

ENFORCEMENT OF ICSID AWARDS IN THE UNITED STATES: SHOULD THE ICSID CONVENTION BE READ AS ALLOWING A ‘SECOND BITE AT THE APPLE’?

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I. INTRODUCTION

The Convention of the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)¹ has become the main tool for the settlement of Investor-State disputes through international arbitration. The United States is party to the ICSID Convention and the U.S. Congress has implemented it at the domestic level via 22 U.S.C. § 1650a² (Enabling Statute), which provides that U.S. courts must recognize each arbitral award rendered pursuant to the ICSID Convention as if it were the final judgment of a court in the United States. Given that ICSID awards are by their nature rendered against sovereign States, an analysis of ICSID judgments must also address the Foreign Sovereign Immunities Act (FSIA),³ a legal instrument that provides for the immunity of sovereign States from jurisdiction and execution of judgments in specific cases.

However, despite the treaty and statutory framework above, no uniform procedure exists in the United States regarding the enforcement of ICSID judgments, and federal

1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [ICSID Convention] (Washington, 18 March 1965), 17 U.S.T. 1270, 575 U.N.T.S. 159, 17 U.S.T.S. 1270, *entered into force* 14 Oct. 1966.

2. 22 U.S.C. § 1650a (2012).

3. Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602–1611 (2012).

court decisions on the issue provide little clarity. The recognition and enforcement of ICSID awards is expressly provided for in the ICSID Convention, and its drafters demonstrated a clear intention to eliminate review of judgments by national courts. However, in the United States, an ICSID award must still be brought to domestic courts for recognition and enforcement in order for a party to ensure its execution. In this context, a plenary action with the risk of a judicial review seems to amount to a second bite at the apple. Seeking to take advantage of the uncertainty, certain sovereign States—the debtor parties, in the majority of ICSID cases—have pursued plenary actions⁴ as a response to the *ex parte* petitions⁵ filed by investors seeking the enforcement of ICSID awards in U.S. district courts.

The proper procedure for enforcement of an ICSID award is highly debated, with two major points of contention. The first is whether recognition, enforcement, and execution of an ICSID award are the same or different steps. This issue is further complicated by the question of the involvement of the FSIA. The second issue is whether the procedure to enforce an ICSID award in the United States should be *ex parte* or rather constitute a plenary action. In any case, both positions have been adopted by U.S. courts.

This paper will first examine the legal and statutory framework surrounding the enforcement of ICSID awards in the United States. Second, it will give an overview of the international and domestic case law in order to see how U.S. courts have been interpreting the framework. Third, it will provide an analysis of the main trends regarding the enforcement of ICSID awards by the U.S. courts.

II. TREATY AND STATUTORY FRAMEWORK

When seeking the recognition and the enforcement of an ICSID award in the United States, both international and domestic legal texts interplay. This section will present the treaty and statutory framework that regulates the recognition and en-

4. A plenary action is the name given to a suit where the merits are fully investigated and discussed, and the decision is not based on another suit.

5. An *ex parte* action is a judicial action on the behalf of one party, without notice to or contestation by any person adversely interested and (in the present case) “off the bench.”

forcement of an ICSID award. At the international level, the ICSID Convention contains an autonomous and simplified regime designed to facilitate the enforcement of awards rendered by ICSID tribunals. At the domestic level, the “Enabling Statute,” provides the related enabling legislation. Finally, the FSIA draws the contours of the sovereign immunity doctrine and its exceptions in the United States.

A. *The ICSID Convention*

1. *Overview of the ICSID Convention*

The regime for the enforcement of arbitral awards rendered under the auspices of the ICSID is prescribed in its constituent treaty, the ICSID Convention (sometimes referred to as the “Washington Convention”).⁶ The ICSID Convention entered into force on October 14, 1966, and as of November 17, 2016, 160 countries have signed it and 152 have deposited instruments of ratification.⁷ The ICSID Convention proposes procedures for the conciliation as well as the arbitration of investment disputes between a Contracting State and individuals or companies that qualify as nationals of another Contracting State,⁸ through a “comprehensive, self-sufficient system.”⁹

Regarding the procedure itself, ICSID proceedings generally consist of two phases. First, the claimant will submit a memorial, setting out its submissions on facts and law, and the respondent will respond with a counter-memorial. The counter-memorial is the last opportunity for the respondent to raise a jurisdictional objection. In addition, a reply and rejoinder may follow. As in commercial proceedings, the parties typically submit factual witness evidence and expert reports and document production. Then, the oral phase of proceedings involves examination of witnesses, oral submissions, and ques-

6. ICSID Convention, *supra* note 1.

7. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (Nov. 17, 2015), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>.

8. ICSID Convention, *supra* note 1, art. 1, 25.

9. A.J. van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2 ICSID REV.—FOREIGN INV. L.J. 439, 441 (1987).

tions from the tribunal about the competing claims and defenses.¹⁰

Arbitration procedures under the ICSID rules are generally characterized as “delocalized” or “denationalized,”¹¹ as they are governed exclusively by the international law provisions of the ICSID Convention and exempt from the application of the arbitration laws and the control of the courts of Contracting States.¹² Indeed, the ICSID system provides for a self-contained dispute resolution process that is intended to foreclose the review of final arbitral awards by any national court.¹³ The United States Court of Appeals for the District of Columbia Circuit confirmed this idea by stating that “the ICSID processes are self-executing once a proper request is submitted to ICSID.”¹⁴ Similarly, Article 53(1) of the ICSID Convention states that an award rendered pursuant to the Convention “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 Convention,”¹⁵ such as the remedy of annulment.¹⁶

In addition, the ICSID Convention contains a mechanism allowing the annulment of an ICSID award in specific circumstances. However, since ICSID procedures are self-contained, any effort by a party to annul an award is not considered a separate appeal or a re-litigation of the merits, but rather is another aspect of the same system.

10. Tom Cummins & Joanna Sidhu, *ICSID Arbitration – What Actually Happens in ICSID Proceedings?*, ASHURST (July 2014), https://www.ashurst.com/publication-item.aspx?id_Content=10505.

11. ALAN REDFERN & MARTIN HUNTER WITH NIGEL BLACKABY & CONSTANTINE PARTASIDES, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 57 (4th ed. 2004).

12. Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, 24TH JOINT COLLOQUIUM ON INT’L ARB., November 16, 2007, at 2.

13. COMM. ON INT’L COMMERCIAL DISPUTES, THE ASS’N OF THE BAR OF THE CITY OF N.Y., *RECOMMENDED PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS RENDERED UNDER THE ICSID CONVENTION* 2–3 (July 2012).

14. *Mar. Int’l Nominees Est. v. Republic of Guinea*, 693 F.2d 1094, 1103 (D.C. Cir. 1982).

15. ICSID Convention, *supra* note 1, art. 53(1).

16. See Gabrielle Kaufmann-Kohler, *Annulment of ICSID Awards in Contract and Treaty Arbitration: Are There Differences?*, in *ANNULMENT OF ICSID AWARDS: A JOINT IAI-ASIL CONFERENCE* 189, 190–91 (2004).

Annulment of ICSID awards is addressed in Article 52 of the Convention. Under this procedure, an *ad hoc* committee, appointed by the Chairman of ICSID's Administrative Council, may annul the award upon the request of a party. The grounds for annulment under the ICSID Convention are listed exhaustively in Article 52(1).¹⁷ Usually, annulment is possible if there has been a serious departure from a fundamental rule of procedure or if other limited grounds exist which relate to the tribunal's jurisdiction, conduct, or the scope of its mandate. In the event of an annulment based on a failure of procedure, two elements are required. First, such failure must be fundamental in that it goes to the heart of the integrity of arbitration proceedings. Second, it must be so substantial and material that it deprives a party of the protection the rule was intended to provide.¹⁸

Thus, the ICSID Convention offers its own self-contained system for review and makes clear that Article 53¹⁹ "imposes a direct obligation to comply with the terms of ICSID awards"²⁰ independently from the nature of the enforcement mechanism that may be used in the case of the non-compliance.

2. *The Regime for the Enforcement of Arbitral Awards Under the ICSID Convention*

Until recently, the nuances of recognition and enforcement seemed to present an issue more theoretical than practical. Indeed, in most cases, States have complied with awards rendered against them, without claimants needing to pursue enforcement.²¹ Consequently, the concepts of "enforcement" and "execution" have never led to an in-depth analysis. However, recent cases have brought into the spotlight the nature of two specific provisions contained in Section 6 of the ICSID Convention, as well as their relationship.

17. ICSID Convention, *supra* note 1, art. 52(1). See generally Christoph Schreuer, *ICSID Annulment Revisited*, 30 LEGAL ISSUES ECON. INTEGRATION 103 (2003) (overviewing and summarizing past annulment cases under ICSID).

18. Cummins & Sidhu, *supra* note 10.

19. ICSID Convention, *supra* note 1, art. 53.

20. Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 322, 326 (Christina Binder et al. eds., 2009).

