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Enforcement of ICSID Convention Arbitral Awards in U.S. Courts

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I. INTRODUCTION

The International Centre for Settlement of Investment Disputes (ICSID) is an international organization and a member of the World Bank Group that was established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[1] to administer arbitrations and conciliations between parties to the

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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 [hereinafter ICSID Convention]; *see also* ANTONIO R. PARRA, THE HISTORY OF ICSID 1, 94–95 (2012); CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 1–3, 10 (2d ed. 2009); *About ICSID*, ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx (last visited Nov. 18, 2015) ("ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [and] is an independent, depoliticized and effective dispute-settlement institution.").

Convention (Contracting States) and foreign investors.[2]

The ICSID Convention establishes a treaty-based framework for the conduct of arbitrations that is entirely self-contained, removed from national court systems.[3] ICSID arbitrations are sometimes referred to as being "denationalized," signifying the fact that they are governed exclusively by the provisions of the ICSID Convention (and the arbitration rules implementing the Convention) and are exempt from the application of the arbitration laws and the control of national courts.[4]

This extends to the recognition and enforcement of ICSID Convention awards. Rather than rely upon the legal framework for the recognition and enforcement of arbitral awards through national courts established by the New York Convention,[5] the ICSID Convention incorporates a self-contained

2. *See* ICSID Convention, *supra* note 1; *see also About ICSID*, *supra* note 1.

3. SCHREUER ET AL., *supra* note 1, at 1097; Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 131, 131–32 (R. Doak Bishop ed., 2009). There are presently 159 member states (Contracting States) to the ICSID Convention. *See Database of ICSID Member States*, ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx (last visited Nov. 18, 2015). ICSID also administers arbitrations that are not conducted under the ICSID Convention, i.e., those that are conducted under the Arbitration Rules of the ICSID Additional Facility or under the UNCITRAL Arbitration Rules. *See* Aron Broches, *The "Additional Facility" of the International Centre for Settlement of Investment Disputes*, *in* SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 249, 249 (1978) ("[A]rbitration [is] governed in [its] entirety by the Convention and the rules adopted thereunder, including . . . recognition and enforcement of awards. The Convention thus establishes a complete jurisdictional system."); *see also ICSID Additional Facility Rules*, ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Additional-Facility-Rules.aspx (last visited Nov. 18, 2015) (enumerating the additional facility services available under ICSID). *See generally* SCHREUER ET AL., *supra* note 1, at 41; *Process Overview*, ICSID, https://icsid.worldbank.org/apps/icsidweb/process/Pages/Overview.aspx (last visited Nov. 18, 2015).

4. SCHREUER ET AL., *supra* note 1, at 1102–04; Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV.—FOREIGN INV. L.J. 287, 288 (1987) ("[T]he Convention could, and did, establish a complete, exclusive, and closed jurisdictional system, insulated from national law."); Ruqiya B. H. Musa & Martina Polasek, *The Origins and Specificities of the ICSID Enforcement Mechanism*, *in* ENFORCEMENT OF INVESTMENT TREATY ARBITRATION AWARDS 13, 13 (Julien Fouret ed., 2015); Parra, *supra* note 3, at 131–32. *See generally* S.A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, 2009 TRANSNAT'L DISP. MGMT. 1 (discussing parties' obligations to comply with awards pursuant to Articles 53 and 54 of the ICSID Convention).

5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; *see* 9 U.S.C. §§ 201–08 (2012) (implementing the New York Convention); *see also* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981) (analyzing the New York Convention's provisions and comparing court decisions in Contracting States).

enforcement regime that is binding on the Contracting States to the Convention.[6]

That enforcement regime is set forth in Articles 53–55 of the ICSID Convention.[7] Article 53 addresses the parties to the dispute and provides that the award is binding on them:

> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
>
> (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.[8]

Article 54 addresses the Contracting States to the ICSID Convention and, significantly, establishes obligations on them to recognize and enforce ICSID awards as follows:

> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this

6. *See* ICSID Convention, *supra* note 1, at arts. 53–55; *see also supra* note 4 and accompanying text.

7. *See* ICSID Convention, *supra* note 1, at arts. 53–55.

8. *Id.* at art. 53(1)–(2).

> purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.[9]

Article 55 clarifies the limited nature of the Article 54 obligation, providing that: "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."[10]

A few observations may be made regarding these enforcement provisions. Article 53 of the ICSID Convention establishes the basic principle that the arbitral award is binding on the parties to the dispute and further clarifies that the award is not subject to any remedies other than those provided by the ICSID Convention.[11] In other words, an ICSID Convention award is not subject, for example, to actions to set aside or vacate the award in any national court.[12]

Viewed in isolation, Article 53 arguably creates an imbalance between the parties to the dispute because the parties in an ICSID arbitration will always be a state on the one side and an investor—usually a private party—on the other.[13] The provisions of the ICSID Convention—including Article 53—may be enforced directly as an international obligation of the State party,[14] but without more, Article 53 does not provide a means of

9. *Id.* at art. 54.

10. *Id.* at art. 55.

11. *See id.* at art. 53. The post-award remedies provided for by the ICSID Convention are supplementary decision or rectification, interpretation, revision, and annulment. *See id*. at arts. 49–52; *see also Post-Award Remedies—ICSID Convention Arbitration*, ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Post-Award-Remedies-Convention-Arbitration.aspx (last visited Nov. 18, 2015) (identifying and describing the relevant post-award remedies).

12. *See, e.g.*, JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 296, 302–06, 332–33 (1997) (noting on page 296 that "the arbitral situs ordinarily is the appropriate venue for [actions to vacate an arbitral award]," detailing on pages 302–06 the grounds for vacatur of an arbitral award in the United States pursuant to the Federal Arbitration Act, and noting on page 333 that "awards governed by the ICSID [Convention] would face few obstacles in American courts").

13. *See* ICSID Convention, *supra* note 1, at art. 53.

14. Article 64 of the ICSID Convention provides, in principle, a basis for one Contracting State party to enforce another state party's obligations under the Convention, including a failure to abide by an award. ICSID Convention, *supra* note 1, at art. 64. Thus, for example, an investor's home state may bring an action before the International Court of Justice if the state party to the investment dispute fails to abide by an ICSID award in the investor's favor. Article 64 provides that "[a]ny

enforcement against the non-State party to the dispute.[15] However, Article 54 establishes the means through which ICSID awards may be enforced against the non-State party to the dispute, as well as against the State party.[16]

Article 54 provides that all Contracting States to the ICSID Convention are obligated to recognize ICSID arbitral awards as binding.[17] There is no basis in the ICSID Convention for a Contracting State party to refuse recognition of an ICSID award.[18] Thus, there is no basis for a Contracting State party, for example, to decline to give res judicata effect to an ICSID award.

