 3 of the ICSID Act which substantively empowers recognition of ICSID awards, I find that this Court is legally and fully equipped to grant the recognition and declarations presently sought without requiring any antecedent procedural rules or regimes provided under the law. As the Court of Appeal made clear in *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 2 MLJ 208, these inherent powers must always be judiciously exercised to remedy injustice, give effect to substantive legislation and prevent abuse of legal process whilst remaining guided by considerations of proportionality and good faith.

[64] Furthermore, at this juncture, considerations regarding immunity from execution measures do not arise to limit the exercise of jurisdiction as matters of execution are separate and subsequent to mandatory recognition under the treaty. The Plaintiffs presently only seek recognition on the basis of Malaysia's treaty obligations under Articles 53(1) and 54(1) of the ICSID Convention. Questions of state immunity from execution that the Defendant may potentially invoke later are premature and inapplicable during this initial recognition stage.

[65] As the recent New Zealand High Court case of *Sodexo* confirms, even absent a bespoke procedural regime, Courts readily adapt ordinary procedures to fulfil mandatory substantive obligations consistently with powers and functions statutorily provided, like Section 3 of the ICSID Act. There, despite lacking any specific statute or process for registering ICSID awards against foreign states, the Court effectively extended its existing personal service dispensations to achieve valid service on Hungary in the originating process for recognising the award.

[66] Specifically, the High Court in *Sodexo* recognised New Zealand's obligations under the ICSID Convention to enforce arbitration awards, as implemented domestically through the ICSID Act. Although the Act does not contain detailed procedures for enforcement against foreign states, the Court adapted its own procedural rules on personal service to permit *Sodexo* to serve its application on Hungary and assert jurisdiction. This allowed the Court to fulfill New Zealand's substantive ICSID obligations by first recognising the award, while preserving Hungary's ability to claim immunity regarding later execution. The Court also emphasised that procedural rules should be interpreted to facilitate ICSID enforcement consistent with New Zealand's international commitments.

[67] For the foregoing reasons, I find that the lack of attentive procedures and rules in the ICSID Act provides no impediment whatsoever to granting the substantive prayers

for recognition and declarations allowed through OS 323 and this Originating Summons. Justice inheres in substantive rights which demand remedies. Courts as foremost custodians of justice are imbued with innate capacities to deliver substantive justice utilising flexible adoption of existing procedures even where bespoke regimes are legislatively absent when particular jurisdictions emerge. At all times, procedural modes remain subservient to substantive dictates of law and justice.

Enforcement limited under Swiss and German BITs

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

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

a) Article 11(3) of the German BIT which states: “The award shall be binding on the parties and shall not be subject to any appeal or remedy other than that

provided for in the said Convention. The 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."

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

[70] I have closely considered the parties' submissions, evidence and authorities on whether the applicable bilateral investment treaties (BITs) limit enforcement of the ICSID award to Zimbabwe. I do not think they do.

[71] The Defendant heavily relies on Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT to argue that recognition and enforcement of the award is limited to the state where the underlying investment lies. However, its interpretation does not properly account for the full text and context.

[72] When read in entirety, neither article expressly states that enforcement can only occur within the host state's domestic legal system or courts. Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT do not state that an investor can only enforce an arbitration award in Zimbabwe. There is

nothing in these provisions to derogate from the waiver of sovereign immunity that exists due to the Defendant's agreement in the BITs to arbitrate disputes at ICSID and the terms of Article 54(1) of the ICSID Convention.

[73] Certainly, the language in the Articles requires applying local laws if enforcement takes place where the investment lies. But it does not clearly prohibit or exclude enforcement in other Contracting States to the ICSID Convention like Malaysia.

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

[75] Article 11(3) of the German BIT provides that the remedy available is as provided in the ICSID Convention. The subsequent sentence that the award shall be enforced in accordance with the domestic law of the Contracting State in the territory of which the investment is situated does not mean that the investor can only enforce an arbitration award in Zimbabwe. The purpose of investment treaties is to promote foreign investment, and the recognition and enforcement mechanism under the ICSID Convention is a core feature. If the award could only be enforced in the respondent state, this would nullify the purpose of investment treaties. There is no language in the article that

prohibits the enforcement of the award outside of the respondent state.