21. Parra, *supra* note 12, at 9.

Section 6 of the ICSID Convention, which is comprised of Articles 53, 54, and 55, is titled “Recognition and Enforcement of the Award.” As mentioned above, first, Article 53(1) states that “[t]he 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 Convention.”²²

Second, Article 54(1) of the ICSID Convention requires each Contracting State to “*recognize* an award rendered pursuant to the Convention as binding and to *enforce* the pecuniary obligations imposed by the award as if it were a final judgment of the State’s courts.”²³ According to various scholars, “recognition” is “the formal certification that an ICSID award is a final and binding disposition of contested claims,” and its primary purpose is “to confirm the *res judicata* effect of an award.”²⁴ Therefore, domestic courts cannot, under the ICSID Convention, review an arbitral award; otherwise it would constitute a Treaty violation.²⁵ Moreover, the use of the word “enforce” in Article 54(1) has been widely discussed in connection with the question of whether the enforcement of an arbitral award really has a distinct meaning from its “recognition” or its “execution.” On one hand, Lucy Reed²⁶ and Jan Paulsson²⁷ have acknowledged that it might be difficult to distinguish between enforcement and recognition.²⁸ According to these authors, the terms “recognition” and “enforcement” are usually used in the same sentence in order to refer to “all steps leading up to, but stopping short of, actual execution of an award.”²⁹ On the other hand, Christoph Schreuer,³⁰ relying on

22. ICSID Convention, *supra* note 1, art. 53(1).

23. ICSID Convention, *supra* note 1, art. 54(1) (emphasis added).

24. LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* 178 (2d ed. 2011).

25. *Id.* at 179.

26. Lucy Reed is global co-head of Freshfields Bruckhaus Deringer’s international arbitration and public international law groups. Profile of Lucy Reed, CHAMBERS AND PARTNERS, <http://www.chambersandpartners.com/asia/person/30733/lucy-reed> (last visited May 28, 2016).

27. Jan Paulsson previously headed the global arbitration and public international law groups at Freshfields Bruckhaus Deringer and is a founding partner of Three Crowns. Profile of Jan Paulsson, THREE CROWNS, <https://www.threecrownsllp.com/team/jan-paulsson/> (last visited May 28, 2016).

28. REED, PAULSSON & BLACKABY, *supra* note 24, at 179.

29. *Id.*

the French³¹ and Spanish³² texts of the ICSID Convention, which do not use the term “enforcement,” understand the term “enforcement” to mean the same as “execution” unless indicated otherwise.³³ Finally, the New York City Bar Committee on International Commercial Disputes reached the following conclusion:

(1) ‘recognition’ refers to confirmation or certification of an ICSID award as a final and binding disposition of claims, with *res judicata* effect; (2) ‘enforcement’ refers to converting the ICSID award into a judicial judgment that orders an award debtor to comply with the award, including paying any monetary sum due; and (3) ‘execution’ refers to coercive measures that an award creditor may take when an award debtor refuses to pay the converted award voluntarily.³⁴

In addition, under Article 54(2) of the ICSID Convention, recognition and enforcement of the award may be obtained from the competent court of a Contracting State on simple

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31. Section 6 of the French version of the ICSID Convention is entitled “De la reconnaissance et de l’exécution de la sentence », and the term “execution” is used in lieu of “enforcement”. Convention pour le Règlement des Différends relatifs aux Investissements entre Etats et Ressortissants d’autres Etats [Convention du CIRDI] (Washington, 18 March 1965), 575 U.N.T.S. 159; 17 U.S.T. 1270; T.I.A.S. No. 6090, *entered into force* 14 Oct. 1966.

32. Section 6 of the Spanish version of the ICSID Convention is entitled “Reconocimiento y ejecución del laudo », and the term “ejecución” is used in lieu of “enforcement”. Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados, [Convenio del CIADI] (Washington, 18 March 1965), 575 U.N.T.S. 159; 17 U.S.T. 1270; T.I.A.S. No. 6090, *entered into force* 14 Oct. 1966.

33. CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 1134–36 (2d ed. 2009). (“[T]he interpretation that best reconciles the three texts would appear to be that the words ‘enforcement’ and ‘execution’ are identical in meaning. This more plausible than the alternative of giving different meaning to the same French and Spanish words in paras. 1 and 2 on the one hand and in para. 3 on the other.”).

34. COMM. ON INT’L COMMERCIAL DISPUTES, *supra* note 13, at 6.

presentation of a copy of the award certified by the Secretary-General of ICSID.³⁵ As discussed below, this provision has largely been ignored by courts when trying to interpret the substance of the ICSID Convention.

As noted by Stanimir Alexandrov,³⁶ “Articles 53 and 54 impose two separate obligations.”³⁷ On one hand, Article 53(1) relates to the parties’ obligation to “abide by and comply with the award.”³⁸ On the other hand, Article 54 requires all contracting States to the ICSID Convention to recognize and enforce any decision rendered by an ICSID tribunal. Interestingly, although the first obligation relates solely to the parties of a specific case, the second requirement involves any signatory member of the ICSID Convention. Moreover, according to Alexandrov, Article 54 comes into play only when the losing party violates Article 53 and refuses to comply with an award.³⁹

However, the ICSID Convention regime does not extend to the execution of the award.⁴⁰ According to Article 54(3) of the ICSID Convention, the law in force in the country where execution is sought governs such execution.⁴¹ In other words, this provision preserves the rights of the judgment debtor under the local laws of the particular State in which enforcement is sought.⁴² Interestingly, this provision relates only to the execution, and no similar language can be found regarding the “recognition” of awards. The reason for this may be, according to Christoph Schreuer, that recognition “is subject only to the requirements of the Convention and may not be refused for reasons of domestic law,”⁴³ and that “States do not have the same procedural flexibility with respect to recognition.”⁴⁴ Thus, although there is an obligation to comply with the terms of an ICSID awards, States are free to set the proce-

35. ICSID Convention, *supra* note 1, art. 54(2).

36. Stanimir Alexandrov is co-leader of the Sidley Austin’s International Arbitration group. Profile of Stanimir A. Alexandrov, SIDLEY AUSTIN, http://www.sidley.com/people/alexandrov_stanimir (last visited May 28, 2016).

37. Alexandrov, *supra* note 20, at 324.

38. *Id.*

39. *Id.*

40. Parra, *supra* note 12, at 3.

41. ICSID Convention, *supra* note 1, art. 54(3).

42. COMM. ON INT’L COMMERCIAL DISPUTES, *supra* note 13, at 7.

43. Schreuer, *supra* note 33, at 1129.

44. *Id.* at 1149.

dure of their choice in order to reach this goal. The only requirement is that any difficulties that may arise under that law “in no way affect the obligation of a party to . . . comply with the award.”⁴⁵ In order to bring some clarity, Article 55⁴⁶ adds: “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.”

Christoph Schreuer, who adopts a literal approach to Articles 54 and 55 of the ICSID Convention, reasons that Article 55 does not apply at the stage of recognition. Schreuer supports the view that “Submission to arbitration may be seen as a waiver of immunity in proceedings to have the award recognized. Therefore, the effect of the award as *res judicata* will apply irrespective of any execution immunity.”⁴⁷ According to this argument, the FSIA should not intervene at the recognition stage, but should only be applied with respect to the execution of arbitral awards. However, this view does not give any guidance regarding the role of the FSIA at the enforcement stage.

B. *United States Enabling Legislation: 28 U.S.C. § 1650a*

1. *Overview of the Enabling Statute*

In the United States, arbitration procedures and other issues are generally regulated by the Federal Arbitration Act (FAA).⁴⁸ Indeed, the Enabling Statute specifically provides that the FAA shall not apply to enforcement of awards rendered pursuant to the ICSID Convention.⁴⁹ Thus, in the United States, the ICSID Convention is statutorily implemented by 22 U.S.C. § 1650a, which states in full:

(a) An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court

45. *Id.*

46. ICSID Convention, *supra* note 1, art. 55.

47. Schreuer, *supra* note 33, at 1129.

48. Federal Arbitration Act, 9 U.S.C. §§ 2–14 (2012) (enacted February 12, 1925).

49. 22 U.S.C. § 1650a (2012).

of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to the enforcement of awards rendered pursuant to the convention

(b) The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have exclusive jurisdiction over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.⁵⁰

2. *The Obligation to Enforce an ICSID Award as if It Were a Final Judgment of a Court in the United States*

The plain language of the Enabling Statute provides that an ICSID award creates a right arising under a treaty of the United States, and that the pecuniary obligations imposed by such an award shall be enforced and given the same “full faith and credit” as if the award were a final judgment of a court in the United States.⁵¹ The expression “full faith and credit” refers to the Full Faith and Credit Clause contained in Article IV of the U.S. Constitution, which requires each U.S. state to recognize the “public acts, records, and judicial proceedings” rendered by the courts of any other state.⁵² Therefore, the Enabling Statute places an international arbitral award rendered within the framework of ICSID arbitration proceedings on an equal footing with domestic decisions rendered by state or federal courts. Accordingly, the full faith and credit obligation, when applied to ICSID awards, reflects the obligation to “treat judgments as final and binding and the same as constituent state judgment.”⁵³

Interestingly, the downside of this concept of “equal footing” is that the requirement under the Enabling Statute to afford “full faith and credit” to ICSID awards may encourage a party contesting recognition or enforcement to argue that the

50. *Id.*

51. COMM. ON INT’L COMMERCIAL DISPUTES, *supra* note 13, at 8.

52. U.S. CONST. art. IV, § 1 (“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”).

53. Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L. L. 675, 693 (2003).

exceptions to the requirement of full faith and credit apply to ICSID awards.⁵⁴ William L. Reynolds⁵⁵ underlined certain exceptions to the application of full faith and credit,⁵⁶ three of which apply to ICSID awards.