Article 54 additionally provides that all Contracting States to the ICSID Convention are obligated to enforce the pecuniary obligations imposed by an arbitral award "as if it were a final judgment of a court in that State."[19] That is, there is no basis for a Contracting State party to decline to enforce

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dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement." *Id*. In practice, no state has invoked Article 64 in response to another state's failure to honor an award. Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503, 518 (2013).

15. *See* ICSID Convention, *supra* note 1, at art. 53.

16. *See* 2 ICSID, HISTORY OF THE ICSID CONVENTION, DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 424 (reprt. 2009) [hereinafter HISTORY OF THE ICSID CONVENTION], https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf; SCHREUER ET AL., *supra* note 1, at 1119; Alexandrov, *supra* note 4, at 7–8; Broches, *supra* note 4, at 302, 316; Musa & Polasek, *supra* note 4, at 14–17.

17. ICSD Convention, *supra* note 1, at art. 54.

18. *Id.* at art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."). This is in contrast to Article V of the New York Convention, which sets out seven bases upon which recognition of covered arbitral awards may be refused. *Compare id.* at art. 54, *with* New York Convention, *supra* note 5, at art. V(1). Article V(1) provides five bases justifying denying recognition of the award: (a) the parties to the arbitration agreement lacked capacity or the agreement was not legally valid; (b) proper notice of the appointment of the arbitrator or of the arbitration proceeding was not given; (c) the award deals with a matter not submitted to arbitration or beyond the scope of the submission; (d) the arbitral authority or procedure was not agreed to by the parties; or (e) the award was not yet binding or had been set aside or suspended in the enforcement forum. *Id*. Article V(2) provides two additional grounds: (a) if "[t]he subject matter of the difference is not capable of settlement by arbitration," or (b) if "recognition or enforcement of the award would be contrary to the public policy" of the forum where enforcement is sought. *Id.* at art. V(2); *see also* 9 U.S.C. § 201 (2012) (providing for enforcement of the New York Convention within the United States).

19. ICSID Convention, *supra* note 1, at art. 54(1).

pecuniary obligations imposed by an ICSID award.[20]

Article 54 also permits Contracting States with a federal constitution to enforce ICSID awards in or through their federal courts and treat the award "as if it were a final judgment of the courts of a constituent state."[21] The drafting history of the ICSID Convention reveals that this provision was included at the request of the United States.[22]

Article 55 clarifies that the obligations in Article 54 of the ICSID Convention do not alter the laws in effect regarding foreign sovereign immunity.[23] In other words, whatever national laws apply to the execution of final judgments against foreign states and their assets generally apply also in relation to the execution of ICSID awards.[24] Though the ICSID Convention establishes a special enforcement regime in relation to ICSID arbitral awards, it does not provide any special regime in relation to the immunities of states or in relation to the execution (i.e., attachment) of state assets.[25]

The Report of the Executive Directors of the World Bank, upon the presentation of the text of the ICSID Convention to the Bank's member governments, describes these provisions of the Convention as follows:

> 42. Subject to any stay of enforcement . . . in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States,

20. *Id.* at art. 54. Although Article 53 requires the parties to the dispute to comply with all aspects of an award, Article 54's enforcement provisions apply only to pecuniary obligations. *Compare id.* at art. 53, *with id.* at art. 54. The disparity is due partially to the ICSID Convention's drafter's anticipation that Article 54 would be used in third party states that would not wish to enforce injunctive or declaratory relief against another state. Alexandrov, *supra* note 4, at 12; Broches, *supra* note 4, at 315–16.

21. ICSID Convention, *supra* note 1, at art. 54(1).

22. HISTORY OF THE ICSID CONVENTION, *supra* note 16, at 900; Broches, *supra* note 4, at 321 ("The substance of this provision was proposed by the deputy representative of the United States . . . .").

23. ICSID Convention, *supra* note 1, at art. 55.

24. *See id.*

25. *See id.*

> Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.
>
> 43. The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that 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.[26]

Article 54 provides that a party seeking recognition or enforcement shall furnish a copy of the award certified by the ICSID Secretary-General to the competent court or other authority designated by the Contracting State for this purpose.[27] This provision thus appears to affirm that all that is necessary to obtain recognition or enforcement of an ICSID award is to present a copy of it to a designated competent authority—which, moreover, need not be a court.[28] Such a simple process is consistent with the fact that the obligation to recognize and enforce is mandatory and there is no basis to decline to do so.[29] Furthermore, a State may only impose enforcement procedures that would apply to a final judgment of a Contracting State or, in the case of a Contracting State with a federal constitution, to a final judgment of a constituent state.[30]

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26. ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, *in* ICSID REGULATIONS & RULES 35, 47–48 (2003), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.

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

28. Broches, *supra* note 4, at 326. Article 54 envisions that recognition and enforcement may be obtained by simple presentation of a copy of the award certified by the Secretary General of ICSID. *Id.* Review of an award by a domestic court or other authority is limited to verification of the authenticity of the award. *Id.*

29. Musa & Polasek, *supra* note 4, at 16–17.

30. *Id.* at 14.

Aron Broches, the first General Counsel of the World Bank and the principal drafter of the ICSID Convention, observed that Article 54 is "one of the key provisions of the ICSID Convention and . . . one of its most striking innovations."[31] The drafting history of the Convention shows that the principal concern at that time regarding enforcement against a State party to a dispute was whether the State party would accept the award as valid and binding.[32] Article 53 addressed that concern by making the State's obligation clear so that "[i]n the unlikely event that a losing State failed to comply with an award it would be in clear violation of the Convention itself, and the investor's national State could take up his case."[33] The drafters viewed Article 54 as important because it would give States that had been successful claimants a means to enforce awards against investors who did not have assets within the host state's territories.[34] Article 54, thus, was intended to make an ICSID award immediately enforceable in every State party to the ICSID Convention upon the mere presentation of a certified copy of the award to a designated competent authority.[35]

Because the different State parties to the ICSID Convention have different legal systems, Article 54 permits each Contracting State to select and designate its competent authority.[36] Although many State parties have designated courts, some have designated an executive authority, such as a ministry, reflecting the fact that Article 54 does not contemplate that recognition and enforcement of an ICSID award would entail judicial review.[37]

31. Broches, *supra* note 4, at 287, 299.
32. *Id.* at 302.
33. *Id.* at 303.
34. *Id.*
35. *Id.* at 326.
36. *Id.* at 326–27.
37. *Id.* For example, Belgium and Sweden have designated the Ministry of Foreign Affairs, while the Czech Republic, Egypt, and Latvia have designated the Ministry of Justice. ICSID, *Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention*, *in* CONTRACTING STATES AND MEASURES TAKEN BY THEM FOR THE PURPOSE OF THE CONVENTION 1–3, 5 (May 2015) [hereinafter ICSID/8-E], https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf.

