

Bahrain Chamber for Dispute Resolution
INTERNATIONAL ARBITRATION
REVIEW

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South
America by Aspen Publishers, Inc. 7201 McKinney
Circle Frederick, MD 21074 United States of
America

Sold and distributed in all other countries by
Turpin Distribution Pegasus Drive Stratton
Business Park, Biggleswade Bedfordshire SG18
8TQ United Kingdom

ISSN 2352-7374
© 2015, Kluwer Law International

This Journal should be cited as (2015) 2 BCDR Int. Arb. Rev. 2

The *BCDR International Arbitration Review* is published twice per year.
Subscription prices for 2016 [Volume 3, Numbers 1 through 2] including postage and handling:
Subscription rate (print or online): EUR 315.00 / USD 425.00 / GBP 252.00

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.wklawbusiness.com
For further information please contact our sales department at +31 (0) 172 641562 or at
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BCDR International Arbitration Review is indexed/abstracted in the European Legal Journals Index.

Printed on acid-free paper

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Volume 2

December 2015

Number 2

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Enforcement of ICSID Awards in the United States

Nicole DUCLOS & Erin THOMAS^{*}

ABSTRACT

The ICSID Convention's self-contained recognition and enforcement regime has long been touted as a unique and, from the perspective of award creditors, favorable feature of the treaty. However, the legislation implementing this regime in the United States does not clearly spell out the procedures that courts must follow in discharging their recognition and enforcement obligations. As a result, U.S. federal courts have adopted diverging approaches to enforcement of ICSID awards. Some courts require award creditors to commence a formal action on the award, while others permit ex parte recognition. This article examines U.S. federal courts' implementation of their recognition and enforcement obligations under the ICSID Convention, focusing in particular on the current divide regarding proper enforcement procedures and the rationales underlying these divergent approaches.

1 INTRODUCTION

A significant advantage of arbitrating, rather than litigating, international disputes, in both the commercial and the investment contexts, is the relative ease with which arbitral awards are recognized and enforced around the world. As reassuring as a favorable award may be, in the absence of voluntary compliance, the prevailing party's ability to enforce (and ultimately execute on) the award is a fundamental consideration.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "Convention")¹ mandates that Contracting

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¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

States² recognize and enforce the awards issued in arbitrations conducted under its rules.

Initially, and for several decades, arbitration practitioners and commentators were of the view that ICSID awards would be swiftly recognized and enforced by Contracting States found to have violated their international obligations.³ In recent years, however, the trend of State compliance with ICSID awards⁴ has been tarnished by the unwillingness of certain Contracting States to satisfy monetary awards, and their disposition to oppose enforcement of such awards in national courts.⁵

This article examines how federal courts in the United States have implemented the Convention's mandate that Contracting States enforce pecuniary obligations imposed by ICSID awards, addressing, in particular, the current divide among federal courts regarding the procedural mechanism that should be employed to enforce ICSID awards in the United States. As a result of this divide, award creditors who seek swift enforcement of a favorable award must choose a federal district that has endorsed summary, *ex parte* recognition of ICSID awards.

² While capitalized, the term "Contracting State" is not expressly defined in the Convention. However, Article 68(2) of the Convention provides that States which have deposited their instrument of ratification, acceptance or approval become Contracting States of the Convention within thirty days from deposit.

³ LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* 107 (2004) ("The ICSID system is largely self-enforcing because Contracting States presumably recognize that blocking the execution of awards against them would alienate the very investors they are trying to attract by ratifying the ICSID Convention. . . . Award-debtor States may also fear political fallout within the World Bank community: their recalcitrance could alienate other Contracting States, which have undertaken to enforce ICSID awards on the understanding that all State parties to the Convention would do the same."); CHRISTOPH H. SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH & ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* 1119 (2d ed. 2009) ("[T]he *travaux préparatoires* to the Convention show clearly that the original motive for the inclusion of a provision on enforcement was to give recourse against a defaulting investor. It was considered highly unlikely that a State party to the Convention would not carry out its treaty obligation under the Convention to comply with an award. This obligation would be backed up by concern for a State's reputation as a place of investment and by the revival of the right to diplomatic protection by the investor's State of nationality. . . . A provision on enforcement was seen as necessary to balance the situation in favour of the host State, should the investor not comply with an award.").

⁴ Georgios Petrochilos, Sylvia Noury & Daniel Kalderimis, *ICSID Convention, Chapter IV, Section 6, Article 54*, in *CONCISE INTERNATIONAL ARBITRATION* 143, 145 (Loukas A. Mistelis ed., 2010) ("Due to the tendency of States to comply voluntarily with ICSID awards, there is little precedent of the enforcement of awards under art. 54.").

⁵ Tsai-Yu Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, 5(1) *CONTEMP. ASIA ARB. J.* 1, 2 (2012) ("It is generally accepted that voluntary compliance by Contracting States with ICSID adverse arbitral awards has been common. The high cost of non-compliance by the State, in terms of losing its reputations in the international business community as an investment-friendly place and the possible indirect impact on its access to World Bank funding or international credit, was considered to contribute to such good practice. In spite of this, recently there have been problems with compliance in ICSID arbitration."); Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 *U. PA. J. INT'L ECON. L.* 449, 453 (2007) ("[E]nforcement of ICSID awards, heretofore thought to be automatic and inescapable, may not be assured against Argentina.").

2 RECOGNITION, ENFORCEMENT, AND EXECUTION OF ICSID AWARDS

Article 54(1) of the Convention provides that:

[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. 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.