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

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

> *"This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently."*

[78] The Defendant referred the Court to the Court of Appeal case of *World Triathlon Corporation v SRS Sports Centre Sdn Bhd [*2019] 4 MLJ 394 for the proposition that Malaysian courts are required to enforce an agreed jurisdiction clause, and a stay should be granted unless the challenging party can demonstrate exceptional circumstances justifying a refusal. In this case, an American

company owning IRONMAN Triathlon trademarks appealed against a Malaysian High Court decision, which dismissed its application to stay proceedings initiated by a Malaysian licensee for unlawful termination of their agreement, citing the agreement's Florida-exclusive jurisdiction clause as overridden by the convenience and economy of having witnesses and evidence in Malaysia. However, this case is not applicable as it dealt with agreements with “exclusive jurisdiction clauses” while there is no such clause in this case. Instead, the ICSID Act enforces the ICSID Convention which provides for the recognition and enforcement of pecuniary obligations imposed by an ICSID award as if it were a final judgment of a Court arising from treaty obligations of nations under the ICSID Convention.

[79] In any event, the interpretation that the BITs expressly limit enforcement of the awards to only Germany, Switzerland, and/or Zimbabwe is not consistent with the Most Favoured Nation (“***MFN***”) clauses present in the agreements as the effect of this interpretation would be the investments and activities of nationals of Germany and Switzerland will be treated less favourably than investments and activities of third states. The MFN clauses are Articles 3 and 8 of the German BIT and Articles 4 and 8 of the Swiss BIT.

[80] Article 3 of the German BIT establishes that each contracting party shall treat investments and activities of nationals or companies of the other party no less favourably

than investments and activities of its own nationals or companies, or those of any third state. It states:

> *"(1) Neither Contracting Party shall in its territory subject investments owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.*
>
> *(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their activities in connection with their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.*
>
> *(3) The treatment granted under this Article shall not relate to the benefit of any treatment, preference or privilege which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs, monetary, or economic union or a common market or free trade area.*
>
> *(4) The treatment granted under this Article shall not relate to any benefit which either National Treatment and Most Favoured Nation Treatment Contracting Party accords to nationals or companies of third States by virtue of a double taxation agreement or any other agreement regarding matters of taxation."*

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

> *"(1) If the laws of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a provision, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provision shall to the extent that it is more favourable prevail over this Agreement.*
>
> *(2) Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party."*

[82] Article 4 of the Swiss BIT states that the Contracting Parties must accord treatment to investors of the other Contracting Party that is not less favourable than the treatment it accords to its own investors or to investors of any third State. It states:

> *"Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of investments in its territory of investors of the other Contracting Party.*
>
> *Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.*
>
> *Each Contracting Party shall in its territory accord investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors or to investors of any third State,*

> *whichever is more favourable to the investor concerned.*
>
> *If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union, a common market or a similar regional organisation or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party."*

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

> *"(1) If provisions in the laws of either Contracting Party or in international agreements entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement.*
>
> *(2) each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."*

[84] The BIT between the Netherlands and the Defendant does not contain the equivalent of Article 11(3) of the German BIT or the equivalent of Article 10(6) of the Swiss BIT. Through the German and Swiss BITs MFN Clauses, the Defendant made commitments to extend better rights to investors from other countries to Swiss and German investors. As there is no restriction in the Dutch BIT that

enforcement of the awards is limited to only Netherland and/or Zimbabwe, the Plaintiffs, who are Swiss and German investors, should not be subject to the restrictions in Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT as interpreted by the Defendant.

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

[86] I am of the view that this approach is correct and adopt the same by holding that the Swiss and German BITs MFN clauses is applied to extend provisions of the Dutch BIT to

the protection of Plaintiffs' rights and interests as the beneficiary of the MFN clauses. In this instance the Dutch BIT relates to the same subject matter as the Swiss and German BITs. I also do not see that there is any contravention of public policy considerations in adopting this approach.

Absence of Defendant's assets in Malaysia

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

[88] The Defendant's claim concerning the absence of its assets in Malaysia, or the Plaintiffs' supposed failure to demonstrate the presence of the Defendant's assets in Malaysia, does not bear relevance to the Plaintiffs' entitlement to seek the recognition of the Award and the

Decision on Annulment, along with related reliefs, as outlined in the Originating Summonses. The pursuit of this relief aligns with the provisions of the ICSID Act and Malaysia's responsibilities as a Contracting State under the ICSID Convention.