II. ENFORCEMENT OF ICSID AWARDS IN THE UNITED STATES

In accordance with Article 54(2) of the ICSID Convention, the United States designated "Federal District Courts (including each Court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States)" as its competent authority.[38]

The United States implemented its obligation to recognize arbitral awards rendered pursuant to the ICSID Convention in 22 U.S.C. § 1650a, which provides as follows:

> (a) An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID 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. The Federal Arbitration Act (9. U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the [ICSID Convention].
>
> (b) 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.[39]

Thus, in the United States, ICSID awards are enforced in the federal district courts and the provisions of the Federal Arbitration Act[40] are not applicable.[41] Below, this Article addresses a number of questions that arise in the application of these provisions.[42]

A. Unclear Terminology and Its Procedural Effects

The first question relates to the sometimes-unclear distinction between the two concepts of recognition—enforcement and execution—each of which is used in the authentic English text of Article 54.[43] Each term

38. ICSID/8-E at 6.
39. 22 U.S.C. § 1650a (2012) (citations omitted).
40. *See* 9 U.S.C. § 1 (2012).
41. 22 U.S.C. § 1650a.
42. *See infra* Part II.A–C.
43. Comm. on Int'l Commercial Disputes, N.Y.C. Bar Ass'n, *Recommended Procedures for*

generally has its own meaning in the context of arbitration award enforcement: (1) *recognition* refers the act of giving the award legal effect, such as by acknowledging its res judicata or preclusive effects or by confirming the content of the award in a court decision, which converts it effectively to a judgment; (2) *enforcement* refers to a court order directing compliance with the award's directives; and (3) *execution* refers to the performance of the obligations, including by forcible attachment of assets in satisfaction of pecuniary obligations contained in the award.[44] Commentators have observed, however, that in some instances the term recognition is equated with enforcement, while in other instances enforcement has been equated to execution.[45] Some commenters suggest that because authentic French and Spanish texts of the ICSID Convention

Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention, 27 ICSID REV. 207, 227–28 (2012) [hereinafter N.Y.C. Bar].

44. *See* Pedro Menocal, *We'll Do It for You Any Time: Recognition and Enforcement of Foreign Arbitral Awards and Contracts in the United States*, 11 ST. THOMAS L. REV. 317, 336 (1999) ("[T]here is a difference between recognition of a foreign arbitral award and *enforcement* of a foreign arbitral award. Recognition means giving effect to an award defensively in order to bar litigation of the same issues. Enforcement means applying judicial remedies to assure that an award is carried out." (emphasis added)); *see also* R. Doak Bishop, *Introduction: The Enforcement of Arbitral Awards Against Sovereigns*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS, *supra* note 3, at 3, 10 ("Enforcement takes place in two stages. The first stage is the enforcement phase, in which the award is accepted by the court for enforcement . . . . The second stage deals with execution on specific assets."); N.Y.C. Bar, *supra* note 43, at 213.

45. *See, e.g.*, SCHREUER ET AL., *supra* note 1, at 1135–36; N.Y.C. Bar, *supra* note 43, at 212. The varied use of these terms is reflected in authentic English versions of the New York Convention and the Panama Convention. *See* New York Convention, *supra* note 5, at art. V(1); *see also* Inter-American Convention on International Commercial Arbitration, art. V(1), Jan. 30, 1975, 104 Stat. 448, 1438 U.N.T.S. 245 [hereinafter Panama Convention]. For example, Article V of the New York Convention and the Panama Convention are nearly identical, establishing the same seven bases for contesting the validity of an arbitral award. *Compare* New York Convention, *supra* note 5, at art. V(1), *with* Panama Convention, *supra*, at art. V(1). However, the New York Convention refers to "enforcement" where the Panama Convention refers to "execution." *Compare* New York Convention, *supra* note 5, at art. V(1) ("Recognition and *enforcement* of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and *enforcement* is sought . . . ." (emphasis added)), *with* Panama Convention, *supra*, at art. V(1) ("The recognition and *execution* of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and *execution* are requested . . . ." (emphasis added)). The New York and Panama Conventions are incorporated into U.S. law pursuant to 9 U.S.C. § 201 and 9 U.S.C. § 301, respectively. 9 U.S.C. §§ 201, 301 (2012). Confusion may be exacerbated by imprecise translations of the term "exequatur," which is a type of order used in many civil law jurisdictions that permits a judgment to be enforced (i.e., performed or complied with). *Definition of Exequatur*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/exequatur (last visited Nov. 19, 2015).

use the same word for both "enforcement" and "execution," the words should be interpreted to have the same meaning in the English text of Article 54[46]—although whether that meaning refers to execution or "a broad concept embracing all steps covered by Art[icle] 54" might not be clear.[47]

The lack of clarity regarding the terms "recognition," "enforcement," and "execution" can also be seen in U.S. case law concerning the enforcement of ICSID arbitral awards. For example, 22 U.S.C. § 1650a uses the term enforcement without any definition.[48] It does not expressly address recognition of an ICSID award where enforcement is not sought.[49] In practice, some ICSID award creditors applying to U.S. courts have sought only recognition of an award—i.e., a judgment confirming the award—without at that time requesting enforcement or execution via attachment of assets of the award debtor.[50] The absence of any reference to recognition or confirmation in § 1650a has given rise to a key question: Are judicial proceedings under the enabling statute seeking a judgment recognizing or confirming the award permissible through summary ex parte procedures, such as those used for recognition of domestic state court judgments?[51]

U.S. courts have reached divergent conclusions on this question, as illustrated by two recent cases in the U.S. District Courts for the District of Columbia and the Southern District of New York.[52]

In *Micula v. Government of Romania* (*Micula D.D.C.*), an award creditor filed a petition in the U.S. District Court for the District of Columbia under § 1650a seeking to confirm an ICSID arbitration award against Romania on an ex parte basis.[53] The petitioner relied upon, and the

46. SCHREUER ET AL., *supra* note 1, at 1134–35.

47. *Id.* at 1136.