First, when a court lacks either personal or subject matter jurisdiction, its judgment is void and, therefore, is not entitled to full faith and credit.⁵⁷ In *Continental Casualty Co. v. Argentina Republic*,⁵⁸ the court noted that the existence of subject matter and personal jurisdiction in an action against a foreign State is governed by the Foreign Sovereign Immunities Act (FSIA).⁵⁹ As such, every action in a district court against a foreign State requires an identifiable exception to sovereign immunity. In that case, the court concluded that there was subject matter jurisdiction because Argentina had waived any foreign sovereign immunity objections to enforcement of an ICSID award under the ICSID Convention.⁶⁰ Moreover, the court held that, in this specific case, there was personal jurisdiction over Argentina under the FSIA because was proper service of process was made and subject matter jurisdiction existed.⁶¹

Second, full faith and credit will not apply to a judgment that was procured by fraud.⁶² Reynolds distinguishes between extrinsic fraud, which could not have been ruled on by the tribunal (*e.g.*, a fraud that deprived defendant of his opportunity to appear and defend) and intrinsic fraud, such as perjured testimony or fabricated documentary evidence.⁶³ However, in the ICSID context, 'intrinsic fraud' is adjudicated by

54. See generally William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994) (discussing the various exceptions to the rule of full faith and credit).

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56. Reynolds, *supra* note 54, at 417–35.

57. *Id.* at 424–30.

58. *Continental Cas. Co. v Argentine Republic*, 893 F. Supp. 2d 747 (E.D. Va. 2012).

59. *Id.* at 750.

60. *Id.* at 751.

61. *Id.* at 752.

62. Reynolds, *supra* note 54, at 422–24.

63. *Id.* at 422–23.

the Tribunal itself, or if the original Tribunal cannot be reconstituted, by a new Tribunal including the same number of arbitrators, and appointed by the same method as the original one.⁶⁴ Therefore, refusing challenges to enforcement or recognition of ICSID awards on the ground of “intrinsic fraud” would not be consistent with the “self-contained” structure of ICSID.⁶⁵ Alternatively, the invocation of ‘extrinsic fraud’ would be limited to circumstances in which a party to an ICSID arbitration has been denied the opportunity to litigate.⁶⁶

Third, the “penal exception” provides that valid criminal judgments are not entitled to full faith and credit,⁶⁷ since “[T]he Courts of no country execute the penal laws of another.”⁶⁸ However, in *Huntington v. Attrill*, the U.S. Supreme Court considerably restricted the scope of this exception to Article IV’s Full Faith and Credit Clause by assigning a narrow meaning to the word “penal.”⁶⁹ The *Huntington* Court required enforcement of a judgment unless that judgment was based upon a statute that is penal in the “international sense.”⁷⁰ The Court then noted that whether a statute is penal in the international sense “depends upon . . . whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.”⁷¹

Thus, it seems that the exceptions mentioned above constitute extraordinary and limited defenses to full faith and credit and should not constitute a significant obstacle when enforcing ICSID awards in the United States. Therefore, ICSID awards should, in the vast majority of cases, be enforceable through the mechanism contained in the Enabling Statute.

64. See ICSID R. ARB. P. 51(3).

65. COMM. ON INT’L COMMERCIAL DISPUTES, *supra* note 13, at 12.

66. *Id.*

67. Reynolds, *supra* note 54, at 434–35.

68. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

69. *Huntington v. Attrill*, 146 U.S. 657 (1892).

70. *Id.* at 673.

71. *Id.* at 673–74.

C. *The Foreign Sovereign Immunities Act*

1. *Overview of the FSIA*

Traditionally, one attribute of sovereignty has been a State's immunity from judicial coercion both in its own courts and in the courts of other nations.⁷² However, the source of this immunity differs depending upon the *situs* of the claim. Indeed, a sovereign's immunity in its own courts is usually a right—although the sovereign may sometimes be sued if consent is given in the domestic legislation—whereas in foreign courts, such immunity is a privilege.⁷³ The United States has always recognized this attribute of sovereignty with respect to all other States.⁷⁴ There are two main approaches to sovereign immunity: absolute sovereign immunity and restrictive sovereign immunity. The first approach is called “structuralist” (*rationae personae*) and centers on the status of the party claiming sovereignty. The second approach is called “functionalist” (*rationae materiae*) and focuses on the subject matter forming the basis for the claim of sovereign immunity.⁷⁵ Although it is not accurate to allege that the former has been completely eradicated, it appears that the restrictive sovereign immunity approach has become more prominent in practice over the last few decades.⁷⁶

Since 1863, the United States has gradually lessened the privilege to sovereign immunity with respect to commercial

72. See *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (quoting Chief Justice Marshall: “One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.”).

73. William H. Reeves, *The Foreign Sovereign Before United States Courts*, 38 *FORDHAM L. REV.* 455, 455 (1970).

74. *Id.* at 456.

75. A.F.M. Maniruzzaman, *State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends*, *DISP. RESOL. J.*, Aug.–Oct. 2005, at 76, 78.

76. *Id.* (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 331 n.31 (5th ed. 1998) (noting that Brazil, Bulgaria, China, Czechoslovakia, Ecuador, Hungary, Japan, Poland, Portugal, Sudan, Syria, Thailand and Tobago, the former USSR and Venezuela still accept the principle of absolute immunity)).

acts of sovereigns and for torts committed by a sovereign or by its agents.⁷⁷ In 1976, ten years after the passage of the Enabling Statute, Congress codified the theory of sovereign immunity in the FSIA, under which a State is entitled to immunity with respect to its sovereign or public acts (acts “*jure imperii*”), but not those acts that are private or commercial in character (acts “*jure gestionis*”).⁷⁸

States generally benefit from two forms of immunity: immunity from jurisdiction and immunity from execution.⁷⁹ A State’s immunity from jurisdiction results from the belief that it would be inappropriate for one State’s courts to call another State under its jurisdiction.⁸⁰ Therefore, State entities are immune from the jurisdiction of the courts of another State. However, this immunity may be waived.⁸¹ States will also have immunity from execution, under the theory that it would be improper for the courts of one State to seize the property of another State.⁸² Immunity from execution may also generally be waived.⁸³ Regarding the former, the FSIA provides the sole basis for obtaining jurisdiction over a foreign State in U.S. courts.⁸⁴ The FSIA provides that, “subject to international agreements to which the United States was a party at the time of enactment in 1976, a foreign State,” or its agencies and instrumentalities, “is immune from the jurisdiction of courts in the United States unless one of the specific exceptions in the

77. Act of March 3, 1863, ch. 92, §2, 12 Stat. 765 (permitting direct suits against the United States).

78. Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 (2012).

79. JEFFREY DELMON, *PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: PROJECT FINANCE, PPP PROJECTS AND RISK* 239 (2d ed. 2005).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (concerning Liberian corporations attempting to sue the Argentine Republic before the American domestic courts, on the basis of the Alien Tort Statute. The Supreme Court rejected this ground and concluded that jurisdiction over foreign states is not conferred Under the Alien Tort Statutes—only the FSIA can be the source of jurisdiction over a foreign state); *see also Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (concluding that unless the action is based upon a commercial activity in the manner of a private player within the market, foreign states are entitled to immunity for the jurisdiction of courts in the United States).

statutes applies.”⁸⁵ Regarding the latter, the FSIA also provides for the modalities of execution⁸⁶ of a judgment against a foreign sovereign. However, as will be discussed in further detail below, the interplay between the concept of immunity of execution in the FSIA and the enforcement of ICSID awards is subject to different interpretations by U.S. federal courts.

2. *The Interplay Between the FSIA and ICSID Arbitration*

The FSIA includes a number of exceptions to sovereign immunity from litigation in the United States. First, U.S. courts may confirm an arbitral award against a sovereign that is “governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.”⁸⁷ Another exception is where the foreign State involved “has waived its immunity either explicitly or by implication.”⁸⁸ Moreover, there is no immunity from jurisdiction when the award stems from the foreign state’s commercial activities in the United States or on an act performed in the United States in connection with the foreign state’s non-U.S. based commercial activity.⁸⁹ It has traditionally been understood that a State or a State-owned enterprise that is legally part of the State itself can waive immunity either expressly or implicitly by a contractual provision or an arbitration clause in a contract with another party.⁹⁰ Consent by a State-enterprise to arbitration under the aegis of the ICSID constitutes, on its part or that of the State involved, an irrevocable waiver of immunity from suit.⁹¹ However, participation by a State or a State entity to ICSID arbitration proceedings should not be interpreted as an implicit waiver of immunity from execution.⁹² Thus, such consent to arbitrate does not it-

85. See U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 311 (2009).

86. 28 U.S.C. § 1609.