[89] The New Zealand High Court in *Sodexo* acknowledged that ordinarily it would be unjust for a court to recognise an award against a non-resident respondent without evidence that there was "a real prospect of obtaining a legitimate benefit from the English proceeding." As the Court cited from *Tassaruf Mevduati Sigorta Fonu v Demirel* [2007] EWCA Civ 799, [2007] 1 WLR 508, this generally requires the applicant to "ordinarily show [...] that he can reasonably expect the benefit from such a judgment". Such benefit typically entails demonstrating assets within the jurisdiction against which the award could be enforced.

[90] However, the Court found that New Zealand's treaty obligations under the ICSID Convention as implemented locally by the ICSID Act overrode such evidentiary requirements at the recognition phase. Regardless of proven assets, Article 54(1) mandates that "Each Contracting State shall recognise an award rendered pursuant to this Convention as binding." The New Zealand legislation designates the High Court as the "competent court" to fulfill this mandate.

[91] The Court reasoned that imposing an asset tracing requirement risks prejudice to the applicant's subsequent attempts to locate and execute against assets, noting "Steps could be taken in an attempt to avoid such execution." Identification of available assets could thus occur later, when enforcement measures are pursued following recognition. At the recognition phase, the mere "possibility of enforcement" coupled with New Zealand's international commitments provided sufficient basis to recognise the award in line with ICSID framework.

[92] Therefore *Sodexo v Hungary* confirms that notwithstanding inability to prove local assets of a foreign state, recognition of an ICSID award remains proper at minimum to uphold treaty obligations of the recognising state under the expressly mandatory terms of the ICSID Convention. This fulfills the recognising state's commitments as a matter of international law, whereas difficulties with proving executable assets can be addressed subsequently under domestic procedures if and when execution is pursued.

[93] I am persuaded by and adopt the reasoning in *Sodexo v Hungary*. Compliance incentives still arise from recognising awards even absent immediately executable assets under the ICSID framework. And the domestic court is bound to recognise awards under Article 54(1) of the Convention, given force of law locally by legislation like Malaysia's ICSID Act. Asset identification imperils that scheme. Hence not knowing local asset specifics does not bar recognition here.

That properly occurs subsequently when execution is attempted.

[94] Premature focus on assets also ignores that the place of enforcement can wait if needed until funds materialise. As stated in Schreuer's noted Convention commentary, “Recognition as a preliminary step to execution may be meaningful even if there are no immediate prospects of execution...Once recognised, execution will be quicker and easier should assets become available later.” Recognition puts uncooperative parties on notice, driving disputes towards resolution.

[95] In conclusion, the absence of identified seizable Malaysian assets presently does not prevent recognising or enforcing these international arbitral determinations as treaty obligations require. The Defendant's non-compliance to date makes prejudicing later execution attempts improvident. Following *Sodexo v Hungary*, and respecting the ICSID Convention’s purpose, the Court continues proper recognition processes at this phase without further asset proofs.

Double Recovery

[96] The position of the Defendant primarily revolves around the issue of double recovery in the context of the Von Pezolds Arbitration and Border Arbitration. The Defendant asserts that allowing the Plaintiffs' claims in both arbitrations would

result in impermissible double recovery, as noted by the Arbitral Tribunal. This stems from the fact that both the Von Pezolds and Border Companies have been granted similar relief for losses related to the Border Estate in their respective arbitrations. Consequently, enforcing these rights jointly against the Defendant would contravene the Tribunal's directive and established principles of justice and public policy.

[97] Furthermore, the Defendant points out that the Plaintiffs have significantly disposed of their interests in the Border Companies before the filing of the annulment application. This disposal, particularly the transfer of the entire 86.49% shareholding in the Border Companies to third parties, effectively strips the Plaintiffs of their shareholder rights to enforce the ICSID awards against the Defendant. In lieu of direct compensation, the Plaintiffs received B Warrants and a nominal sum, which the Defendant argues should be considered adequate compensation. The exact economic value of the B Warrants is deemed irrelevant, with the Defendant emphasising that the Court's focus should not be on the adequacy of compensation but rather its existence.

[98] Additionally, the Defendant contends that the Plaintiffs have benefited from continued operations and profits from the Estates since the alleged expropriation. This factor should be considered to prevent the Plaintiffs from receiving a financial windfall if their applications to enforce the Award and the Decision on Annulment are granted. Lastly, the

Defendant invokes the principle that any monetary judgment must strictly correspond to the actual amount due, taking into account any prior compensations or payments received, to avoid excessive or unjust enrichment of the Plaintiffs.