48. *See* 22 U.S.C. § 1650a (2012).

49. *See id.*

50. *See, e.g.*, Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela, 87 F. Supp. 3d 573, 575 (S.D.N.Y 2015); Miminco, L.L.C. v. Democratic Republic Congo, 79 F. Supp. 3d 213, 215 (D.D.C. 2015); Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru, 904 F. Supp. 2d 131, 131–32 (D.D.C. 2012); Blue Ridge Invs., L.L.C. v. Republic of Argentina, 902 F. Supp. 2d 367, 370 (S.D.N.Y. 2012); Siag v. Arab Republic of Egypt, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009).

51. *See* Micula v. Government of Romania, No. 1:14-cv-00600, 2015 WL 2354310, at *1 (D.D.C. signed May 18, 2015) [hereinafter *Micula D.D.C.*]; *see also Mobil*, 87 F. Supp. 3d at 574.

52. *Compare Micula D.D.C.*, 2015 WL 2354310, at *1, *with Mobil*, 87 F. Supp. 3d 573.

53. *Micula D.D.C.*, 2015 WL 2354310, at *1 (stating that the petitioner requested confirmation of the arbitral award, meaning that the award would be rendered an enforceable judgment of the court).

court noted, a series of cases in the Southern District of New York in which the court granted confirmation of ICSID awards under § 1650a on an ex parte basis by applying the forum state's procedural rules for registration of foreign or out-of-state judgments.[54] The court defined the question before it as "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."[55]

The court analyzed the question on an ex parte basis and noted its concern whether Congress intended to grant federal courts the authority to confirm "substantial arbitration awards" against a foreign sovereign without service of process, which is fundamental for a U.S. court to obtaining personal jurisdiction over a named defendant.[56] After conducting a contextual analysis of § 1650a, the court concluded that the structure and text of the statute did not permit ex parte procedures for confirmation of an ICSID arbitral award.[57]

The court noted the absence of any reference to confirmation or recognition in the statute: "Notably, the statute uses only the verb 'enforce' as it relates to state court judgments; it does not use the verbs 'confirm' or 'recognize.'"[58] Relying on an earlier decision by the Eastern District of Virginia,[59] the court further noted that § 1650a requires the court to treat ICSID awards in the same manner as state court judgments, but federal courts have no procedure for recognizing or confirming state court judgments; rather, the only method for enforcing a state court judgment in federal court is through "a suit on the judgment as a debt."[60] Thus, the court observed that the reference to enforcement in § 1650a "is consistent with the procedural rule that 'the proper treatment of a state court judgment by a

54. *Id.* at *8 (first citing *Mobil*, 87 F. Supp. 3d 573; then citing Grenada v. Grynberg, No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011); then citing *Siag*, 2009 WL 1834562; then citing Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic, No. M-82 (S.D.N.Y. Nov. 20, 2007); and then citing Sempra Energy Int'l v. Argentine Republic, No. M-82 (S.D.N.Y. Nov. 14, 2007)).

55. *Id.* at *1.

56. *Id.* at *6–7.

57. *Id.* at *1, *13.

58. *Id*. at *10.

59. *See* Cont'l Cas. Co. v. Argentine Republic, 893 F. Supp. 2d 747, 752–55 (E.D. Va. 2012). The court, in analyzing congressional intent, also found it significant that under § 1650a, the provisions of Title 9 of the Federal Arbitration Act, which refer to confirmation of an arbitral award, expressly do not apply. *Micula D.D.C.*, 2015 WL 2354310, at *5.

60. *See Micula D.D.C.*, 2015 WL 2354310, at *4–5.

federal court is not recognition, or registration, but enforcement,'" and that enforcement—resulting in full faith and credit to the state judgment—may be achieved only by means of plenary actions.[61]

The court thus concluded that Congress in enacting § 1650a "did not intend for parties who had won ICSID awards to *confirm* such awards" and accordingly ruled that to enforce the award under § 1650a the petitioner had to "file a plenary action, subject to the ordinary requirements of process under the Foreign Sovereign Immunities Act, to convert its ICSID award . . . into an enforceable domestic judgment."[62] Notably, plenary actions seeking enforcement of ICSID awards were commenced in other cases as well.[63]

In contrast, the Southern District of New York reached the opposite conclusion in a case brought, coincidentally, to confirm the same award (*Micula S.D.N.Y.*).[64] After the U.S. District Court for the District of Columbia rejected the petition for ex parte confirmation, different award creditors sought confirmation of the same ICSID award in summary ex parte proceedings before the U.S. District Court for the Southern District of New York.[65] Notably, the court had permitted ex parte enforcement of ICSID awards in several other cases in previous years.[66] Thus, consistent with the

61. *Id.* at *5–6 (quoting *Cont'l Cas. Co.*, 893 F. Supp. 2d at 759).

62. *Id.* at *6–7. The court also observed that this conclusion was consistent with the obligations of the United States under the ICSID Convention because Article 54 does not specify a procedure for recognizing and enforcing an ICSID award and permits a Contracting State with a federal constitution to treat an ICSID award as a final judgment of a constituent state court. *Id.* at *2.

63. *See* Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru, 904 F. Supp. 2d 131, 131–32 (D.D.C. 2012) (noting that petitioner filed an action to confirm an ICSID award and respondent moved to dismiss the petition for failure to state a claim or to remand the dispute to the arbitrator); Blue Ridge Invs., L.L.C. v. Republic of Argentina, 902 F. Supp. 2d 367, 370 (S.D.N.Y. 2012) (noting that petitioner filed an action to confirm an ICSID award and respondent filed a motion to dismiss the petition for lack of subject matter and personal jurisdiction); Funnekotter v. Republic of Zimbabwe, No. 09 Civ. 08168, 2011 WL 5517860, at *1–2 (S.D.N.Y. Nov. 10, 2011) (noting that petitioner filed an action to confirm an ICSID arbitral award and that respondent failed to comply with its discovery obligations). *Blue Ridge Investments, L.L.C. v. Republic of Argentina* is discussed in greater detail below. *See infra* notes 116–25 and accompanying text.