One of the unique features of the Convention is that it provides no grounds for the national courts of Contracting States to refuse recognition and enforcement of ICSID awards. Unlike other international treaties, which provide for some degree of review of arbitral awards by the courts of signatory States at the enforcement stage,⁶ the Convention establishes a self-contained system in which awards may only be challenged through the annulment mechanism of the Convention.⁷

For this reason, the United States Congress decided that the Federal Arbitration Act (“FAA”)⁸ was not the appropriate instrument for the enforcement of ICSID awards, as the FAA allows U.S. courts to vacate arbitral awards on the

⁶ See 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) art. 5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. In this respect, see *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 14 Civ. 8163 (PAE), 2015 WL 631409, at **18, 20 (S.D.N.Y. Feb. 13, 2015) (“In considering the recognition and execution of ICSID awards, the delegates drew upon, referenced, and in important respects deliberately deviated from the terms of an earlier treaty, the foundational treaty in the area of international arbitration: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. . . . Articles 53 through 55 of the ICSID Convention . . . represented a considered decision to depart fundamentally from the New York Convention, in denying courts any power to review the parties’ agreement to arbitrate, to decline to hear particular types of cases, and, most salient here, to refuse to recognize ICSID awards.”); see also 1975 Inter-American Convention on International Commercial Arbitration (“Panama Convention”), art. 5, Jan. 30, 1975, S. Treaty Doc. No. 97-12, O.A.S.T.S. No. 42, 14 I.L.M. 336.

⁷ REED ET AL., *supra* note 3, at 96 (“The [national] courts may not vacate ICSID awards, because they are a-national and subject to the ICSID treaty regime rather than to national law. The parties may contest awards only under the limited review mechanism in the ICSID Convention: on restricted grounds, before a three-member ad hoc committee constituted under the Convention, which may only interpret, revise or annul the award.”). *Mobil Cerro Negro*, *supra* note 6, at *4 (“Where ICSID has jurisdiction, its determinations are final. ICSID awards are binding and subject to review only within ICSID itself. . . . National courts thus lack the power to set aside or modify ICSID awards. They may review such awards solely to confirm their authenticity. . . . In this respect, ICSID awards are more secure from attack than awards from other arbitral institutions. Other arbitral awards, whether governed by a statute or an international treaty, are subject to substantive review, albeit limited.”).

⁸ The FAA sets out the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States. 9 U.S.C. §§1-307 (Domestic arbitration at 9 U.S.C. §1 *et seq.*; New York Convention at 9 U.S.C. §201 *et seq.*; Panama Convention at 9 U.S.C. § 301 *et seq.*).

grounds stated therein.⁹ Consistently, the implementing statute of the Convention expressly provides that “[t]he Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) shall not apply to enforcement of awards rendered pursuant to the convention,”¹⁰ thereby reflecting “Congress’s intention that the New York Convention, which provided for limited substantive review of—and the right of the award debtor to challenge—arbitral awards would *not* apply to the enforcement of ICSID awards.”¹¹

The Convention’s self-contained enforcement regime consists of two different mandates: first, Contracting States must *recognize* all ICSID awards as binding; and second, Contracting States must *enforce* pecuniary obligations imposed by ICSID awards as if they were final judgments issued by their national courts.

The term “recognition” has been described as the confirmation by national courts of an award’s authenticity¹² and validity,¹³ as well as of its final and binding nature.¹⁴ Recognition is a preliminary step or condition to an award’s enforcement.¹⁵

While Article 54(1) of the Convention mandates automatic recognition of all ICSID awards—monetary and non-monetary—it only mandates automatic

⁹ *Convention on the Settlement of Investment Disputes: Hearing Before the Subcomm. on Int’l Orgs. & Movements of the H. Comm. on Foreign Affairs on H.R. 15785*, 89th Cong. 2d Sess., at 4-5 (1966) (statement of Hon. Fred B. Smith, the General Counsel of the Treasury) (“The Federal Arbitration Act is not an appropriate instrument for enforcing arbitral awards rendered pursuant to the convention . . . [T]he Federal Arbitration Act would permit the courts to vacate an arbitral award on certain grounds, such as the corruption of one of the arbitrators, which under Article 52 of the convention ought to be raised through the annulment proceedings provided for in the convention.”).

¹⁰ 22 U.S.C. § 1650a(a).

¹¹ *Mobil Cerro Negro*, *supra* note 6, at *21 (emphasis in original).

¹² SCHREUER ET AL., *supra* note 3, at 1128 (defining recognition as “the formal confirmation that the award is authentic and that it has the legal consequences provided by the law”).

¹³ Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the ‘Judgment Route’ the Wrong Road?*, 4 J. INT’L DISP. SETTLEMENT 587, 590 (2013) (“[I]n some jurisdictions national courts may be called to confirm that an award is valid and effective, typically if the seat of the arbitration was located in that jurisdiction. . . . National courts may also be called to decide on the validity of an award if a question regarding the effects of the award is raised which does not relate to its enforcement.”); *see also* Linda Silberman & Maxi Scherer, *Forum Shopping and Post-Award Judgments*, in FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 336 (Franco Ferrari ed., 2013) (“In most civil law jurisdictions, confirmation judgments (or judgments refusing to set aside the award) merely contain a non-enforceable declaration as to the validity of the award and/or a dismissal of the underlying claim to set aside the award. As such they are not capable of enforcement. . . . To the contrary, in most common law jurisdictions, the foreign court enters a judgment on the terms of the award, rather than just declaring the award confirmed or not set aside. Arguably, if the court orders the award debtor to perform the award, *e.g.* to pay the damages awarded therein, the judgment contains an enforceable content.”).

¹⁴ SCHREUER ET AL., *supra* note 3, at 1128 (“Recognition . . . is the confirmation of the award as binding or *res judicata*.”); REED ET AL., *supra* note 3, at 95 (Recognition “is the formal imprimatur that an award is a final and binding decision on issues disputed by the parties. The primary purpose of recognition is to confirm the *res judicata* effect of an award—that is, to establish that the issues resolved in the award may not be reexamined in other court or arbitration proceedings.”).