[99] In essence, the Defendant's position hinges on the principles against double recovery, the adequacy of the compensations already provided to the Plaintiffs, and the need to limit claims to prevent unjust enrichment.

[100] I have considered the evidence and submissions from the Plaintiffs and the Defendant and it is my finding that there is no merit to the Defendant's submissions. I will explain my reasons.

[101] There were two separates but related ICSID arbitration proceedings against the Defendant: (i) the arbitration proceedings leading to the Award and the Decision on Annulment in Case No. ARB/10/15 brought by the Von Pezold family already defined as "the Von Pezolds Arbitration"; and (ii) Case No. ARB/10/25 brought by companies the Von Pezolds control regarding the Border Estate, already defined as "the Border Arbitration".

[102] Although the two cases were heard jointly by the same tribunal for efficiency, they remained separate proceedings that resulted in separate awards. However, both sets of claimants were granted the same relief concerning harms to

the Border Estate in their respective awards. Paragraph 938 of the Award states:

> *"Although, formally, each tribunal has been constituted separately, and has adjudicated the Von Pezold Claimants' and Border Claimants' respective claims separately, it would be artificial to pretend that this Tribunal is unaware of its counterpart Award, or the consequences of it. The Tribunal therefore wishes to make clear that, although the Von Pezold Claimants and the Border Claimants have each been granted the same relief in respect of the Border Estate, these rights cannot both be jointly enforceable. To the extent that one set of Claimants (Von Pezold or Border) enforces its right to restitution of the expropriated Border Properties, restitution will, become legally and materially impossible for the other set of Claimants. Similarly, to the extent that the Border Claimants enforce their right to compensation in respect of the Border Properties (or, for that matter, the Border Liquidation Shortfall and Border Forex Losses), the right to compensation of that amount in the name of the Von Pezold Claimants will become unenforceable as an impermissible double recovery (given that, ultimately, it is the Von Pezold Claimants who control the Border Claimants: see paras. 320-326 above) (see also Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 270-272). Such an outcome would, undoubtedly, be the case if the two sets of Claimants had brought proceedings consecutively rather than concurrently."*

[103] Paragraph 938 of the Award in the Von Pezolds Arbitration recognises that the two claimant groups (the Plaintffs and the Border companies) cannot both fully enforce the duplicate relief granted for the Border Estate losses. If one group enforces restitution or compensation, that forecloses the same remedies being claimed by the other group. This

mechanism prevents “double recovery” - getting paid twice for the same loss.

[104] The Defendant now argues the Plaintffs are precluded from enforcing relief related to the Border Estate since the Award grants the same remedies to the Border companies in the Border Arbitration. Hence the contention that double recovery would result if the Plaintiffs receive compensation for Border Estate harms through enforcing the Award.

[105] The Defendant argues that the Plaintiffs' efforts to enforce the Award and the Decision on Annulment constitute impermissible “double recovery”, allegedly violating paragraph 938 of the Award. This interpretation hinges on the belief that losses from the Border Estate cannot be jointly enforced by the claimants in both the Von Pezolds Arbitration and Border Arbitration, which would result in double recovery. However, this argument is overly restrictive and overlooks the broader context of the Award, which does not explicitly prohibit such recognition proceedings.

[106] The Tribunal held as follows in paragraphs 63 and 936 of the Award:

> *“[63], Procedural Order No. 13 dated 23 December 2013 (“PO No. 13”), the Tribunal found that, while the matters in issue in the two proceedings were indeed intertwined, in that they arose from substantially the same events “from a practical perspective and as a matter of principle”, the Von*

> *Pezold Claiments and the Border Claimants, having filed their claims independently of each other, should also be able to pursue enforcement of any award independently of each other";*
>
> ……
>
> *"[936], One final word needs to be said about the Tribunal's quantum findings. As noted at the outset of this Award, the present proceeding in fact comprises one part of a pair of arbitrations, heard together but with separate outcomes (see para. 5 above). There is significant overlap between these Awards, however, because both the Von Pezold Claimants in this proceeding and the Border Claimants in the other proceeding have made claims in respect of the same loss as concerns the Border Estate. Both the Von Pezold Claimants and Border Claimants have sought - and shall be awarded - the same rights to restitution and compensation, or compensation in the alternative, in respect of the losses relating to the Border Estate."*

[107] Therefore, double recovery is only a concern in two specific instances: (i) "restitution of the expropriated Border Estate has been obtained by one set of Claimants and the other set of Claimants pursues the same restitution remedy"; and (ii) "compensation is recovered in respect of the Border Estate by one set of the Claimants and the other set of the Claimants nevertheless seeks to pursue the same recovery and ignoring the compensation already recovered." As of now, neither of these conditions has been met, as there has been no enforcement of restitution or compensation by either set of claimants.