87. *Id.* § 1605(a)(6)(B).

88. *Id.* § 1605(a)(1).

89. *Id.* § 1605(a)(2).

90. Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 313, 314-15 (Julian D.M. Lew ed., 1987).

91. *Id.* at 316.

92. A.F.M. Maniruzzaman, *Sovereign Immunity and the Enforcement of Arbitral Awards Against State Entities: Recent Trends in Practice*, in AMERICAN ARBITRA-

self constitute consent to the court's enforcement of the resultant award.⁹³ The International Law Commission has adopted this position,⁹⁴ and commentators have noted this dichotomy.⁹⁵

The FSIA also provides certain procedural protections to foreign sovereigns subject to U.S. court action under the FSIA. Among other things, section 1608 of the FSIA provides alternative procedures to ensure that the foreign sovereign is served with the summons and complaint in the action against it and affords to the foreign State a full sixty days after service has been made to answer the pleadings.⁹⁶ Also, the FSIA added a new item to the venue provisions in 28 U.S.C. § 1391, to provide that the proper venue for a suit against a foreign State is in federal district court in either Washington, D.C., or in the judicial district where a substantial part of the activity resulting in the claim occurred.⁹⁷

Regarding the execution of ICSID awards, arbitration under the auspices of the ICSID necessarily involves a foreign sovereign. As mentioned previously, Articles 54(3) and 55 of the ICSID Convention⁹⁸ provide that the execution of ICSID awards is governed by the laws of the State in which execution is sought and is subject to the sovereign immunity laws of that State. Accordingly, the execution of an ICSID award in the United States implicates the FSIA. The FSIA grants extensive protections to foreign sovereigns regarding the execution of judgment. For instance, pursuant to 28 U.S.C. § 1610(c), a party seeking to execute a judgment against a foreign sovereign must first make a motion to the district court explaining why it believes that a reasonable period of time has elapsed and why execution should be permitted.⁹⁹ The FSIA also pro-

TION ASSOCIATION, HANDBOOK ON INTERNATIONAL ARBITRATION PRACTICE 346 (2010).

93. *Id.* at 345.

94. Int'l Law Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 13–62 (1991) (Draft Articles on Jurisdictional Immunities of States and Their Property with Commentaries).

95. JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 272 (1999).

96. Foreign Sovereign Immunity Act, 28 U.S.C. § 1608 (2012).

97. *Id.* § 1610.

98. ICSID Convention, *supra* note 1, arts. 54(3), 55.

99. *See* Ned Chartering & Trading Inc. v. Republic of Pakistan, 130 F. Supp. 2d 64, 67 (D.D.C. 2001); *see also* Ferrostaal Metal Corp. V. S.S. Lash

fects foreign sovereigns by limiting the property that is subject to execution to the ones that are used for a commercial activity¹⁰⁰ and by listing certain types of assets or properties that are immune from execution, notwithstanding their eventual commercial purpose.¹⁰¹

Thus, the FSIA provides immunity to sovereign States from both jurisdiction and execution, under certain conditions.

D. *New York Civil Practice Law and Rules*

As will be seen in Section II, the enforcement of ICSID awards has only been sought in three jurisdictions: Virginia, the District of Columbia, and New York. However, federal courts in New York are unique in that they rely on a local legal instrument in order to accept *ex parte* enforcement of an ICSID award, namely the New York Civil Practice Law and Rules (CPLR). New York law contains a clear and simplified procedure regarding the enforcement of "foreign" judgments, *i.e.*, judgments issued by courts located in other U.S. states or other nations. Accordingly, Section 5402 of the CPLR states:

(a) Filing. A copy of any foreign judgment authenticated in accordance with an act of congress or the statutes of this state may be filed within ninety days of the date of authentication in the office of any county clerk of the state. The judgment creditor shall file with the judgment an affidavit stating that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment debtor.

(b) Status of foreign judgments. The clerk shall treat the foreign judgment in the same manner as a judgment of the supreme court of this state. A judgment so filed has the same effect and is subject to the same

Pacifico, 652 F. Supp. 420, 423 (S.D.N.Y. 1987) (stating that what constitutes a "reasonable period of time" is within the broad discretion of the court and depends upon the facts and circumstances of each case).

100. 28 U.S.C. § 1610(a).

101. *Id.* § 1611.

procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the supreme court of this state and may be enforced or satisfied in like manner.¹⁰²

In *Keeton v. Hustler Magazine*, the Second Circuit noted that Section 54 of the CPLR establishes “procedures designed to facilitate the registration of foreign, or out-of-state, judgments, for New York will, with specified exceptions, simply recognize a foreign judgment as its own, rather than require a separate action on the judgment.”¹⁰³ Section II of this article will show how federal courts in the Southern District of New York have relied on the simplified procedure provided by Section 54 of the CPLR in the context of the enforcement of ICSID awards in the United States.

The treaty and statutory framework that regulates the recognition and enforcement of an ICSID award in the United States appears to be unclear. As previously stated, at the international level, the ICSID Convention contains an autonomous and simplified regime designed to facilitate the enforcement of awards rendered by ICSID tribunals. However, at the domestic level, the Enabling Statute and the FSIA do not address the practical steps for the enforcement of an ICSID award, leaving this question for the U.S. courts.

III. CASE LAW

Although the Enabling Statute provides that U.S. courts must enforce every arbitral award rendered pursuant to the ICSID Convention as if it were a final judgment of a court in the United States, what procedures federal courts may use in order to enforce ICSID awards in the United States remains unsettled. This section will briefly present the international case law, primarily from French domestic courts and also from English courts, before analyzing the U.S. approach regarding the enforcement of ICSID awards. In a nutshell, U.S. courts disagree about the procedure for the enforcement of ICSID awards and have adopted two very different approaches. Some have allowed creditors who seek the recognition and the enforcement of an ICSID award to do so via an *ex parte* proce-

102. N.Y. CPLR § 5402 (McKinney 2015).

103. *Keeton v. Hustler Magazine, Inc.*, 815 F.2d 857, 860 (2d Cir. 1987).

dure. However, in order to reach a similar objective, some courts have instead interpreted the FSIA as requiring the creditor to file a plenary action.

A. *International Case Law*

1. *France: Benvenuti & Bonfant v. Congo and SOABI v. Senegal*

Benvenuti & Bonfant was the first case¹⁰⁴ to deal with the enforcement of an ICSID award. In 1973, Benvenuti & Bonfant (Benvenuti), an Italian company, entered into an agreement with the government of the Republic of the Congo—then known as the People's Republic of the Congo¹⁰⁵—to set up a company to manufacture plastic bottles and produce mineral water. However, the Congolese government decided to nationalize Benvenuti's investment two years later. Benvenuti initiated ICSID proceedings and an award was subsequently rendered in its favor on August 8, 1980.¹⁰⁶ When the government refused to pay, Benvenuti took the step of locating Congo's assets in France and attempted to have the award enforced and executed there. The Paris *Tribunal de Grande Instance* recognized the award with the grant of an *exequatur* (leave for enforcement) on December 28, 1980.¹⁰⁷ The court order was made subject to a condition that Benvenuti would need to obtain prior authorization for any measures of execution in order to ensure the immunity of sovereign public assets. Benvenuti objected to the condition as precluding the concrete enforcement of the ICSID award and confusing the different concepts of "recognition" and "enforcement" as compared to "execution", and appealed the decision.¹⁰⁸ On June 26, 1981, the Paris Court of Appeal admitted the appeal with

104. Parra, *supra* note 12, at 3.

105. *Republic of Congo Profile*, BBC NEWS (Mar. 29, 2016), <http://www.bbc.com/news/world-africa-14121195>.

106. *Benvenuti & Bonfant Co. v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award (Aug. 8, 1980), 1 ICSID Rep. 330 (1993), *translated in* 21 INT'L LEGAL MATERIALS 740.

107. *Tribunal de grande instance [TGI]* [ordinary court of original jurisdiction] Paris, Jan. 13, 1981, 108 *Journal du droit international* 365 (1981) (Fr.).