64. Micula v. Government of Romania, No. 15 Misc. 107 (Part I), 2015 WL 4643180, at *4 (S.D.N.Y. Aug. 5, 2015) [hereinafter *Micula S.D.N.Y.*].

65. *Id.* at *2.

66. *See, e.g.*, Grenada v. Grynberg, No. 11 Misc. 45, slip op. at 1–2 (S.D.N.Y. Apr. 29, 2011) (enforcing an ICSID award ex parte upon receipt of a certified copy of the award and accompanying declaration); *see also* Siag v. Arab Republic of Egypt, No. M-82, 2009 WL 1834562, at *1–3 (S.D.N.Y. June 19, 2009) (adopting the procedures of New York's Civil Practice Law Rules to enforce an ICSID award ex parte); Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic, No.

procedure followed in other cases in that district, the petitioners obtained an order confirming the ICSID award as a judgment (later amended to include Micula as an intervenor).[67] Romania subsequently sought to vacate the judgment,[68] arguing—among other grounds—that an ICSID award can only be recognized through a plenary, and not an ex parte, proceeding.[69]

The court rejected the argument, relying on the recently decided Southern District of New York case *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*,[70] in which the award debtor had argued the language of § 1650a does not permit the use of non-plenary mechanisms to convert an ICSID award into a judgment:

> As fully discussed in *Mobil*, given the spirit of the ICSID Convention (to which the United States is a party), the language of its enabling 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.[71]

The court specifically rejected the conclusion in *Micula D.D.C.* that the reference in § 1650a to "enforcement" of the award precluded confirmation as a precursor to enforcement through ex parte proceedings under forum state procedures:

> Contrary to the reasoning in *Micula*, the enabling statute should not be read to collapse all distinction between "recognition" and "enforcement." Regardless of how state judgments are typically treated in federal courts . . . the ICSID Convention, a treaty to which

M-82, slip op. at 1–2 (S.D.N.Y. Nov. 20, 2007) (enforcing an ICSID award ex parte upon receipt of a certified copy of the award and accompanying affidavit); Sempra Energy Int'l v. Argentine Republic, No. M-82, slip op. at 1–2 (S.D.N.Y. Nov. 14, 2007) (same); Zhinvali Dev. Ltd. v. Republic of Georgia, No. M-82, slip op. at 1–2 (S.D.N.Y. Jan. 15, 2004) (same); Liberian E. Timber Corp. v. Republic of Liberia, 650 F. Supp. 73, 74, 77 (S.D.N.Y 1986) (denying Liberia's motion to vacate an ex parte judgment enforcing the pecuniary obligations of an ICSID award).

67. Ex Parte Petition to Recognize Arbitration Award Pursuant to 22 U.S.C. § 1650a, Micula v. Government of Romania, 2015 WL 4512425 (S.D.N.Y. Apr. 21, 2015) (No. 15 Misc. 107); *see also Micula S.D.N.Y.*, 2015 WL 4643180, at *2.

68. *See Micula S.D.N.Y.*, 2015 WL 4643180, at *1.

69. *Id.* at *3.

70. 87 F. Supp. 3d 573 (S.D.N.Y. 2015).

71. *Micula S.D.N.Y.*, 2015 WL 4643180, at *3.

> the United States is a party, mandates both recognition *and* enforcement. As has been recognized in the academic literature and explained at length in *Mobil*, by addressing only "enforcement," § 1650a created a statutory gap that is appropriately filled by looking to the law of the forum state—in this case, New York.[72]

The court noted that its holding "is narrow and limited to the 'recognition' of the Award," which it described as "a matter in which a court has no discretion once it determines that an award is authentic."[73] The court further stated that confirmation of the award had no effect on the protections available to Romania in connection with execution of the Micula claimants' judgment, quoting Judge Englemeyer's statement in *Mobil*: "Creation of a domestic judgment is a predicate to, not a substitute for, execution upon judgment."[74]

Thus, the *Micula D.D.C.* and *Micula S.D.N.Y.* decisions stand in direct opposition regarding the availability of ex parte procedures for confirmation of ICSID awards.[75] The decision in *Micula D.D.C.* suggests that there is no basis, whether under § 1650a or otherwise, for a U.S. federal court to issue an order "recognizing" or "confirming" an ICSID award without giving it enforcement effects.[76] Therefore the *Micula D.D.C.* court concluded there is no basis for a federal court to permit confirmation of an ICSID award by means of an ex parte procedure: confirmation of an ICSID award, as it entails enforcement—in the sense of issuing a judgment that may be enforced—requires a plenary civil action.[77] In this sense, the court followed

72. *Id.* (citations omitted).

73. *Id.* at *4.

74. *Id.* (citing *Mobil*, 87 F. Supp. 3d at 601). Both the *Micula* and *Mobil* decisions in the Southern District of New York emphasize that, regardless of award confirmation through ex parte procedures, the award debtors retain all the available procedural safeguards under Article 55 of the ICSID Convention. *See id.* at *3 ("Accordingly, a judgment debtor's 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' contemplated by Article 54." (alteration in original) (quoting *Mobil*, 87 F. Supp. 3d at 579)); *see also Mobil*, 87 F. Supp. 3d at 585 (noting that conversion of the award into a judgment does not affect the foreign sovereign's right to challenge attachment or execution pursuant to federal and forum state law).

75. *Compare Micula S.D.N.Y.*, 2015 WL 4643180, at *3, *with Micula D.D.C.*, Civil No. 1:14-cv-00600, 2015 WL 2354310 (D.D.C. signed May 18, 2015).

76. *Micula D.D.C.*, 2015 WL 2354310, at *6. *But see Micula S.D.N.Y.*, 2015 WL 4643180, at *3 (arguing that United States courts, in enforcing ICSID awards, should not collapse the distinction between enforcement and recognition merely because § 1650a fails to distinguish the two).