[108] Far from any claimant having "enforce[d] its right to restitution of the expropriated Border Properties", the Defendant has denied the Plaintiffs precisely that. It has

rendered itself a stranger to the Award, breaching the ICSID Convention requirement that "...Each party shall abide by and comply with the terms of the award..." (Art 53(1)). In these circumstances where no funds or assets have exchanged hands to recompense either claimant set, paragraph 938 by its own terms does not yet activate to bar either from continuing enforcement attempts.

[109] The restructuring of the Plaintiffs' interests in the Border Companies, as per the Framework Agreement dated 28.2.2012 ("***the Framework Agreement***"), is also crucial to this analysis. There was a divestment of the Plaintiffs' interests in the Border Companies arising from a restructuring of a joint venture that took place on 28.2.2012. This restructuring involved the Høeghs and the Von Pezolds, resulting in a phased transfer of assets into the Joint Venture, with the holding company being Rift Valley Investments Limited (RVI). In this arrangement, the Von Pezolds, through Gusterheim Africa Holdings Limited (GAH), held a 55% stake, and the Høeghs, through HCP Africa Limited (HCPA), held the remaining 45%.

[110] Under the Framework Agreement, GAH was to transfer the Plaintiffs' entire 86.49% shareholding in the Border Companies into the Joint Venture. In return, GAH received a nominal consideration of US$1 and was issued 36,544,153 'RVC Warrants' (B Warrants). These B Warrants were not immediate share capital but conferred rights to exchange each warrant for one share in Rift Valley

Corporation Limited (RVC) upon the satisfaction of certain conditions related to the Von Pezold Arbitration concerning the Border Estate.

[111] The Claimants' JV Notification dated 4.9.2012 clarified that the nominal consideration of US$1 was a legal formality under English law to make the contract binding, as English law does not inquire into the adequacy of consideration. Therefore, it is common practice to use nominal consideration for binding contracts without executing them as a deed.

[112] Crucially, clause 12.11 of the Framework Agreement emphasised that the Von Pezolds retained "all rights of action and claims for reparation and rights to any reparation awarded (including restitution and compensation) in relation to the Von Pezold Arbitration and its subject matter." This clause ensured that despite the restructuring, the Von Pezolds did not relinquish any rights to compensation due from the Defendant under the Award.

[113] The divestment did not entail an assignment of any rights or claims subject to the Von Pezold Arbitration and the Border Companies Arbitration, as clearly notified to the Defendant in the Claimants' JV Notification. The Høeghs and the Von Pezold Claimants agreed that all rights of action, claims for reparation, and rights to any reparation awarded in the Arbitrations would remain vested with the respective claimants, despite the joint venture.

[114] Therefore, the divestment and the subsequent joint venture did not result in the Plaintiffs being disentitled to any claim in relation to the Border Companies. The Defendant had the opportunity to raise concerns about the impact of this divestment during the hearing of the Von Pezold Arbitration but chose not to, rendering it inappropriate to do so at a later stage.

[115] On the Defendant's argument that the Plaintiffs' continued operation of the Estates and the purported profits therefrom should be disclosed to prevent an alleged windfall if the current application is granted, the Court finds that this argument, however, does not find a foothold in the procedural history or the legal principles governing this case. As per paragraph 159 of the Award, the Tribunal's observation is that despite the ongoing operation of the Estates, the Plaintiffs have been effectively reduced to "mere licensees at the will of the Respondent" due to the alleged expropriation under the 2005 Constitutional Amendment. The viability of the remaining properties and assets is therefore compromised, impeding the Plaintiffs' ability to realise value from these assets through sale.