108. Alan S. Alexandroff & Ian A. Laird, *Chapter 29: Compliance and Enforcement*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 1178 (Peter Muchlinski et al. eds., 2008).

respect to the restrictive conditions and amended the lower court's order.¹⁰⁹ The Paris Court of Appeal concluded that Article 54 of the ICSID Convention had laid down an *ex parte* procedure for obtaining recognition of ICSID awards and that municipal courts were limited to ensuring that the award before them was authentic and properly certified by the Secretary-General of ICSID.¹¹⁰ In other words, the court acknowledged the distinction between the first-stage process of granting *exequatur*, which it characterized as simply a preliminary measure of recognition, and the second stage measure of execution, at which point the court could become involved in addressing the question of immunity.¹¹¹

The second French case involved the Société Ouest Africaine des Bétons Industriels (SOABI) in an ICSID dispute against the Republic of Senegal, regarding a project for the construction of low income housing in Dakar, as well as a related project to build and operate a factory for the prefabrication of reinforced concrete. An ICSID Tribunal rendered an award in favor of SOABI on February 25, 1988,¹¹² and SOABI subsequently obtained an order recognizing the award with the grant of *exequatur* from the Paris *Tribunal de Grande Instance* on November 14, 1988.¹¹³ Senegal appealed the lower court decision.¹¹⁴ On December 5, 1989, the Paris Court of Appeal vacated the award¹¹⁵ on the ground that Senegal "did not waive its right to invoke its immunity from [execution]," and that SOABI had not demonstrated that execution of the award in France would not affect assets related to Senegal's exercise of sovereignty.¹¹⁶ Moreover, the Paris Court of Appeal found that the execution of the award in France would be contrary to

109. Cour d'appel [CA] [regional court of appeal] Paris, June 6, 1981, 1 ICSID Rep. 369 (1993), *translated in* 20 INT'L LEGAL MATERIALS 878.

110. *Id.* at 880.

111. Alexandroff & Laird, *supra* note 108, at 1177-1778.

112. Société Ouest Africaine des Bétons Industriels (SOABI) v. Sénégal, ICSID Case No. ARB/82/1, Award, (Feb. 25, 1988), 2 ICSID Rep. 114 (1994), 6 ICSID REV. —FOREIGN INT'L L.J. 125 (1991) (Fr.).

113. Alexandroff & Laird, *supra* note 108, at 1171. The decision against the claimant of the *Tribunal de Grande Instance* has not been published.

114. Cour d'appel [CA] [regional court of appeal] Paris, Dec. 5, 1989, Société Ouest Africaine des Bétons Industriels v. Senegal, *translated in* 5 ICSID REV. —FOREIGN INT'L L.J. 135 (1990) (Fr.).

115. *Id.* at 138.

116. *Id.*

public policy since it would violate the principle of immunity.¹¹⁷ However, on June 11, 1991, the Court of Cassation¹¹⁸ quashed and annulled the decision of the Court of Appeal.¹¹⁹ The Court of Cassation reached the conclusion that under the ICSID Convention, *exequatur* would be granted to arbitral awards without constituting an act of "execution," which could give rise to immunity issues. In other words, the Court concluded that "the ICSID Convention had in its Articles 53 and 54 created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the Code of Civil Procedure and the remedies provided therein."¹²⁰

In *SOABI v. Sénégal*, the Court of Cassation followed the path of the Paris Court of Appeal in *Benvenuti & Bonfant* by distinguishing between the recognition and enforcement of an ICSID award, where there should be no issues of sovereign immunity, and its execution. Thus, French courts have held in two separate and unique cases on this issue that the recognition, the enforcement and the execution of an ICSID award are three distinct steps.

2. *United Kingdom: AIG Partners v. Kazakhstan*

In *AIG Partners v. Kazakhstan*,¹²¹ the dispute was related to the execution of an ICSID award itself, rather than its enforcement. In this case, notwithstanding Article 54(1) of the ICSID Convention, the claimant found itself unable to execute against certain assets in the face of sovereign immunity principles.

AIG Capital Partners (AIG) had formed a joint venture relating to a construction project with the Republic of Kazakhstan. However, the city of Almaty transferred all project prop-

117. *Id.* at 136.

118. The Court of Cassation is the highest court in the French judiciary. *About the Court*, Cour de Cassation, https://www.courdecassation.fr/about_the_court_9256.html (last visited May 28, 2016).

119. Cour de cassation [Cass.] [supreme court for judicial matters] June 11, 1991, *Société Ouest Africaine des Bétons Industriels (SOABI) v. Sénégal*, translated in 6 ICSID REV. —FOREIGN INT'L L.J. 598 (Fr.).

120. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1131–32 (2d ed. 2009).

121. *See generally* *AIG Capital Partners Inc. v. Republic of Kazakhstan*, [2005] EWHC (Comm) 2239, 1 WLR 1420 (Eng.).

erty to itself and provided no compensation. AIG Partners started ICSID proceedings under the United States–Kazakhstan Bilateral Investment Treaty (BIT).¹²² In October 2003, the Tribunal rendered an award in which Kazakhstan was found to have breached the BIT by failing to compensate the claimant, and was ordered to pay AIG damages of U.S. \$9.9 million.¹²³

Since Kazakhstan did not pay, AIG sought, and obtained, leave to register the award in the High Court of Justice in the United Kingdom.¹²⁴ Then AIG obtained interim charging orders and third-party debt orders in respect of certain securities and cash, respectively held by third parties pursuant to a global custody agreement with the National Bank of Kazakhstan (“NBK”).¹²⁵ However, the NBK argued that those assets were the property of the NBK, and thus, they were subject to sovereign immunity under Section 14(4) of the State Immunity Act (1978),¹²⁶ which provides that the property of a central bank is deemed not to be in use, or intended for use, for commercial purposes.¹²⁷ On October 20, 2005, the court concluded that the wording of section 14(4) of the 1978 State Immunity Act was “clear and imperative” and extended to all property of a central bank, notwithstanding how the central bank holds the property or the purpose of which it is held.¹²⁸ In addition, the court determined that even if the assets were those of Kazakhstan, they were property of the State that was not for commercial purposes because the management of the State’s economy and revenue constitutes a sovereign activity.¹²⁹

AIG Partners v. Kazakhstan is interesting for a reason that is distinct from *Benvenuti & Bonfant* and *SOABI v. Sénégal*. In the

122. *Id.* ¶ 4.

123. AIG Capital Partners, Inc. v. Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award, 118–119 (Oct. 7, 2003), 11 ICSID Rep. 7 (2007). See Alexandroff & Laird, *supra* note 108, at 1181 (calculating cost of damages paid).

124. Alexandroff & Laird, *supra* note 108, at 1181.

125. AIG Capital Partners, Inc., 11 ICSID Rep. 7 at §1. See Alexandroff & Laird, *supra* note 108, at 1181.

126. State Immunity Act 1978, c.33, § 14 (Eng.).

127. AIG Capital Partners, Inc. 11 ICSID Rep. 7 at § 28. See Alexandroff & Laird, *supra* note 108, at 1181.

128. AIG Capital Partners, Inc. 11 ICSID Rep. 7 at § 57. See Alexandroff & Laird, *supra* note 108, at 1182.

129. *Id.* §92. See Alexandroff & Laird, *supra* note 108, at 1182.

French cases, the French courts explicitly drew a distinction between the recognition and enforcement phase, and the execution stage, based on their interpretation of Article 53 and 54 of the ICSID Convention. In *AIG Partners v. Kazakhstan*, the claimant obtained an “automatic” leave to register the award in the High Court of Justice, and sovereign immunity issues were raised at the execution stage. Therefore, it can be deduced from this case that the English courts draw an implicit distinction between recognition and enforcement, which would consist of the registration of the ICSID award, and execution, to which the 1978 State Immunity Act would apply. This interpretation appears to be consistent with the French courts’ approach in both *Benvenuti* and *SOABI*.

B. *Procedures for the Enforcement of ICSID Awards in the United States*

1. *Ex Parte Recognition: Arguments in Favor and Related Issues*
 - a. *Cases Where the Creditor Petitioned Ex Parte for Entry of Judgment*

On various occasions, U.S. courts have been presented with an *ex parte* application to recognize an ICSID award. By definition, an *ex parte* decision is one decided by a judge without requiring all of the parties to the controversy to be present.¹³⁰ Prior to 2015, only five federal district court cases had addressed the *ex parte* recognition of an ICSID award, all issued by the federal district court for the Southern District of New York. Each of these cases will be addressed below.

The U.S. courts had to deal with the issue of recognition and enforcement of ICSID awards for the first time in *LETCO v. Liberia*.¹³¹ In this case, the award creditor obtained an ICSID award against the Republic of Liberia.¹³² It then petitioned *ex*

130. 2 ‘LAI OSHITOKUNBO OSHISANYA, AN ALMANAC OF CONTEMPORARY JUDICIAL RESTATEMENTS (CIVIL LAW) 710 (2015).

131. There are three U.S. District Court decisions published in regard to the LETCO enforcement proceedings: (1) *In re Liberian Timber Co.* (*Timber I*), No. M-68, 1986 U.S. Dist. LEXIS 31062 (S.D.N.Y. Sept. 5, 1986); (2) *Liberian E. Timber Corp. v. Republic of Liberia* (*Timber II*), 650 F. Supp. 73 (S.D.N.Y. 1986); (3) *Liberian E. Timber Corp. v. Republic of Liberia* (*Timber III*), 659 F. Supp. 606 (D.D.C. 1987).