77. *Micula D.D.C.*, 2015 WL 2354310, at *5–6. *But see* Miminco, L.L.C. v. Democratic

the decision of the U.S. District Court for the Eastern District of Virginia in *Continental Casualty v. Argentine Republic*.[78]

In contrast, the Southern District of New York noted in *Mobil* that § 1650a had a gap (the silence on the applicable procedure for recognizing an ICSID award) and undertook to fill that gap by reference to forum state law and Second Circuit precedent.[79] This approach takes into consideration the policy interests, reflected in Articles 53–55 of the ICSID Convention, that ICSID awards should be expeditiously recognized and free from any substantive review or challenge.[80]

The *Micula D.D.C.* court's conclusion that § 1650a mandates a plenary action either to recognize or enforce an ICSID award appears to be in tension with the ICSID Convention enforcement provisions the statute is intended to implement.[81] Broches observed that interpreting § 1650a to require plenary proceedings before a court could recognize or enforce an ICSID award appeared to be "inconsistent with the provisions of paragraph (2) of Article 54 of the Convention which applies without distinction to enforcement in unitary as well as federal states."[82] A requirement of plenary judicial proceedings for recognition or enforcement of ICSID awards in U.S. courts—including service of process upon a sovereign (as would be required for most ICSID awards)—seems to conflict with the simplified recognition

Republic of the Congo, 79 F. Supp. 3d 213, 216–17 (D.D.C. 2015) (confirming an ICSID award through ex parte proceedings and stating that ex parte proceedings are consistent with the statutory mandate of 22 U.S.C. § 1650a but rejecting application of forum state rules for recognition of foreign judgments).

78. *See* Cont'l Cas. Co. v. Argentine Republic, 893 F. Supp. 2d 747, 753–54 (E.D. Va. 2012) ("To be sure, as Continental argues, the ICSID Convention appears to provide for recognition of an award on one hand and enforcement on the other. The short answer to this argument is that Congress in implementing the ICSID Convention provided a system for enforcement of awards, not for the recognition or confirmation of awards. And in this regard, 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.").

79. *See Mobil*, 87 F. Supp. 3d at 582 (noting that "the Second Circuit has repeatedly held that federal courts are to borrow state law to fill gaps in a federal statutory scheme, including in cases whose subject matter presents a quintessentially federal concern").

80. *Id*. at 597.

81. *See Micula D.D.C.*, 2015 WL 2354310, at *7.

82. Broches, *supra* note 4, at 323. Broches questioned whether a requirement of a plenary proceeding before according full faith and credit to an award is consistent with the simplified recognition procedures contemplated in Article 54 that should be applied in all Contracting States to the ICSID Convention, whether unitary or federal. *Id.* This is particularly apparent given that plenary proceedings could give rise to challenges to award recognitions based on jurisdictional or due process considerations, which would be contrary to the provisions of Article 54. *Id*. at 322–24.

and enforcement procedures of Article 54(2) of the ICSID Convention.[83] Article 54(2) contemplates that an ICSID award would be recognized—and its pecuniary obligations enforced—upon the presentation of a certified copy of the award, without further process or any possible objections.[84]

The *Mobil* court looked for evidence of congressional intent and observed that it is reasonable to assume that by using the phrase "full faith and credit" in § 1650a, Congress intended to adopt the commonly used mechanistic procedure of providing full faith and credit by means of interstate registration of both federal and state court judgments for the recovery of money or property.[85] Such proceedings do not require that the recognizing court have personal jurisdiction over the judgment debtor.[86] In light of this alternative analysis, the concerns of the *Micula D.D.C.* court regarding the need to establish personal jurisdiction over a sovereign award debtor by means of service under the Foreign Sovereign Immunities Act appear to be overstated. Articles 54 and 55 of the Convention make clear that sovereign immunity protections relating to execution of judgments continue to apply.[87] Thus, in the United States, even if a judgment recognizing and enforcing an award against a sovereign is obtained on an ex parte basis, there cannot be ex parte attachment of sovereign assets in satisfaction of that judgment without either prior agreement or reasonable notice of the judgment to the sovereign and court permission.[88] Nor are any immunities from attachment in relation to sovereign property affected.[89]

B. Non-Pecuniary Obligations

Another question relates to whether—and if so, how—non-pecuniary obligations in an ICSID award may be enforced by U.S. courts. Here, one should recall that in accordance with Article 54 of the ICSID Convention,

83. *Id.* at 323, 326; *see also* SCHREUER ET AL., *supra* note 1, at 1144 (asserting that a U.S. district court's review of jurisdiction and procedural fairness frustrates the award).

84. Broches, *supra* note 4, at 326.

85. *Mobil*, 87 F. Supp. 3d at 598–99.

86. *Id.* The court further noted that, even if personal jurisdiction were necessary, it had been waived through the agreement to submit to ICSID Convention arbitration. *Id.* at 602 n.36 (stating that "[p]ersonal jurisdiction ordinarily is not required in recognition proceedings" and that, further, by signing the ICSID Convention, Contracting States acknowledged the possibility of proper enforcement actions in the courts of other Contracting States).

87. *See, e.g.*, ICSID Convention, *supra* note 1, at arts. 54–55.

88. 28 U.S.C. § 1610(c)–(d) (2012).

89. *Id.*

the United States, as a Contracting State to the Convention, is bound without limitation to recognize ICSID awards. A Contracting State's obligation to recognize ICSID awards is not limited to the pecuniary obligations contained in such awards.[90] Thus, the United States is bound to recognize declaratory awards and awards of specific performance; it is merely not bound to *enforce* such obligations.[91]

Notably, although Contracting States to the ICSID Convention are not bound to enforce non-pecuniary obligations, they are not prohibited from doing so.[92] In practice, however, as Broches observed, there are "practical difficulties involved in the enforcement of non-pecuniary awards," and the drafters of the Convention had concerns that enforcement by one state's courts of an obligation of another state to perform or abstain from performing a specific act in some instances would not be permitted on public policy grounds.[93]

As ICSID Convention Article 54 requires Contracting States to enforce only the pecuniary obligations imposed by the award, § 1650a accordingly provides only that the pecuniary obligations "shall be enforced" and afforded the same full faith and credit as a final state court judgment.[94] Thus, just as § 1650a does not expressly address recognition of an ICSID award, it does not address recognition or enforcement of non-pecuniary obligations, such as a declaratory ruling or an order of specific performance, that may be contained in an award.

In this context, one may consider whether an ICSID award with non-pecuniary obligations may be enforced in U.S. courts under the provisions of the New York Convention.[95] Although the New York

90. *See* Alexandrov, *supra* note 4, at 12.