¹⁵ SCHREUER ET AL., *supra* note 3, at 1128 (Recognition is “a step preliminary to enforcement.”).

enforcement of monetary awards.¹⁶ This means that ICSID awards providing for the specific performance of certain obligations (such as restitution, or the obligation to refrain from engaging in conduct described in the award) are subject to recognition and enjoy the effect of *res judicata*, but are not subject to automatic enforcement.¹⁷ Enforcement, in turn, is aimed at obtaining satisfaction of the award on the debtor's assets.¹⁸

Pursuant to Article 54(1) of the Convention, Contracting States with a federal constitution, such as the United States, may enforce ICSID awards "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." This language was included at the request of the United States so that it could provide for "a uniform procedure for enforcement of awards rendered pursuant to the convention," making the federal courts' jurisdiction over enforcement of ICSID awards "exclusive."¹⁹

Lastly, execution of ICSID awards is not included in the Convention's self-contained enforcement regime.²⁰ Article 54(3) provides that "[e]xecution 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." Consistently, Article 55 provides that "[n]othing 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." Therefore, while Contracting States are bound to recognize all ICSID awards and enforce monetary awards automatically, they may execute any such awards in accordance with their own laws.²¹

¹⁶ The implementing statute of the Convention in the United States mirrors this distinction. See 22 U.S.C. §1650a(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 of general jurisdiction of one of the several States. . . .") (emphasis added).

¹⁷ SCHREUER ET AL., *supra* note 3, at 1129.

¹⁸ Scherer, *supra* note 13, at 590; see also REED ET AL., *supra* note 3, at 95 ("In some legal systems, enforcement refers to the judicial practice of issuing 'exequatur,' or declaring in an order that an arbitration award is in fact enforceable. In other legal systems, the term loosely refers to an award creditor's legal right to execute its award—i.e., to collect monetary damages or benefit from other remedies granted—and is thus another way of referring to execution.").

¹⁹ 89th Cong. 2d Sess., *supra* note 9, at 11 (Statement of Andreas F. Lowenfeld, Deputy Legal Advisor, Department of State); see also SCHREUER ET AL., *supra* note 3, at 1143 (commenting that while the language was inserted "at the insistence of the US delegate . . . public records do not explain the rationale behind the request," and, "[a]s it turns out, this provision authorizes the United States to do what it could have done anyway"); Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REVIEW - FILJ 287, 322 (1987) ("In retrospect one may wonder why no one . . . questioned the U.S. proposal.").

²⁰ While execution is outside the scope of this article, we address it in general terms and contrast it against recognition and enforcement in the ICSID regime.

²¹ REED ET AL., *supra* note 3, at 96 ("This self-contained delocalized enforcement scheme shelters ICSID arbitration awards from the scrutiny of national courts until an award must be executed, at which time the laws of the country of execution apply.").

Execution “is the prevailing party’s actual collection of monetary damages, or actual achievement of other relief granted in the award. Execution generally requires the assistance of local courts, which exercise their authority to cause awards to be satisfied by, for example, issuing judgments and ordering attachment of assets of the award debtor.”²²

While the Convention makes an express distinction between recognition and enforcement, on the one hand, and execution, on the other hand, the distinction between recognition and enforcement is less clear. For some commentators, there is no distinction between recognition and enforcement in the context of the Convention.²³ For others, recognition and enforcement are distinct steps leading up to the award’s execution.²⁴ These differing approaches can also be found in the contradicting decisions by U.S. federal courts called upon to enforce ICSID awards (*see infra* at Section 4).

Before examining the U.S. case law on enforcement of ICSID awards, it bears addressing the meaning ascribed to these three concepts—recognition, enforcement, and execution—in the United States. In the context of international arbitration generally, a distinction is made between *confirmation* of an award arising out of a U.S.-seated arbitration and *recognition* or *enforcement* of an award arising out of an arbitration seated abroad.²⁵

²² *Id.* at 95.

²³ *Id.* (“In the context of the ICSID arbitration, enforcement is generally indistinguishable from recognition. The two terms are used in a single phrase—recognition and enforcement—that broadly refers to all steps leading up to, but stopping short of, actual execution of an award.”).

²⁴ *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention*, Report by the Committee on International Commercial Disputes of the New York State Bar Association (July 2012) (“This Committee views recognition, enforcement and execution in the ICSID award context as points progressing along a single continuum as follows: (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.”).

²⁵ See S.I. STRONG, *INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES* 70-71 (Federal Judicial Center 2012) (“Another action that can be brought in a U.S. court after the conclusion of an arbitration seated in the United States is a motion to confirm the award. . . . ‘Recognition’ of an award gives the award the status of a national court judgment in that state. An award may also be ‘recognized’ at the arbitral seat, although that process is usually referred to in the United States as ‘confirmation.’ An award is ‘enforced’ when parties ask a court to use its coercive power to give effect to the terms of the award.); *see also* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION §§ 1(g), 1(l), 1(z); § 4-1, note (e) (Tentative Draft No. 2, 2012) (“‘Confirmation’ is a determination that reduces to judgment a Convention award made in the United States,” “‘Enforcement’ is the reduction to a judgment of an international arbitral award, other than a Convention award made in the United States,” and “‘Recognition’ is a determination by a court or other tribunal that an international arbitral award is presumptively entitled to preclusive effect with respect to one or more matters determined therein.” However, “[t]he Restatement does not contemplate a cause of action for recognition, as such, of an international arbitral award. While recognition is in effect a precondition to enforcement, and is governed by the same standards as

In U.S. procedure, confirmation of an arbitral award “ordinarily [consists of] a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.”²⁶ “Once confirmed, . . . awards become enforceable court orders,”²⁷ and they are enforced “when parties ask a court to use its coercive power to give effect to the terms of the award.”²⁸ Lastly, execution is the “[j]udicial enforcement of a money judgment, [usually] by seizing and selling the judgment debtor’s property.”²⁹ Once a money judgment is entered in a federal district court (whether arising out of a civil trial, an arbitral award, or the registration of the judgment of another federal district court), a party can enforce that judgment using Federal Rule of Civil Procedure 69.³⁰ Rule 69 provides that “[a] money judgment is enforced by a writ of execution, unless the court directs otherwise.”³¹ While the “procedure on execution . . . must accord with the procedure of the state where the court is located, . . . a federal statute governs to the extent it applies.”³²

enforcement, it is not sought as an affirmative remedy, but rather invoked as a barrier to relitigation of a matter. Thus, the principal function served by recognition of an award is to provide a basis for giving the award preclusive effect in subsequent litigation or arbitration, thus barring a party from reasserting a particular claim in the subsequent action. . . . Because recognition has this limited function, the Restatement includes it (alongside confirmation, vacatur, and enforcement) as a form of ‘post-award relief,’ but not as a type of ‘post-award action.’”