[116] The Defendant's attempt to introduce a set-off from the income derived by the Plaintiffs from the Estates appears to be an afterthought, not raised during the Tribunal proceedings. This omission is significant. Matters not brought before the Tribunal at the appropriate juncture

cannot be introduced at a later stage, especially when they could have been raised during the arbitration process. The principle of finality in arbitration, as well as the need for procedural efficiency, underpin this stance.

[117] Moreover, the Von Pezold Arbitration's Tribunal did not provide the Defendant with an option to compensate the Plaintiffs by allowing them to continue occupying the Estates post-award. The clear terms of paragraph 1020.3 of the Award stipulate that if restitution and restitution damages are not provided within 90 days as detailed, the Defendant is obligated to pay the specified damages. The Award does not contemplate payment through alternative means, such as the set-off proposed by the Defendant.

[118] The binding nature of the Award and the Decision on Annulment, as enshrined in Article 53(1) of the ICSID Convention, further solidifies the Plaintiffs' position. The Award, granting various reliefs to the Plaintffs in relation to the expropriation of the Border Estate, is final and binding on the parties. The Convention explicitly states that awards are not subject to appeal or any other remedy except those provided within the Convention itself. Compliance with their terms is not optional but a legal obligation of the parties.

[119] In conclusion, the Defendant's argument for a set-off based on the profits from the continued operation of the Estates is neither procedurally nor substantively tenable. The Award's directives are clear and unambiguous, and the Defendant's

obligations under the Award and the Decision on Annulment and the ICSID Convention are binding.

Orders for Service Out of Jurisdiction

[120] The Defendant submits that unlike the UK and Singapore, Malaysia lacks specific legislation governing the service of process on a foreign sovereign state. In the UK, this procedure is outlined in Section 12 of the UK State Immunity Act 1978, while Singapore's procedure is detailed in Section 14 of the Singapore State Immunity Act 1979. The Defendant argues that Order 11 rule 1 of the ROC 2012 in Malaysia, which the Plaintiffs relied upon for serving out of jurisdiction, is applicable only to service on a defendant located in a foreign state, not on a foreign state itself. This point is supported by the case of *Embassy of Brazil v de Castro Cerqueira* [2014] ICR 703, emphasising the purpose of the UK's legislation to ensure states receive notice of proceedings against them.

[121] Furthermore, the Defendant refers to the commentary by Fox and Webb in a chapter titled “English Law: The UK State Immunity Act 1978 highlighting the importance of providing foreign states adequate notice and opportunity for diplomatic action. The Defendant contends that the absence of Malaysian legislation in this area means the Court cannot create or expand jurisdiction to serve a sovereign state. This argument is reinforced by the case of *Josias Van Zyl and others v Kingdom of Lesotho* [2017] SGHC 104, where

the Singapore High Court emphasised the need for explicit parliamentary authorisation for such service, illustrating caution in exercising jurisdiction over sovereign states. The Defendant suggests that any gaps in Malaysian law regarding this matter should be addressed by Parliament.

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

[123] First, the court addresses the Defendant's argument that the absence of Malaysian legislation similar to the UK's or Singapore's State Immunity Act 1979 prevents this Court from permitting service of process on a foreign state. The Plaintiffs' Leave Application was predicated on Order 11 rule 1(1)(M) of the ROC 2012. It allows for leave to serve a claim out of jurisdiction if the claim is brought "to enforce" "any judgment or arbitral award". It provides:

> *"(1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of-*
>
> *(a) a collision between ships;*
>
> *(b) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or*
>
> *(c) non-compliance on the part one or more of two or more ships, with the collision regulations made under section 252 of the Merchant Shipping Ordinance 1952,*

> *service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in the following cases:*
>
> *……*
>
> *(M) if the claim is brought to enforce or set aside any judgment or arbitral award."*

[124] The Plaintiffs submit that the Originating Summonses seek orders relating to the recognition of an ICSID award, which, under the ICSID Act, may be viewed as if it were a final judgment of a court in each Contracting State, including Malaysia. This interpretation is consistent with the understanding that the word "enforcement" encompasses steps to have a judgment recognised and then subject to execution, as reflected in the New Zealand case of *Sodexo v Hungary*.

[125] The New Zealand High Court's decision in *Sodexo v Hungary* provides a useful precedent regarding extraterritorial service to enforce an ICSID award. The High Court allowed service out of jurisdiction relying principally on Rule 6.27m of the New Zealand High Court Rules. As the Court explained, this rule generally permits service outside New Zealand "when it is sought to enforce any judgment or arbitral award."