91. *Id.*

92. *Id.*

93. Broches, *supra* note 4, at 303, 315–16. Although it is difficult for a state to do so unilaterally, it remains open to a state to seek to enforce non-pecuniary obligations of an ICSID award through diplomatic protection or in an action brought before the International Court of Justice. *See* ICSID Convention, *supra* note 1, at arts. 27, 64.

94. 22 U.S.C. § 1650a(a) (2012); *see* ICSID Convention, *supra* note 1, at art. 54.

95. *See* JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 801 (2003) ("While the obligation to recognise awards is not limited to any form of award the facilitated enforcement procedure only covers the pecuniary obligations. Orders for specific performance or other non pecuniary obligations must be enforced under the New York Convention or the law of the state of enforcement."); SCHREUER ET AL., *supra* note 1, at 1138–39 ("[A] party to an ICSID arbitration may find it useful to rely on the New York Convention where Art. 54 of the ICSID Convention is of no avail because the award imposes a

Convention provides a mechanism for enforcement of arbitral awards without regard to whether the obligations are pecuniary, there are difficulties applying the provisions of the New York Convention to an ICSID award in U.S. courts.[96] This is because 22 U.S.C. § 1650a appears expressly to preclude that possibility.[97] Section 1650a states without limitation that the Federal Arbitration Act, which implements the New York Convention in 9 U.S.C. § 201, shall not apply to enforcement of awards rendered pursuant to the ICSID Convention.[98]

Thus, while there is no statutory provision for *enforcement* in U.S. courts of non-pecuniary obligations contained in ICSID awards, the United States' obligation under Article 54 of the ICSID Convention to *recognize* ICSID awards is without such limitation; that is, the obligation to recognize an ICSID award extends to non-pecuniary obligations.[99] Moreover, the obligation of the United States, as an ICSID Contracting State, to recognize an ICSID award is not necessarily limited to judicial recognition. There may be other circumstances in which an ICSID Contracting State should act to recognize an ICSID award and its effects.

C. Provisional Measures

Another question is whether an order issued by an ICSID tribunal granting provisional measures may be enforced in a U.S. court. The question may be considered because some U.S. courts when applying the provisions of the Federal Arbitration Act—which includes the U.S. legislation implementing the New York Convention—have enforced as an award arbitral decisions granting provisional or interim measures.[100] These courts have done so when they have concluded that the ordered measures "finally and conclusively disposed" of a "discrete issue" or that the failure to enforce the "interim measures award" would render the arbitration or the

non-pecuniary obligation.").

96. SCHREUER ET AL., *supra* note 1, at 1138–39; *see* Broches, *supra* note 4, at 322–23.

97. *See* Broches, *supra* note 4, at 323; *see also* 22 U.S.C. § 1650a.

98. 22 U.S.C. § 1650a.

99. Christopher Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT'L 325, 325 (2004) (arguing that "[i]t would be wrong to conclude from [Article 54] that an ICSID tribunal may not order non-pecuniary relief").

100. *See* D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About to Turn?*, 30 TEX. INT'L. L.J. 71, 79 (1995).

final relief a meaningless exercise.[101] In such cases, the courts have focused on the nature of the relief ordered by the arbitrators and not whether the order of provisional measures was labeled an "award," even though the provisions of the Federal Arbitration Act relating to enforcement of awards were invoked.[102]

The provisions relating to the enforcement of ICSID awards, by comparison, likely could not be invoked to enforce an ICSID order of provisional measures due to the particular wording of the implementing legislation. Section 1650a only provides a means of enforcement of the pecuniary obligations imposed by an award rendered pursuant to the ICSID Convention, and most orders of provisional measures do not impose pecuniary obligations.[103] Even if an order of provisional measures did impose pecuniary obligations that a party might wish to enforce, the precise wording of § 1650a seems clearly limited to awards rendered pursuant to the ICSID Convention in the formal sense and excludes interim orders by the tribunal.

Regarding whether an ICSID tribunal's order of provisional measures can be enforced pursuant to the provisions of the Federal Arbitration Act, § 1650a expressly states that "[t]he Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the [ICSID] [C]onvention."[104] Thus, following the reasoning of the court decisions enforcing provisional measures under the Federal Arbitration Act, an order of provisional measures that is considered tantamount to an award (whether or not it imposed pecuniary obligations) should not qualify for enforcement under the Federal Arbitration Act.

Some commentators have also concluded that enforcement of an ICSID tribunal's order of provisional or interim measures by any national court is prohibited by Article 26 of the ICSID Convention, which provides that consent to ICSID arbitration is consent to the exclusion of any other remedy.[105] This provision has been understood as establishing an ICSID

101. *See, e.g.*, Caline Mouawad & Elizabeth Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 ARB. INT'L 381, 421–22 (2013).

102. *Id.*

103. *See* 22 U.S.C. § 1650a.

104. *Id.*

105. *See* Gabrielle Kaufmann-Kohler & Aurélia Antonietti, *Interim Relief in International Investment Agreements*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 507, 524–25, 549 (Katia Yannaca-Small ed., 2010) (concluding that ICSID provisional measures cannot be enforced in a national court because they are not final awards

tribunal's jurisdiction as exclusive and prohibiting recourse to any other forum or authority in relation to the dispute over which the ICSID tribunal is seized.[106] This is consistent with the "self-contained" nature of ICSID arbitration, which does not rely on national courts to support, supervise, or make the arbitration effective in any way.[107]

III. FULL FAITH AND CREDIT CHALLENGES

Some commentators question whether the provision of § 1650a requiring courts to afford ICSID awards the same full faith and credit as if the award were a final state court judgment opens enforcement of an ICSID award to the possibility of challenges that are permissible to raise, albeit rarely granted, against a final state court judgment.[108]

Indeed, in the recent case *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*,[109] the court observed that the U.S. constitutional requirement of affording full faith and credit to state court judgments does have limited exceptions, but that "[n]one apply in the context of an ICSID award."[110] The court noted that under the full faith and credit doctrine, a federal court could decline to recognize a rendering state court's judgment where the judgment "is not on the merits, is not yet final, resulted from fraud, or was issued in the absence of personal or subject matter jurisdiction."[111] It concluded, however, that such exceptions would not apply to an ICSID award by its nature because "an ICSID award necessarily reflects consent by both parties to ICSID's jurisdiction, follows [an

and also due to Article 26 of the Convention). Judicial recourse to enforce a provisional measure, however, is not necessarily inconsistent with the exclusivity of a reference to ICSID arbitration. *See Rules of Procedure for Arbitration Proceedings: Chapter V*, ICSID, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap05.htm (last visited Nov. 19, 2015) ("Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.").