²⁶ *Am. Univ. of Antigua Coll. of Med. v. Leeward Const. Co.*, No. 14CV8410 DLC, 2015 WL 1958971, at *3 (S.D.N.Y. May 1, 2015) (citation omitted).

²⁷ *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007).

²⁸ See STRONG, *supra* note 25, at 71. However, “the procedures for recognition and enforcement are the same.” *Id.*; see also RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-33, note (a)(i) (Tentative Draft No. 3, 2013) (“In the interest of expedition, an action to confirm, vacate, or enforce an award under the Federal Arbitration Act is a summary procedure. . . . For example, a party seeking to confirm an award need not commence an action by filing a complaint, but rather may ‘apply to’ the United States district court for an ‘order confirming the award.’ 9 U.S.C. §§ 9, 208, & 307.”).

²⁹ BLACK’S LAW DICTIONARY (10th ed. 2014); see also *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 262 n.13 (2d Cir. 2012) (“Execution is an act of dominion over specific property by an authorized officer of the court which results in the creation of a legal right to subject the debtor’s interest in the property to the satisfaction of the debt of his or her judgment creditor.”) (internal quotation marks and citation omitted).

³⁰ Other forms of relief, such as an order for specific performance, are outside the scope of this article.

³¹ Fed. R. Civ. P. 69(1); see also Carolyn B. Lamm, *Enforcement of Judgments*, in 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 57:2 (3rd ed. 2011) (“Fed. R. Civ. P. 69 sets forth the procedural regime for enforcing federal money judgments. Once a judgment is final in one jurisdiction, enforcement proceedings may then be commenced in each district (if federal) or each state where assets are located. The proceeding is a summary one to obtain recognition of the judgment, but then it is necessary to execute against each asset separately. Although Rule 69 provides for enforcement in federal district court, it incorporates the practices and procedures of the state where enforcement is sought. State law practices and procedures, usually set forth in statutes, vary significantly from state to state.”).

³² Fed. R. Civ. P. 69(1). An example of a federal statute that would preempt state procedural laws regarding execution is the Foreign Sovereign Immunities Act (“FSIA”), which provides that “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.” 28 U.S.C. § 1609 (2015).

3 THE CONVENTION'S IMPLEMENTING STATUTE IN THE UNITED STATES

Article 69 of the Convention requires that Contracting States “take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.” The Convention is thus considered “a non-self-executing treaty . . . requir[ing] implementing legislation to give it domestic legal effect.”³³

Accordingly, the U.S. Congress passed legislation implementing the Convention in 1966.³⁴ The implementing legislation provides that:

An award of an arbitral tribunal rendered pursuant to chapter IV of the [C]onvention 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*³⁵ as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention . . . The district courts of the United States . . . shall have *exclusive jurisdiction* over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.³⁶

The FSIA is discussed further below.

³³ *Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 749 n.6 (E.D.Va. 2012); see also *Medellin v. Texas*, 552 U.S. 491, 521 (2008) (referring to the Convention's implementing legislation, 22 U.S.C. § 1650a, as an example of “Congress . . . implementing non-self-executing treaties.”); *Micula v. Romania*, Civil No. 1:14-cv-00600 (APM), 2015 WL 2354310, at *2 (D.D.C. May 18, 2015) (“Congress gave the ICSID Convention domestic effect in the United States by passing the Convention on the Settlement of Investment Disputes Act of 1966 (‘Investment Disputes Act’); see Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, 80 Stat. 334 (1966) (codified at 22 U.S.C. §§ 1650 and 1650a). Section 3 of the Investment Disputes Act, codified at 22 U.S.C. § 1650a, addresses the enforcement of ICSID arbitration awards in the United States.”).

³⁴ The “main purpose” of the Convention on the Settlement of Investment Disputes Act of 1966, 22 U.S.C. § 1650a, was “to implement article 54(1) of the [C]onvention.” S. REP. NO. 1374, at 3 (1966).

³⁵ The principle of “full faith and credit” arises from the United States Constitution, which provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. ART. IV, § 1. As the United States Supreme Court has explained, “[r]egarding judgments, . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.” *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); see also *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270 (1980) (citation omitted) (“It has long been the law that ‘the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.’”); *Adar v. Smith*, 639 F.3d 146, 151 (5th Cir. 2011) (“Because the [full faith and credit] clause guides rulings in courts, the ‘right’ it confers on a litigant is to have a sister state judgment recognized in courts of the subsequent forum state. The forum’s failure properly to accord full faith and credit is subject to ultimate review by the Supreme Court of the United States.”).

³⁶ 22 U.S.C. § 1650a (emphasis added). The implementing legislation also included 22 U.S.C. § 1650, which provided that “[t]he President may make such appointments of representatives and panel members as may be provided for under the convention.” This provision is outside the scope of this article.

4 ANALYSIS OF U.S. DECISIONS REGARDING ENFORCEMENT OF ICSID AWARDS

As described above, the Convention mandates that Contracting States recognize ICSID awards as binding and enforce monetary awards without review by their national courts.³⁷ The U.S. implementing statute, in turn, mandates that monetary awards be enforced and given the same full faith and credit as if they were final judgments issued by U.S. state courts.³⁸ What the implementing legislation does not address, however, is *how* a U.S. federal court must discharge its obligation to enforce ICSID awards: is it necessary to commence a plenary action, or is it possible to use a more streamlined process?³⁹

U.S. federal courts have not answered this question in a consistent manner. Some courts have required award creditors to file a complaint and comply with attendant procedural requirements regarding service, personal jurisdiction, and venue. Other courts have recognized and entered judgment on ICSID awards on an *ex parte* basis and required the investor to provide notice to the debtor State only *after* the award has been converted into a U.S. federal court judgment.