[126] In reaching this conclusion, the High Court held that the ICSID Convention creates binding obligations on member states to recognise ICSID awards, finding that "Each Contracting State shall recognise an award...as binding and

enforce the pecuniary obligations imposed by that award...as if it were a final judgment of a court in that State." The Court ruled that New Zealand's ICSID Act "has the force of law in New Zealand in accordance with the provisions of the Act."

[127] Significantly, the New Zealand High Court endorsed a broad concept of "enforcement" encompassing both initial recognition of the award under the adjudicative jurisdiction of domestic courts as well as subsequent execution steps. As the Court reasoned, "Enforcement is a more general term. The concepts of recognition in art 54(1), and execution in arts 54(3) and 55, are the more technical and precise concepts." While execution may implicate foreign state immunity issues, the court found that Hungary had clearly waived adjudicative immunity under the ICSID Convention framework. Cooke J commented:

> *"[48] I do not accept Hungary's arguments. As I have found above the word "enforcement" has a more general meaning which encompasses steps to have the judgment recognised, and then subject to execution. That is the meaning also contemplated by s 4 of the ICSID Act. The award here is plainly an arbitral award falling within the terms of r 6.27(2)(m)."*

[128] The tiered enforcement process under Order 11 rule 1(1)(M) ROC 2012 allowing service out of jurisdiction to "enforce" foreign judgments or arbitral awards draws a similar distinction between initial adjudicative jurisdiction to recognise an award and subsequent execution

proceedings. As with New Zealand's ICSID Act, Malaysian implementing legislation gives domestic effect to international enforcement obligations assumed through acceding to convention frameworks like ICSID. The Court can exercise its inherent jurisdiction to give effect to the Award and the Decision on Annulment and ensure that Malaysia fulfills its treaty obligations under the ICSID Convention. Therefore, it is possible to resort to to Order 11 rule 1(1)(M) ROC 2012 so as to permit service of the Originating Summonses and the Plaintiffs' Affidavits in Support on the Defendant since what is at hand is originating process "to enforce or set aside a judgment or an arbitral award". In this regard, the Originating Summonses are claims that seek to enforce both a judgment and an arbitral award. The Award and the Decision on Annulment are awards given by the arbitrator under the ICSID Act and viewed as a final judgment in each Contracting State (including Malaysia). Order 11 rule 1(1)(M) of the ROC 2012 applies to the enforcement of a judgment as well as an arbitral award, and is not limited to enforcement under the Arbitration Act 2005.

[129] Furthermore, the Federal Court of Malaysia in *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] supp MLJ 151 provided guidance on the interpretation of Order 11 of the ROC 2012. The Court held that "the plaintiff need not satisfy the court that he is right. His burden is only to make it 'sufficiently to appear ... that the case is a proper one for service out of the jurisdiction under this Order'." This

precedent supports the position that the Plaintiffs have established a 'good arguable case' for the purposes of obtaining the Orders for Service Out of Jurisdiction.

[130] The Defendant's argument, as per *Embassy of Brazil v de Castro Cerqueira*, that the purpose of the UK's legislation is to ensure states receive notice of proceedings against them, is not disputed. However, this does not preclude the Court from exercising jurisdiction in the absence of similar Malaysian legislation.

[131] In sum, the Plaintiffs have satisfactorily established that the Orders for Service Out of Jurisdiction falls within the ambit of Order 11 rule 1(1)(M) of the ROC 2012. The absence of specific Malaysian legislation akin to the UK or Singapore's Acts does not restrict this Court’s discretionary power to grant such an order in cases involving the enforcement of an international arbitral award. Therefore, this Court upholds the Orders for Service Out of Jurisdiction, ensuring that the principles of international law and comity are respected, and Malaysia's obligations under international conventions are fulfilled.

Failure to make full and frank disclosure

[132] The Defendant argued that the order granting the leave should be set aside because the Plaintiffs have failed to make full and frank disclosure of relevant facts and documents by not producing the relevant German BIT and

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

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

[134] The Defendant also submitted that the Plaintiffs have failed to make full and fair disclosure when it did not disclose or identify any assets and/or properties of the Defendant that are allegedly in Malaysia. In particular, the Plaintiffs failed to draw the attention of the Court that the only assets which the Plaintiffs were relying on, were rumours of no probative

value about assets and/or properties which the deceased former President of Zimbabwe and/or members of his family are alleged to have acquired decades ago in Malaysia.