132. *Liberian E. Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award (Mar. 31, 1986), 2 ICSID Rep. 346 (1994).

parte the federal district court for the Southern District of New York for entry of judgment and for the issuance of writs of execution permitting it to begin enforcing that judgment. The Part I¹³³ judge granted LETCO's petition in both respects.¹³⁴ However, the court provided no rationale for the *ex parte* nature of the order and judgment. Notified of the Part I judgment, Liberia then moved to vacate it.¹³⁵ The federal district court for the Southern District of New York denied the motion to vacate.¹³⁶ It reasoned that first, Article 54 of the ICSID Convention obliges the United States, as a contracting party, "to recognize and enforce the pecuniary obligation of the award;"¹³⁷ second, Liberia, as a Convention signatory, *waived* its sovereign immunity with respect to recognition "of any arbitration award entered pursuant to the Convention;"¹³⁸ and third, "Liberia clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award."¹³⁹ Notwithstanding the foregoing, the court dissolved the writs of execution—writs granted prior to affording Liberia the right to be heard—on the ground that the assets that were the subject of the writs were immune from execution under the FSIA.¹⁴⁰

In the following years, judgments using an *ex parte* procedure and recognizing ICSID arbitral awards were entered, without a written decision, in two other cases brought before the federal district court for the Southern District of New York: *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*¹⁴¹

133. In the Southern District of New York, Part I refers to a special motion part that addresses expedited or emergency applications. The judges in the Southern District take turns serving as the Part I judge for two-week periods. S.D.N.Y. Rules for the Division of Business Among District Judges, Rule 3, <http://www.nysd.uscourts.gov/rules/rules.pdf>.

134. *Liberian E. Timber Corp.*, 2 ICSID Rep. 346 (1994) at 75.

135. *Alexandroff & Laird*, *supra* note 108, at 1180.

136. *Timber II*, 650 F. Supp. at 77.

137. *Id.* at 76.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M-82, Dkt. 26, Ex. 3 (S.D.N.Y. Nov. 20, 2007) (order recognizing ICSID award and entering as a judgment).

and *Sempra Energy Int'l v. Argentine Republic*.¹⁴² The propriety of an *ex parte* recognition proceeding does not appear to have been raised in these matters. Indeed, it appears that the award debtor did not object to the entry of judgment.¹⁴³ In each case, the award creditor filed an affidavit and a certified copy of its ICSID award before the federal district court for the Southern District of New York, that recognized the awards and entered judgment on an *ex parte* basis.¹⁴⁴ In both *Enron* and *Sempra*, the court relied on both the wording of Articles 53 and 54 of the ICSID Convention, and the Enabling Statute, and did not require that notice of the judgment be served on the judgment debtor.¹⁴⁵

The federal district court for the Southern District of New York decided to address the proper recognition procedure for ICSID awards in 2009, in *Siag v. Arab Republic of Egypt*.¹⁴⁶ Acting *ex parte*, the ICSID award creditors submitted a certified copy of the award in the underlying arbitration, a proposed judgment incorporating the pecuniary obligations of the ICSID award and an affidavit stating that the proposed judgment was not obtained by default in appearance and that it is unsatisfied.¹⁴⁷ The court directed the award creditors to brief whether the sovereign was entitled to advance notice and an opportunity to be heard. After briefing, the court entered judgment for the creditors, upholding their *ex parte* application. The court adopted a two-step approach. First, the court relied on both Article 54(1) of the ICSID Convention, according which, "[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 a court of a constituent state"¹⁴⁸ and

142. *Sempra Energy Int'l v. Argentine Republic*, No. M-82, Dkt. 26, Ex. 3 (S.D.N.Y. Nov. 14, 2007) (order recognizing ICSID award and entering as a judgment).

143. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573, 580 (S.D.N.Y. 2015).

144. COMM. ON INT'L COMMERCIAL DISPUTES, *supra* note 13, at 20.

145. *Id.* at 20–21.

146. *Siag v. Arab Republic of Egypt*, No. M-82, 2009 U.S. Dist. LEXIS 54066 (S.D.N.Y. June 19, 2009).

147. COMM. ON INT'L COMMERCIAL DISPUTES, *supra* note 13, at 21.

148. *Siag v. Arab Republic of Egypt*, 2009 U.S. Dist. LEXIS 54066, at *2 (quoting ICSID Convention Article 54(1)).

the Enabling Statute, by affording the full faith and credit.¹⁴⁹ Then, the court considered that it was appropriate for a federal court in New York to “adopt the procedures of Article 54 of the [Civil Practice Law and Rules] (CPLR) to effectuate the entry of judgment for an award rendered under the ICSID Convention.”¹⁵⁰ *Siag* thus identified CPLR Article 54 as the appropriate mechanism for converting ICSID awards into judgments, through an expeditious registration procedure for New York to register an out-of-state judgment that is entitled to full faith and credit.¹⁵¹

Finally, in *Grenada v. Grynberg*,¹⁵² the award creditor—unusually, a sovereign State—relied on the wording of the ICSID Convention and mentioned the outcomes in *Enron*, *Sempra*, and *Siag*. On April 29, 2011, the court entered the *Grenada* award as a “final judgment of [the] court.”¹⁵³

b. *Cases Rejecting the Arguments in Favor of a Plenary Action*

Two cases before the federal district court for the Southern District of New York, silent regarding the proper procedure to follow, may be understood as favoring *ex parte* proceedings: *Funnekotter v. Republic of Zimbabwe*¹⁵⁴ and *Blue Ridge Invs., LLC v. Republic of Argentina*.¹⁵⁵

In *Funnekotter v. Republic of Zimbabwe*, the petitioners stated in their Petition to Confirm Arbitration Award Pursuant to the Enabling Statute that the federal district court for the Southern District of New York “applies New York state procedural law in adjudicating an ICSID award”,¹⁵⁶ by relying on the *Siag* decision.¹⁵⁷ The court did not discuss whether the *Siag* ap-

149. *Id.*

150. *Id.* at *6.

151. *Id.*

152. *Grenada v. Grynberg*, No. 11 Misc. 45, Dkt. 26, Ex. 3 (S.D.N.Y. Apr. 29, 2011).

153. COMM. ON INT’L COMMERCIAL DISPUTES, *supra* note 13, at 25-26.

154. *Funnekotter v. Republic of Zimbabwe*, Case No. 1:09-cv-8168 (CM), 2011 U.S. Dist. LEXIS 14915 (S.D.N.Y. Feb. 10, 2011).

155. *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72 (2d Cir. 2013).

156. *Funnekotter v. Republic of Zimbabwe*, 2011 U.S. Dist. LEXIS 14915, at *3.

157. COMM. ON INT’L COMMERCIAL DISPUTES, *supra* note 14, at 26 n.82.

proach was valid or consistent with the ICSID Convention and confirmed the arbitration award.¹⁵⁸

In *Blue Ridge Invs., LLC v. Republic of Argentina*, the Second Circuit reviewed the federal district court for the Southern District of New York's foreign sovereign immunity decision, and confirmed that Argentina had waived its immunity from suit, finding that two exceptions to the FSIA were applicable: (1) the "implied waiver exception,"¹⁵⁹ described in 28 U.S.C. § 1605(a)(1), and (2) the "arbitral award exception," described in 28 U.S.C. § 1605(a)(6).¹⁶⁰ However, neither the federal district court for Southern District of New York nor the Second Circuit expressly addressed the possibility of *ex parte* proceedings. Thus, in both cases, the courts did not reject the possibility of *ex parte* proceedings, without addressing it directly.

c. *Current Trends*

In 2015, the federal district court for the Southern Districts of New York once again took the opportunity to analyze whether the use of CPLR Article 54's *ex parte* recognition procedures was proper to confirm an ICSID award in *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*.¹⁶¹ The court underlined the difficulty of *ex parte* procedures since it would not meet the service of process requirement necessary under the FSIA, and thus raised the question of the jurisdiction of federal courts over a foreign sovereign State. In its opinion, the court presented the issue as following:

Does the FSIA require that its service, venue, and other requirements be met—in effect, that a plenary civil action lawsuit be brought—where an ICSID award creditor seeks to convert its award against a foreign sovereign into a federal court judgment? Or, did it leave intact an ICSID award creditor's ability to use the streamlined recognition procedures of a forum state, including *ex parte* recognition proceedings

158. *Funnkotter v. Republic of Zimbabwe*, 2011 U.S. Dist. LEXIS 14915, at *8.

159. *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d at 75.