The following sections address two key issues underlying these divergent approaches to the enforcement of ICSID awards: first, whether there is a “gap” in the legislation implementing the Convention in the United States, and second, what is the appropriate mechanism for enforcing ICSID awards in the United States. This article also explores other rationales U.S. courts have offered to support their respective approaches.⁴⁰

4.1 IS THERE A GAP IN THE U.S. STATUTE THAT IMPLEMENTS ARTICLE 54 OF THE CONVENTION?

U.S. federal courts agree that while Article 54 of the Convention addresses both *recognition* and *enforcement* of ICSID awards, the implementing legislation only

³⁷ Article 54(1) of the Convention.

³⁸ 22 U.S.C. § 1650a.

³⁹ See *Micula I*, *supra* note 33, at *1 (“The question . . . is whether a statute that empowers federal courts to ‘enforce’ an international arbitration award as if it were a final state court judgment permits a federal court, as a precursor to enforcement, to recognize or confirm such an arbitration award on an *ex parte* basis.”); *Mobil Cerro Negro*, *supra* note 6, at *1 (“§ 1650a does not specify the process by which a creditor is to convert its ICSID award into a federal court judgment. Must the creditor bring a plenary action, subject to the ordinary requirements of service of process, personal jurisdiction over the award debtor, and venue? Or may a more streamlined process be used?”).

⁴⁰ The cases discussed in this article address several additional issues, including subject matter jurisdiction over judgment debtors, and related FSIA analysis (*Continental*, *supra* note 33, at 751, *Liberian Eastern Timber v. Liberia*, 650 F. Supp. 73, 76–77 (S.D.N.Y. 1986), *Mobil Cerro Negro*, *supra* note 6, at *10; personal jurisdiction (*Continental*, *supra* note 33, at 751–52, *Mobil Cerro Negro*, *supra* note 6, at *21); and venue (*Continental*, *supra* note 33, at 753–54). These topics are beyond the scope of this article.

expressly mentions the *enforcement* of ICSID awards.⁴¹ They disagree, however, on whether this language is an expression of congressional intent or a gap in the statute.

Some courts have concluded that the implementing legislation makes no distinction between recognition or confirmation, on the one hand, and enforcement, on the other, thereby “provid[ing] *only* for the *enforcement* of ICSID awards” and requiring U.S. courts to enforce such awards “in the same manner as state court judgments.”⁴² In the view of these federal judges, this reflects Congress’ intent to provide a system for enforcing ICSID awards in the United States, but not for recognizing or confirming them.⁴³

Under this approach, a court applying the Convention’s implementing statute thus must consider how state court judgments are treated in federal court.⁴⁴ Unlike the procedural law in states that have implemented some version of the 1964 Uniform Enforcement of Foreign Judgment Acts (the “Uniform Act”)⁴⁵ (like Article 54 of New York’s Civil Practice Law and Rules (the “CPLR)),⁴⁶ there is no comparable statutory mechanism for recognizing or confirming a state court judgment in federal court, nor does the statute for registering the judgment of one federal court in another federal court apply to state court judgments.⁴⁷ Rather, the “proper treatment of a state court judgment by a federal court is not recognition,

⁴¹ *Continental*, *supra* note 33, at 752, 753 (The court concedes that the FAA “recognizes a distinction between confirmation and enforcement,” but “§ 1650a specifically states that the [FAA] shall not apply to ICSID awards.”); *Micula I*, *supra* note 33, at *5 (emphasizing that the implementing statute “uses only the verb ‘enforce’ as it relates to state court judgments,” which is “consistent with the procedural rule that ‘the proper treatment of a state court judgment by a federal court is not recognition, or registration, but enforcement’”); *Micula v. Gov’t. of Romania*, No. 15 Misc. 107 (Part I), 2015 WL 463180, at *3 (S.D.N.Y. Aug. 5, 2015) (noting that while the Convention “mandates both recognition and enforcement,” the implementing legislation “address[es] only ‘enforcement’”) (emphasis in original).

⁴² *Continental*, *supra* note 33, at 747, 752 (emphasis added); see also *Micula I*, *supra* note 33, at *5.

⁴³ *Continental*, *supra* note 33, at 753–54.

⁴⁴ *Id.* at 752–53.

⁴⁵ The Uniform Act is model legislation drafted to “provide [] a simplified way of enforcing judgments entered in another state, implementing full faith and credit.” Uniform Law Commission, *Legislative Fact Sheet - Enforcement of Foreign Judgments Act*, [http://uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement of Foreign Judgments Act](http://uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act). Some form of the Uniform Act has been implemented in forty-seven U.S. states, as well as the District of Columbia and the U.S. Virgin Islands. *Id.*

⁴⁶ The CPLR governs the procedure of civil judicial proceedings in New York state courts (except where displaced by another statute). N.Y. C.P.L.R. § 101. Article 54 of the CPLR is discussed *infra* at Section 4.2.

⁴⁷ *Continental*, *supra* note 33, at 753 (“There 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. Although 28 U.S.C. § 1963 provides for the registration of other federal district court judgments, there is no parallel provision for state court judgments.”); *Micula I*, *supra* note 33, at *5 (“[T]here is no federal statutory mechanism akin to the Uniform Enforcement of Foreign Judgments Act that enables a federal court to register, recognize or confirm a state court judgment.”).

or registration, but enforcement.”⁴⁸ The specific procedures for enforcing a state court judgment in federal court are discussed in the next section.

Other federal courts have followed a different approach. Rather than “collaps[ing] all distinction between ‘recognition’ and ‘enforcement,’” these courts read the implementing legislation as requiring federal courts to both *recognize* and *enforce* ICSID awards.⁴⁹ The statute’s “silence” regarding the process by which an ICSID award is to be converted into an enforceable U.S. federal court judgment constitutes a “statutory gap.”⁵⁰ The relevant question is not how federal courts typically treat state courts judgments.⁵¹ Rather, the appropriate way to fill this statutory gap is to look to the law of the forum state in which the federal court is sitting.⁵² State court procedures for the recognition of foreign judgments are discussed in the next section.