[135] I do not accept the contentions of the Defendant above. In the Plaintiffs' Application for Leave in Enclosure 6, the Plaintiffs have placed before the Court all the relevant and material facts. The Orders for Service out of Jurisdiction were properly granted by the Court with due consideration of all material facts related to this matter.

[136] In reaching a decision on this matter, the Court takes into consideration the Defendant's reference to *Lee Teck Chee Anor v Merrill Lynch International Bank Ltd* [1998] 4 CLJ 188. In this case, it was established that plaintiffs are required to present relevant and material facts explicitly to the High Court rather than make a general reference. This requirement ensures that the Court is fully informed and can decide based on comprehensive information.

[137] Applying this principle to the current case, the Court finds that the Plaintiffs have indeed met their obligation of adequately informing the Court in their application to recognise the Award and Decision on Annulment under the ICSID Act. It was understood that the Defendant was a foreign state and the process of serving the Originating Summonses would be through the Defendant's officials in Zimbabwe. Therefore, the Plaintiffs provided all necessary material facts in their Application for Leave.

[138] The Court also refers to the case of *Cantrans Services 1965 Ltd v Clifford* [supra], which underscores the importance of "full and fair" disclosure in ex-parte applications. Though the Plaintiffs' Application for Leave did not explicitly demand "full and frank disclosure", the Plaintiffs presented all relevant and material facts for the application. This approach aligns with the judgment in *Koperasi Permodalan Felda Malaysia Bhd v Alrawda Investment For Real Estate Development & Projects Management Co Ltd & Anor* [2021] 7 MLJ 647. This case highlighted the critical importance for the Court to possess all relevant and material facts to decide whether to grant leave for serving the writ out of jurisdiction.

[139] Regarding disclosure, I am satisfied based on the precedents cited that all material and relevant facts were duly placed before this Court. At the leave application stage, the Plaintiffs disclosed the certified copies of the Award and the Decision on Annulment as mandated under the ICSID Convention for recognition and enforcement proceedings. While the Defendant seeks to draw similarities with the decision in *Koperasi Permodalan Felda Malaysia Bhd* where failure to disclose an arbitration agreement resulted in leave being set aside, those facts are plainly distinguishable. Here, the arbitration proceedings have concluded and there is no dispute regarding the status and validity of the Award and the Decision on Annulment that the Plaintiffs now seek to have recognised pursuant to Malaysian legislation implementing the ICSID framework.

[140] As such, the only facts that warrant disclosure relate to the Award and the Decision on Annulment themselves and the procedural history confirming its current enforceability, rather than any underlying arrangements between the parties. Those were comprehensively set out in the evidence accompanying the Plaintiffs' leave application.

[141] The Plaintiffs’ non-disclosure or failure to identify any assets of the Defendant in Malaysia is irrelevant to the Plaintiffs’ right to seek recognition of the Award and the Decision on Annulment and associated reliefs under the Originating Summonses. The enforcement of the Award and the Decision on Annulment aligns with Malaysia's obligations under the ICSID Convention, and that asset identification is not a prerequisite for award recognition. Therefore, this non-disclosure cannot be regarded as the Plaintiffs’ failure to make full and fair disclosure of material facts for the purposes of obtaining the Orders for Service Out of Jurisdiction.

[142] Similarly, there is no failure by the Plaintiffs to make full and frank disclosure of relevant facts and documents in respect of the German BIT and Swiss BIT as the BITs do not limit enforcement to only Germany, Switzerland, and/or Zimbabwe. In gist, as addressed by the Court earlier, the award can be enforced in Malaysia, consistent with the MFN clauses in the BITs and the provisions of the ICSID Convention.

Conclusion

[143] For the above reason, the Plaintiffs' Originating Summons in Enclosure 1 is allowed and the Defendant's application in Enclosure 11 is dismissed.

[144] The Defendant is ordered to pay costs the Plaintiffs in the sum of RM60,000.00 with respect to Enclosure 1 and with respect to the dismissal of Enclosure 11 subject to allocator.

27 November 2023

ATAN MUSTAFFA YUSSOF AHMAD

Judge

Kuala Lumpur High Court NCC1

(Commercial Division)

Counsel:

For the Plaintiffs:	*John Mathew with Sabin Ann Thomas (Messrs. Christopher & Lee Ong)*
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