160. *Id.*

161. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573, 579–80 (S.D.N.Y. 2015).

where state law so provides, as the enabling statute permitted a creditor to do between its enactment in 1966 and the enactment of the FSIA in 1976?¹⁶²

To answer those questions, the court first went through an analysis of the content and the procedural history of the FSIA, and observed that both were silent regarding whether the procedures prescribed were to apply to a conversion of ICSID awards against foreign sovereigns. The issue left unanswered, the court decided to examine the FSIA in a broader context, in order to determine whether interpreting the FSIA as requiring creditors to pursue plenary actions in order to convert their ICSID awards into federal court judgments was contradictory to the ICSID Convention. The court established a comparison between the New York Convention, which allows a party to file a petition to confirm the award without filing a complaint, with the ICSID Convention, whose drafters originally planned to use the New York Convention's recognition and enforcement provisions.¹⁶³ Moreover, many scholars, including Schreuer, urged that the ICSID Convention is a "self-contained regime" with no judicial review, contrarily to the New York Convention, which contains grounds for annulment and refusal of enforcement.¹⁶⁴ Relying on the wording of Articles 53, 54 and 55 of the ICSID Convention, the court in *Mobil Cerro Negro* emphasized the idea that "Contracting States [are] required, without exception, to recognize arbitral awards, but they [are] obliged to *enforce* only the pecuniary obligations of awards."¹⁶⁵ Regarding the Enabling Statute, the court reached the conclusion that Congress' use of the term "full, faith and credit" makes clear that ICSID awards are not "subject to any appeal or to any other remedy."¹⁶⁶ In his decision, Judge Engelmayer rejected all of Venezuela's arguments, including the one that federal district courts for the Southern District of New York were not a proper venue and that this action should have been brought before the federal district court for the District of Columbia.¹⁶⁷ He also noted that there are a number of

162. *Id.* at 590.

163. *Id.* at 593–596.

164. *Id.* at 594–596.

165. *Id.* at 596.

166. *Id.* at 578.

167. *Id.* at 590.

prior federal district court for the Southern District of New York decisions which permitted use of New York State law's *ex parte* recognition procedures to obtain judgments on ICSID arbitral awards.¹⁶⁸

The same month as *Mobil Cerro Negro*, the federal district court for the District of Columbia reviewed an *ex parte* request. In *Miminco v. Democratic Republic of the Congo*, the court issued a short opinion stating that it was "satisfied that *ex parte* proceedings suffice for recognition of ICSID arbitral awards."¹⁶⁹ Such a procedure is consistent with the statutory mandate that ICSID awards "'shall be enforced and shall be given the same full faith and credit' as a state court judgment"¹⁷⁰ and the court concluded that "by filing a certified copy of the award, Petitioners have complied with the requirements of Article 54(2) of the ICSID Convention."¹⁷¹ The court relied on previous decisions issued by the federal district court for the Southern District of New York, and found them in compliance with the Enabling Statute, which, according to the D.C. District court, "authorize[d] *ex parte* recognition of ICSID awards."¹⁷²

A few months after the decision was reached in *Miminco*, ICSID award creditors sought the recognition and the enforcement of an ICSID award before both the federal district court for the District of Columbia and the federal district court for the Southern District of New York, in two cases which came to be known respectively as *Micula I*¹⁷³ and *Micula II*.¹⁷⁴ In *Micula I*, the federal district court for the District of Columbia reached a different view from *Miminco*, as we will see in the following subsection. Conversely, the federal district court for the Southern District of New York remained consistent regarding *ex parte* and summary proceedings. In this case, Romania argued that ICSID Awards can be recognized only through a plenary action after service on a foreign state as required by

168. *Id.* at 579–583.

169. *Miminco v. Democratic Republic of the Congo*, 79 F. Supp. 3d 213, 216 (D.D.C. 2015).

170. *Id.* (quoting 28 U.S.C. § 1650a(a)).

171. *Id.*

172. *Id.* at 216–17.

173. *Micula v. Gov't of Romania (Micula I)*, 104 F. Supp. 3d 42 (D.D.C. 2015).

174. *Micula v. Gov't of Romania (Micula II)*, No. 15 Misc. 107 (Part I), 2015 U.S. Dist. LEXIS 102907 (S.D.N.Y. Aug. 5, 2015).

the FSIA, 28 U.S.C. 1608(a), and cannot be recognized by *ex parte* proceedings. The federal district court for the Southern District of New York heavily relied on *Mobil Cerro Negro*,¹⁷⁵ but also mentioned *Mimingo*,¹⁷⁶ to reject Romania's arguments. Once again, the court went through the language of Articles 53, 54, and 55 of the ICSID Provisions, as well as the Enabling Statute and the FSIA, and concluded that:

Given the spirit of the ICSID Convention (to which the United States is a party), the language of the statute, the clear exceptions to the FSIA that apply and precedent in this District, the expensive and time-consuming process of a plenary proceeding to recognize an ICSID award in the United States is unnecessary as a matter of law.¹⁷⁷

Although in *Micula II* the federal district court for the Southern District of New York court qualifies a plenary action as "unnecessary",¹⁷⁸ in *Siag*, the court did not exclude this possibility.

2. Plenary Action: Arguments in Favor and Issues

In two decisions involving a private company, Duke Energy, and the Republic of Peru,¹⁷⁹ the investor filed an action to confirm an ICSID award and the debtor, the Republic of Peru, first moved to dismiss the action for failure to state a claim, which was denied,¹⁸⁰ before filing a pleading styled as a "motion to deny confirmation."¹⁸¹ Regarding the motion to dismiss, the question presented related to the clarity of the ICSID award in order for the court to determine the applicable interest rate.¹⁸² The federal district court for the District of Columbia answered positively and interpreted the statute as according full faith and credit to the ICSID award.¹⁸³ Regard-

175. *Id.* at *7–12.

176. *Id.* at *7.

177. *Id.* at *8.

178. *Id.*

179. *Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru (Duke Energy I)*, 892 F. Supp. 2d 53 (D.D.C. 2012); *Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru (Duke Energy II)*, 904 F. Supp. 2d 131 (D.D.C. 2012).

180. *Duke Energy I*, 892 F. Supp. 2d. at 56.

181. *Duke Energy II*, 904 F. Supp. 2d. at 132.

182. *Id.* at 132–33.

183. *Id.* at 133–34.

ing the motion to deny confirmation, the court interpreted it as a being a second motion for remand,¹⁸⁴ stating that Peru was seeking “what amounts to a second bite at the apple” and denied it.¹⁸⁵ In addition, regarding “remand”, the court clarified that although it was the only relief available, it should be “an exceptional remedy . . . ‘to avoid if possible, given the interest in prompt and final arbitration.’”¹⁸⁶ The court went further and said remand was only warranted where the award is “so ambiguous that a court is unable to discern how to enforce it.”¹⁸⁷ Although both motions were denied, the court not only supported the plenary action brought by Peru and did not address the issue of *ex parte* proceedings, but also mentioned the exceptional, yet possible option of remand for an ICSID award.

In *Continental Casualty Co. v. Argentine Republic*, the federal district court for the Eastern District of Virginia rejected any distinction between recognition or confirmation of an ICSID award, on the one hand, and enforcement on the other.¹⁸⁸ The court read the Enabling Statute as providing “only for the enforcement of ICSID awards.”¹⁸⁹ Focusing on the statutory text that federal courts should “enforce” an ICSID award as they would a final state court judgment, the court observed that “[t]here is no mechanism for the recognition or confirmation by a federal court of a state court judgment. Unlike state courts that have domestication procedures, there is no procedure in the federal courts for the recognition or confirmation of state court judgments.”¹⁹⁰ Because federal courts do not recognize or confirm state court judgments, the court reasoned, “Congress in implementing the ICSID Convention provided a system for enforcement of awards, not for the recognition or confirmation of awards.”¹⁹¹ Thus, the court concluded that the only available method for converting an ICSID award into a domestic judgment was through the same method by

184. *Id.* at 133.

185. *Id.* at 132.

186. *Id.* at 133 (quoting *Duke Energy I*, 892 F. Supp. 2d at 57).

187. *Id.*

188. *Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 752 (E.D. Va. 2012).

189. *Id.*

190. *Id.* at 753.

191. *Id.* at 753–54.

which a state court judgment could be enforced in federal court, “a suit on the judgment as a debt,” or in other words, a plenary proceeding, which would require service on the foreign government.¹⁹²

As mentioned previously, the cases in the *Micula* saga, where the creditor sought the recognition and the enforcement of its ICSID awards in both the federal district court for the Southern District of New York and for the District of Columbia, led to two very different results. The decision issued by the federal district court for the District of Columbia was delivered three months before the federal district court for the Southern District of New York decision. In this case, the federal district court for the District of Columbia reached the conclusion that “Petitioner Micula must file a plenary action under the [Enabling Statute] to convert his ICSID award into an enforceable judgment in this court.”¹⁹³ According to the court, although the Enabling Statute provides some guidance on how a federal court should convert an ICSID arbitration award into a federal court judgment, it “does not address precisely how a court should go about ‘enforcing’ and ‘giving full faith and credit’ to an ICSID award—whether by complaint, motion, registration, or otherwise.”¹⁹⁴ Surprisingly, the court based this argument on *Mobil Cerro Negro* where the federal district court for the Southern District of New York expressly stated that the Enabling Statute did not contain any specific procedural mechanism in order to convert an arbitral award into a federal judgment.¹⁹⁵ Moreover, the court directly quoted Professors Charles Wright, Arthur Miller, and Edward Cooper, who are leading authorities in federal civil procedure,¹⁹⁶ and reached the conclusion that the application of the full faith and credit statute “is that a federal court must enforce a state court judgment when *an action* is brought for that purpose.”¹⁹⁷ The court focused on the wording of this

192. *Id.*

193. *Micula v. Gov’t of Romania (Micula I)*, 104 F.Supp. 3d 42, 51 (D.D.C. 2015).