4.2 WHAT MECHANISM SHOULD BE USED TO ENFORCE AN ICSID AWARD?

A second point of divergence in U.S. case law is the proper mechanism for converting an ICSID award into an enforceable federal court judgment. Federal courts have followed three different approaches: enforcement through a plenary action, *ex parte* recognition or enforcement under state court procedures, or *ex parte* recognition under the implementing legislation itself.

As described in the preceding section, some courts have taken the position that ICSID awards can only be enforced (not recognized or confirmed) in the same manner as a state court judgment would in federal court.⁵³ There is no federal statutory scheme providing for streamlined enforcement of state court judgments in U.S. federal court, so the only way to do so is to initiate a plenary

⁴⁸ *Continental*, *supra* note 33, at 753.

⁴⁹ *Micula II*, *supra* note 41, at *3 (“[T]he enabling statute should not be read to collapse all distinction between ‘recognition’ and ‘enforcement.’”); *see also Mobil Cerro Negro*, *supra* note 6, at *1 (“[T]he enabling statute for the ICSID Convention, 22 U.S.C. § 1650a, contemplates that federal courts will *recognize* ICSID awards *and enforce* them.”) (emphasis added).

⁵⁰ *Mobil Cerro Negro*, *supra* note 6, at **5, 7 (“The brief text of the enabling statute thus does not specify the procedural mechanism by which an arbitral award is to be converted into a federal judgment. . . . It is undisputed that there is a statutory gap.”); *Micula II*, *supra* note 41, at *3 (“by addressing only ‘enforcement,’ § 1650a created a statutory gap . . .”).

⁵¹ *Micula II*, *supra* note 41, at *3.

⁵² *Mobil Cerro Negro*, *supra* note 6, at *7; *Micula II*, *supra* note 41, at *3.

⁵³ *Micula I*, *supra* note 33, at *5 (“The most direct consequence of applying 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.”); *see also Continental*, *supra* note 33, at 754 (stating, *in dicta*, that “Congress mandated that the proper method of enforcement of an ICSID arbitral award is the same as the enforcement of a state court judgment, which is a suit on the judgment as a debt”). Note that the award creditor in that case did not proceed on an *ex parte* basis. *Id.*

action on the award.⁵⁴ A plenary action is not a summary proceeding, but a complete and formal hearing on the merits.⁵⁵ Notably, under this approach, enforcement of an ICSID award against a Contracting State requires the award creditor to effect service of process under the FSIA.⁵⁶

Other courts, including in the Southern District of New York, have taken a different approach, looking to state law to fill what they consider is a statutory gap in the federal legislation implementing the Convention.⁵⁷ Article 54 of New York's CPLR sets forth a summary procedure for the registration of out-of-state judgments entitled to full faith and credit.⁵⁸ Article 54's "simple" procedures "obviate an action on the judgment,"⁵⁹ requiring only that the judgment creditor file an authenticated copy of the judgment,⁶⁰ along with an affidavit, following which the clerk of the court "shall treat the foreign judgment in the same manner as a judgment of the supreme court of this state."⁶¹ Notably, a court recognizing a foreign judgment on an *ex parte* basis under Article 54 is not required to have personal jurisdiction over the judgment debtor.⁶²

⁵⁴ See *Micula I*, *supra* note 33, at *5 ("Because the plain language of the ICSID enabling statute requires arbitral awards and state court judgments to be treated in a parallel manner, it follows that ICSID awards were intended to be enforced by plenary actions.").

⁵⁵ *Kowohl v. Roschko*, 659 F. Supp. 910, 912 n.2 (E.D.N.Y. 1987).

⁵⁶ See *e.g.*, *Micula I*, *supra* note 33, at *1 (noting that if the judgment creditor "wishes to have his arbitration award recognized and enforced in a United States federal court, he must file a plenary action, with proper service on the Government of Romania under the Foreign Sovereign Immunities Act").

⁵⁷ U.S. federal courts will borrow from state law to fill gaps in federal statutory schemes. *Mobil Cerro Negro*, *supra* note 6, at *8.

⁵⁸ N.Y. C.P.L.R. §§ 5401-5408 (2015). Article 54 is based on the Uniform Act. N.Y. C.P.L.R. § 5401, Judicial Conference Notes; see *Siag v. Egypt*, No. M-82, 2009 WL 1834562, at *2 (S.D.N.Y. June 19, 2009) ("Conversion of a state court judgment into a federal court judgment is not common. . . . In treating the ICSID arbitration award as I would a final judgment of a state court, the procedures of New York's CPLR are relevant."); *Mobil Cerro Negro*, *supra* note 6, at *9 ("using the streamlined recognition procedure in CPLR Article 54 effectuates the policy interests underlying the ICSID enabling statute . . .").

⁵⁹ *Siag*, *supra* note 58, at *2 (quoting DAVID SIEGEL, *NEW YORK PRACTICE* § 435 (4th ed. 2005)). Prior to the implementation of the Uniform Act in New York, "there [was] no particular machinery for the enforcement of foreign judgments. . . . The holders of sister state or foreign country judgments have, presently, but one choice. They must bring an action on the judgment." *State of New York Administrative Board of the Judicial Conference*, Report for the Judicial Year July 1, 1966 Through June 30, 1967, at 249-50, 251 (1968). However, there was "longstanding recognition of the need for reform" of this state of affairs. *Id.* at 248.

⁶⁰ In the context of Article 54, a "foreign judgment" is "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in [the] state [of New York], except one obtained by default in appearance, or by confession of judgment." N.Y. C.P.L.R. § 5401.

⁶¹ N.Y. C.P.L.R. § 5402. A judgment creditor who uses this procedure must, within thirty days of entry of judgment, notify the judgment debtor. After filing proof of service, the judgment creditor must wait thirty more days before executing on the judgment. N.Y. C.P.L.R. § 5403.