194. *Id.* at 48.

195. *Id.*

196. *Id.* at 50 (quoting 18B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4469, at 79 (2d ed. 2002)).

197. *Id.*

statement by including the word "action" in italics, in order to insist on the active aspect of the eventual enforcement of an ICSID award. Finally, the court relied on section (b) of the Enabling Statute and interpreted the use of the words "actions" and "proceedings" as demonstrating a "congressional intent to domesticate ICSID awards through a plenary action, rather than *ex parte* confirmation or recognition."¹⁹⁸ Accordingly, the court concluded that since the Enabling Statute required arbitral awards and state court judgments to be treated similarly, ICSID awards were intended to be enforced by plenary action.¹⁹⁹

IV. ANALYSIS

The *Micula* saga is the perfect illustration of the split between the federal district court for the District of Columbia and the federal district court for the Southern District of New York. While the status of the law on this issue is still somewhat uncertain before the former, the latter has made clear that ICSID award creditors may take advantage of expedited, *ex parte* procedures in seeking recognition of an ICSID award.

The approach in favor of *ex parte* proceedings relies on the plain meaning of the wording of the ICSID Convention and provides that the recognition and the enforcement of an ICSID arbitral award must be made automatically by the domestic courts of the place of enforcement, as provided by Articles 53 and 54 of the ICSID Convention. This seems to be in accordance with Article 31 of the Vienna Convention on the Law of Treaties.²⁰⁰ In this approach, the Enabling Statute is interpreted as having been enacted by Congress specifically for the recognition and enforcement of ICSID awards and with the objective of allowing expeditious and *ex parte* proceedings. Moreover, this theory emphasizes the practical aspect of time consuming proceedings that would present no specific interest since the ICSID system is a self-contained one which prohibits

198. *Id.* at 49.

199. *Id.*

200. Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *entered into force* 27 Jan. 1980 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

the judicial review of arbitral awards rendered by ICSID tribunals by domestic courts. Finally, under this perspective, the federal district court for the Southern District of New York rejects the argument regarding the lack of jurisdiction and improper venue. Accordingly, a Contracting State has waived its immunity from jurisdiction and thus, cannot invoke the FSIA or any of its provision regarding immunity from jurisdiction as a defense.

Notwithstanding the foregoing, the federal district court for the District of Columbia as well as the federal court for the Eastern District of Virginia have issued three decisions in favor of a plenary action. The underlying rationale for this approach is the following: given that there is no express procedure for the enforcement of ICSID awards, the “full, faith and credit” approach is essentially the same procedure used for U.S. state decisions *i.e.*, a plenary action. Moreover, these courts interpret the wording of the Enabling Statute, which contains the terms “actions” and “proceedings” as demonstrating the explicit intent of Congress to provide for a plenary action. However, this approach largely ignores the text of the ICSID Convention, and goes far beyond the Convention’s spirit by evoking the exceptional possibility of ‘remand,’ whereas the Convention in no case provides for a judicial review of ICSID awards. Interestingly however, regardless of which approach the courts have adopted, the courts have accepted the application of FSIA at the execution stage. This issue is not debated and the controversy focuses solely on the intervention of the FSIA at the recognition and enforcement stage in order to provide an immunity from jurisdiction for sovereign States as an enforcement defense.

One issue is left unanswered: the possibility of filing, even before a court that would in theory accept *ex parte* proceedings, a plenary action. Indeed, *Siag* did not close the door to a plenary action and, for example, Article 54 of the CPLR, used by the federal district court for the Southern District of New York in order to allow *ex parte* proceedings, states in Section 6 that “the right of a judgment creditor to proceed by an action on the judgment or a motion for summary judgment in lieu of complaint, instead of proceeding under this article, remains unimpaired.”²⁰¹

201. N.Y. CPLR § 5402 (McKinney 2015).

V. CONCLUSION

While the ICSID Convention expressly addresses the issue of the enforcement of ICSID awards, both the Enabling Statute and the FSIA are silent regarding the procedural steps that should be followed in order to enforce ICSID awards in the United States. Not surprisingly, the question was quickly raised before U.S. courts in different jurisdictions, which have answered it in two distinct ways. On one hand, the federal district court for the Southern District of New York has supported the idea of an *ex parte* procedure—that would allow the parties to submit an *ex parte* application for the recognition and enforcement of an ICSID award—relying on, *inter alia*, a local instrument, namely Article 54 of the CPLR. On the other hand, the federal district court for the District of Columbia has, in certain cases, rejected the possibility of an *ex parte* procedure and has interpreted the Enabling Statute, as well as the FSIA, as requiring a plenary action in order to enforce an ICSID award in the United States. At present, the issue is not settled and the answer remains unclear.

The first approach, which provides for the possibility of *ex parte* proceedings, seems to be closer to the text of the ICSID Convention, which expressly provides the procedure to follow in order to obtain the recognition and the enforcement of an ICSID award. *First*, the adherence to the ICSID Convention waives the immunity from jurisdiction provided by the FSIA in certain cases. *Second*, the Enabling Statute provides for (1) the full, faith and credit qualification to be accorded to an ICSID award and (2) the exclusive jurisdiction of district courts—with no differentiation—regarding the enforcement of an ICSID award under the Enabling Statute. Thus, improper venue should not be able to be invoked and all federal district courts have jurisdiction to enforce an ICSID award. *Third*, the full faith and credit requirement allows federal courts to enforce ICSID awards as if they were U.S. state court judgments. As explained earlier, there is no uniform procedure regarding the recognition and the enforcement of the judgments of foreign States in the United States. Some states, like New York, have adopted a simplified procedure contained in CPLR 54. Moreover, there is no rule regarding the enforcement of this type of judgment before a federal court. In any case, Article 54(2) of the ICSID Convention states that parties seeking rec-

ognition or enforcement in the territories of a Contracting State shall furnish a copy of the award certified by the Secretary-General to the competent court. The Supremacy Clause does not establish a hierarchy between the “laws of the United States”²⁰² and treaties.²⁰³ However, in the present context, the Enabling Statute was passed in order to allow the integration of the ICSID Convention into the U.S. legal system.²⁰⁴ Therefore, the content of the ICSID Convention, including its wording, should overcome the silence and confusion of the Enabling Statute, in order to allow parties seeking the recognition and enforcement of an ICSID awards to have access to the *ex parte* procedure of the ICSID Convention. Moreover, Article 54(2)²⁰⁵ is very similar in its meaning to Section 54 of the CPLR,²⁰⁶ since they both require the parties to furnish a copy of the award or decision to the competent court in order for them to obtain its recognition or enforcement.

Accordingly, *ex parte* proceedings should be seen as the rule, and plenary action as the exception. *Ex parte* proceedings do not preclude the application of the FSIA at the execution stage, in accordance with Article 55 of the ICSID Convention. Moreover, unlike the New York Convention, the ICSID Convention does not contain any grounds for refusing enforcement so there should be no judicial review by the domestic courts of the place of enforcement. This approach is consistent with Article 53(1) of the ICSID Convention, according to which, “the award *shall* be binding on the parties and *shall not*

202. U.S. CONST. art. VI, cl. 2 (“The Supremacy Clause contained in Article VI, Clause 2, of the U.S. Constitution states: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

203. *Id.*

204. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573, 574 (S.D.N.Y. 2015).

205. ICSID Convention, *supra* note 1, art. 54(2) (“A party seeking recognition or enforcement . . . 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.”).

206. N.Y. CPLR § 5402 (McKinney 2015) (“A copy of any foreign judgment authenticated in accordance with an act of congress or the statutes of this state may be filed within ninety days of the date of authentication in the office of any county clerk of the state.”).

be subject to any appeal or to any other remedy except those provided for in this Convention.”²⁰⁷ The term “shall” provides for a mandatory rule that cannot be derogated from. By avoiding hearings related solely to the enforcement of an ICSID awards, with a risk of review or remand, the courts would follow the spirit of the ICSID Convention, which does not allow the parties to have “a second bite at the apple,” *i.e.*, obtaining a change in the substance of the arbitral award, or alternatively, its non-recognition or enforcement.

To conclude, it is clear that recognition, enforcement, and execution of an ICSID award are three distinct steps. Thus, on one hand, immunity of jurisdiction should not be accepted as a regular defense before domestic courts in cases related to the recognition and the enforcement of ICSID awards, as seen earlier. On the other hand, immunity issues related to the execution should not come up at the enforcement phase. At a practical level, the issue of whether an ICSID award may be enforced *ex parte* still remains unclear since federal courts have not adopted the same interpretation of the ICSID Convention and the Enabling Statute. However, assuming that the execution stage is distinct from the recognition and the enforcement of an ICSID award, a plenary action at the enforcement stage seems unnecessary. Indeed, since the FSIA seems to come into play only at the execution phase, parties should be allowed to obtain the recognition and the enforcement of their ICSID awards through *ex parte* proceedings.

207. ICSID Convention, *supra* note 1, art. 53(1).