⁶² *Mobil Cerro Negro*, *supra* note 6, at *7. Courts have, in several other instances, permitted *ex parte* recognition and/or enforcement of an ICSID award without expressly relying on Article 54 of the CPLR. In one case, the court upheld an order enforcing an ICSID award, but did not address the fact

One court has followed a third approach by permitting *ex parte* recognition of an ICSID award without applying state court procedures. This court held that the Convention's implementing legislation itself permitted the recognition of ICSID awards in an *ex parte* proceeding.⁶³ In its decision, the court rejected the application of state court recognition procedures, like Article 54 of the CPLR and its District of Columbia equivalent, on the basis that such procedures "have no place in an ICSID enforcement action commencing in *federal* court."⁶⁴

4.3 WHAT PROCEDURAL MECHANISM DOES THE LANGUAGE OF THE CONVENTION'S IMPLEMENTING STATUTE SUPPORT?

Courts requiring a plenary action to enforce an ICSID award and courts recognizing ICSID awards on an *ex parte* basis justify their respective approaches on the grounds that each is consistent with the language of, and intent underlying, the Convention's implementing legislation.

One court reasoned that requiring enforcement by plenary action was consistent with subsection (a) of the implementing statute, which "expressly stated" that the FAA "shall not" apply to enforcement of ICSID awards.⁶⁵ Since the FAA permits *confirmation* of arbitral awards, this language reflects a decision by Congress to *not* use confirmation procedures for ICSID awards.⁶⁶

The same court also pointed to the use of the word "action" in both subsection (b) of the implementing legislation and its legislative history, rather than "*ex parte* proceeding."⁶⁷ Had Congress intended for ICSID awards to be enforced

that the application had been brought on an *ex parte* basis. *Liberian Eastern Timber*, *supra* note 40. In three other instances, *ex parte* judgments recognizing ICSID awards were entered without a written decision by the court. *Sempre Energy Int'l v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 14, 2007); *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 20, 2007); and *Grenada v. Grynberg*, No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011).

⁶³ *Mimincó, LLC v. Democratic Republic of the Congo*, Civil Action No. 14-01987, 2015 WL 1061555, at *2 (D.D.C. Feb. 9, 2015).

⁶⁴ *Id.* at *2 n.3 (emphasis in original). Somewhat confusingly, the court also both acknowledged a distinction between *mere recognition* and *enforcement* of an ICSID award and acknowledged the debtor State's pecuniary obligations under the ICSID award, but also cited with approval *Continental's* conclusion that U.S. federal courts "can only enforce, not recognize or confirm," ICSID awards. *Id.* at **2 n.3, 4.

⁶⁵ *Micula I*, *supra* note 33, at *5.

⁶⁶ *Id.*

⁶⁷ *Id.* at *6. As the court explained, "[t]he use of the words 'actions' and 'proceedings' strongly connotes a congressional intent to domesticate ICSID awards through a plenary action, rather than *ex parte* confirmation or recognition." *Id.* Similarly, "[b]oth the House and Senate Reports state that '[i]f an action is brought in a U.S. district court to enforce the final judgment of a State court, it is, of course, given full faith and credit in the Federal court' and refer to the implementing legislation 'as providing a 'uniform procedure for *enforcement* of awards,'" but "[n]owhere does either report refer to *ex parte* proceedings or the need for confirmation or recognition as a precursor to enforcement, even though Congress knew that such mechanism was possible under the FAA. As with the text of the statute itself,

in a summary proceeding, the court reasoned, it could have so provided in the implementing statute.⁶⁸

The court also relied upon the fact that, four years after passing legislation implementing the Convention, Congress enacted the statute implementing the New York Convention, which expressly permits a party to apply for an order *confirming* an arbitration award.⁶⁹

Courts permitting *ex parte* recognition of ICSID awards also find support for their own approach in the implementing legislation. As one court explained, “although the ICSID enabling statute does not affirmatively prescribe the procedures to be used for domestic recognition of an ICSID award, the words it does use,” including “full faith and credit” and the prohibition on the application of the FAA, “underscore Congress’s expectation that award recognition would be automatic and not subject to contest.”⁷⁰ Indeed, during a congressional hearing on the implementing legislation, the Department of State’s legal adviser testified that the enforcement of ICSID awards “should be as simple as possible.”⁷¹

4.4 WHAT APPROACH EFFECTUATES THE INTENT OF THE CONTRACTING STATES TO THE CONVENTION?

Federal courts similarly reason that their respective approaches effectuate the intent of the Contracting States to the Convention. Courts requiring plenary actions point to the fact that the Convention does not actually require that the

Congress’ use of the term ‘action’ in the legislative history, without reference to a process of recognition or confirmation, indicates an intent to use a plenary proceeding to domesticate an ICSID award.” *Id.* (quoting H.R. REP. NO. 1741, at 3–4 (1966), S. REP. NO. 1374, *supra* note 34, app. at 3–4 (1966)). In this respect, *see also* 89th Cong. 2d Sess., *supra* note 9, at 4 (“To give full faith and credit to an arbitral award as if it were a final judgment of a court of one of the several States means that an action would have to be brought on the award in a U.S. district court just as an action would have to be brought in a U.S. district court to enforce the final judgment of a State court.”). Commentators have offered views on the impact of the word “action” in the statute’s legislative history. *See, e.g.*, Broches, *supra* note 19, at 323 (“The alleged requirement that the beneficiary of a Convention award must initiate an original federal action against the losing party can give rise to the unwarranted assumption that the use of the full faith and credit language would empower the federal court to review the rendering tribunal’s jurisdiction and its observance of due process. . . . It is, however, clear that the legislation was not intended to leave open even a theoretical possibility of such a review which in the view of its sponsors would have been contrary to the provisions of the Convention.”).

⁶⁸ *Micula I*, *supra* note 33, at *6.

⁶⁹ *Id.* The court found the fact that “only four years earlier Congress chose not to include such a process in the ICSID enabling statute” constituted “strong evidence that Congress did not intend for parties who had won ICSID awards to *confirm* such awards.” *Id.* (emphasis added).

⁷⁰ *Mobil Cerro Negro*, *supra* note 6, at *22 (S.D.N.Y. Feb. 13, 2015); *see also Miminco*, *supra* note 63, at *2 (holding that *ex parte* recognition “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.’”).

⁷¹ 89th Cong. 2d Sess., *supra* note 9, at 9.

Contracting States “adopt any *specific method* for fulfilling” their obligation “to both ‘recognize’ and ‘enforce’ ICSID awards.”⁷²

Courts endorsing *ex parte* applications focus not only on the text of the Convention, but also on the intent of its Contracting States, emphasizing that the “expectation underlying the ICSID Convention was that awards would be expeditiously recognized in contracting states.”⁷³ Indeed, these courts conclude that requiring award creditors to initiate plenary actions to recognize an ICSID award “would be, at a minimum, in significant tension with the intentions of the Convention and the enabling statute as to the process of recognition.”⁷⁴ Furthermore, requiring investors to undertake “the expensive and time-consuming process of a plenary proceeding” would undermine the “expansive spirit” on which U.S. investors rely when seeking confirmation of ICSID awards in the national courts of other Contracting States.⁷⁵

Courts permitting *ex parte* recognition also note that a plenary action would be essentially futile. The Convention makes clear that the recognition process is non-substantive, and a court presented with an application to recognize an ICSID award has no power to review the merits of the award.⁷⁶ Thus, the form of the recognition proceeding, be it an *ex parte* application or a more cumbersome plenary action, has no impact on the substantive rights of the debtor State under the Convention.⁷⁷ As one court explained, “[e]ven if [the award creditors] were

⁷² *Micula I*, *supra* note 33, at *7 (emphasis added).

⁷³ *Mobil Cerro Negro*, *supra* note 6, at *10. Moreover, the prohibition in Article 53 of the Convention of any appeal or remedy outside of the Convention itself leaves an award debtor with “no valid ground to claim offense at a streamlined recognition procedure.” *Id.*

⁷⁴ *Id.* at *18. “[O]ne conclusion is certain: Registration of ICSID awards was intended to be automatic.” *Id.* at *22. The court also found it relevant that “legislatures in a number of other contracting states drew the same conclusion. A number of them,” including the United Kingdom, Australia, and France, “permit immediate, and *ex parte*, recognition of ICSID awards.” *Id.*

⁷⁵ *Micula II*, *supra* note 41, at **3, 7. Commentators have also criticized interpretations that grant national courts any discretion in reviewing ICSID awards before enforcement. See SCHREUER ET AL., *supra* note 3, at 1143–44 (Any “impression that the federal courts have the power to review the ICSID tribunals’ jurisdiction and to investigate whether the proceedings satisfied standards of procedural fairness . . . would be inconsistent with the principle of the award’s finality. It is doubtful whether the Convention’s authorization to federal States to treat awards like judgments of constituent states and to have them enforced through their federal courts implies that the review mechanisms for judgments of constituent states that may exist in these States can be applied to ICSID awards.”); see also Broches, *supra* note 19, at 323–24 (The differences between an “action” to enforce an ICSID award and an “action” brought in U.S. federal court to enforce a state court judgment “are so great that one may argue that there is no need to follow the route of an original action in federal court to enforce a Convention award in the absence of specific language to that effect, and that a Convention award may directly be enforced by a U.S. District Court.”).

⁷⁶ See *Mobil Cerro Negro*, *supra* note 6, at *10.

⁷⁷ *Id.* (“Those rights—to challenge the award substantively before ICSID and to resist attachment or execution in the United States to the extent assets are found here—are unaffected by the recognition process.”).

directed to commence a plenary action for recognition [,] . . . nothing would change substantively.’⁷⁸

5 AN UNCLEAR PATH FOR THE AWARD CREDITOR

From the perspective of a prevailing investor, the differences between the procedural approaches to ICSID enforcement discussed above are not merely academic. *Ex parte* proceedings allow investors to reduce a favorable award to a U.S. judgment within a matter of days.⁷⁹ A plenary action may be expensive and time-consuming,⁸⁰ particularly if the judgment debtor engages in dilatory or evasive measures to avoid service of process. It bears noting, however, that even if an *ex parte* application is granted, the judgment debtor may move to vacate the order, and, if that motion is denied, file an appeal.⁸¹

The award creditor thus must carefully consider its strategic options when enforcing an ICSID award in the United States. In the Southern District of New York, where *ex parte* applications have been granted on eight occasions,⁸² the choice may be clearer. The district courts in the District of Columbia, however, have both required a plenary enforcement action⁸³ and permitted *ex parte* recognition.⁸⁴ And other federal district courts have not yet directly addressed whether an ICSID award can be reduced to judgment on an *ex parte* basis, nor has any court of appeals,⁸⁵ much less the U.S. Supreme Court. In light of the divergent approaches adopted by U.S. courts, the path to ICSID enforcement remains unclear for many award creditors.

⁷⁸ *Micula II*, *supra* note 41, at *4.

⁷⁹ In *Tidewater Investment SRL v. Bolivarian Republic of Venezuela*, for example, the investor/award creditor filed its *ex parte* petition for recognition of an ICSID award on March 16, 2015. A federal court judgment on the amount of the award was signed on the same day, and entered on March 18, 2015. *Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, 15-cv-01960, slip op. at 2 (S.D.N.Y. Mar. 18, 2015).

⁸⁰ *Micula II*, *supra* note 41, at *3.

⁸¹ *Mobil Cerro Negro*, *supra* note 6, is currently on appeal to the Second Circuit. *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 15-707-cv (2d Cir. 2015). Venezuela, the award debtor in *Tidewater*, *supra* note 79, has also moved to vacate the judgment entered on the award against it. *Notice of Motion to Vacate Ex Parte Judgment, Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, No. 15 CV 1960 (ALC) (S.D.N.Y. Mar. 23, 2015). Resolution of both the *Mobil* appeal and the *Tidewater* motion are still pending.

⁸² *Tidewater*, *supra* note 79, *Micula II*, *supra* note 41, *Mobil Cerro Negro*, *supra* note 6, *Grenada*, *supra* note 62, *Siag*, *supra* note 58, *Semptra Energy*, *supra* note 62, *Enron*, *supra* note 62, *Liberian Eastern Timber*, *supra* note 40.

⁸³ *Micula I*, *supra* note 33, at *7.

⁸⁴ *Mimincó*, *supra* note 63, at *2.

⁸⁵ *But see supra* note 81. This may change soon after the publication of this article.