106. *See* Kaufmann-Kohler & Antonietti, *supra* note 105, at 524.

107. *See* SCHREUER ET AL., *supra* note 1, at 1097; Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L. L. 784, 784–85 (1983).

108. *See* Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARB. 1, 9–13 (2006) (describing limited exceptions in U.S. practice for refusing to enforce a final state court judgment otherwise entitled to "full faith and credit" as necessary to accomplish justice).

109. 87 F. Supp. 3d 573 (S.D.N.Y. 2015).

110. *Id.* at 598.

111. *Id*. at 598 n.32.

arbitration on the merits], represents a final judgment not subject to substantive challenge within the courts of a contracting state, and equates to a judgment entered by a state's highest court."[112]

Additionally, it may be argued that the language of Article 54 of the ICSID Convention and the U.S. enabling legislation, 22 U.S.C. § 1650a, preclude a full faith and credit challenge to enforcement of an ICSID award. Article 54 imposes an obligation on each Contracting State to recognize an ICSID award, without any exceptions, and to enforce the pecuniary obligations of a final ICSID award.[113] The U.S. implementing legislation provides in mandatory terms that "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."[114]

These are stated as two separate requirements, and the first precludes exceptions to the second. The specification that the pecuniary obligations of an ICSID award "shall be given" the same full faith and credit as if the award were a state court judgment suggests that no exceptions to that full faith and credit are to be permitted, and consequently, courts should not even engage in a full faith and credit analysis under § 1650a.[115]

IV. ASSIGNMENT OF THE RIGHT TO ENFORCE AN ICSID AWARD

The practical question of whether the right to enforce an ICSID Convention award may be assigned was addressed in *Blue Ridge Investments, L.L.C. v. Republic of Argentina*.[116] The claimant in that case, CMS Gas Transmission Company (CMS), had obtained an ICSID award in its favor against Argentina, and an ICSID Annulment Committee subsequently rejected Argentina's application to annul the award and thus, in effect, confirmed Argentina's obligations as set forth in the award to

112. *Id*.

113. *See* ICSID Convention, *supra* note 1, at art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.").

114. 22 U.S.C. § 1650a(a) (2012) (emphasis added).

115. *See Mobil*, 87 F. Supp. 3d at 586 ("There is no charter for a federal court to examine an ICSID award as it would a state-court judgment for infirmities, because under § 1650a, such awards are entitled to full faith and credit and are subject to substantive review by ICSID alone.").

116. 902 F. Supp. 2d 367, 370–71 (S.D.N.Y. 2012), *aff'd*, 735 F.3d 72 (2d Cir. 2013).

compensate CMS.[117] CMS later sold and assigned its rights in the award to Blue Ridge Investments, which notified Argentina that it was the successor-in-interest to CMS as a result of the purchase and assignment.[118] Blue Ridge filed a petition in the Southern District of New York for a judgment confirming the ICSID award and granting Blue Ridge the benefit of the pecuniary obligations set forth in the award as successor-in-interest to CMS.[119] Argentina opposed the petition on several grounds, including that Blue Ridge as assignee was not a party to the arbitration and therefore lacked standing to seek recognition and enforcement of the award under Article 54 and the enabling legislation in § 1650a.[120]

The district court first concluded that neither the ICSID Convention nor § 1650a prohibited such an assignment and that neither contained an indication that "only a party to the ICSID arbitration can seek enforcement of an ICSID award."[121] The court then considered whether such an assignment was affirmatively permitted.[122] Since judgments are enforced in U.S. federal court in accordance with state law, the court considered the applicable state law regarding assignment of judgments.[123] The court noted that under the applicable state law, a money judgment may be transferred and that assignment of a judgment operates as a transfer of the right to the judgment.[124] On that basis, the court stated that there was "no difficulty" concluding that an ICSID award must be treated likewise as assignable and that the assignee has the same standing to enforce the award as its assignor.[125] This ruling appears to be consistent with Article 54's requirement that Contracting States enforce an ICSID award as if it was a judgment: nothing in the Convention even requires a judicial proceeding to

117. *Id.* at 371.

118. *Id.*

119. *Id.* at 382–83.

120. *Id.* at 376–77.

121. *Id.* at 381. In reaching this conclusion, the court rejected as "unpersuasive" commentary on the ICSID Convention that only a party to the original arbitration may initiate an enforcement procedure in accordance with Article 54(2). *Id*. at 380 n.11.

122. *Id.* at 381.

123. *Id.*

124. *Id*. (citing N.Y. GEN. OBLIG. LAW § 13-103 (West 2010)).

125. *Id.* at 381–82. Although the Second Circuit later affirmed on interlocutory appeal certain jurisdictional findings at issue, it declined to review the district court's decision on the assignment issue because it was not sufficiently intertwined with the jurisdictional issues to merit the exercise of appellate pendant jurisdiction. Blue Ridge Invs., L.L.C. v. Republic of Argentina, 735 F.3d 72, 81–82 (2d Cir. 2013).

confirm the award as a judgment.[126]

V. MANDATORY POST-JUDGMENT INTEREST AS A CONSEQUENCE OF RECOGNITION

The question whether an award creditor may obtain statutory post-judgment interest on an ICSID award was addressed in the case of *Miminco, L.L.C. v. Democratic Republic of the Congo*.[127] There, the award creditors sought statutory post-judgment interest and the award of pre-judgment interest upon ex parte confirmation of an ICSID award that was silent on the question of interest.[128] In proceedings conducted without the participation of the award debtor, the U.S. District Court for the District of Columbia concluded that it was required to award post-judgment interest because "the Court recognizes the award as if it were its own judgment," and therefore, 28 U.S.C. § 1961(a) applies, which requires that interest be imposed on "any money judgment in a civil case recovered in a district court."[129] The court cited Ninth Circuit precedent in a New York Convention case to support its conclusion that its judgment confirming the arbitral award was a money judgment within the meaning of the statute.[130] The *Miminco* court denied the petitioners' additional request for discretionary pre-judgment interest because the award was silent on the question of interest, and the court expressed reluctance to exercise its discretion to award interest in ex parte confirmation proceedings.[131] The court observed that the award creditors were free to raise the request for pre-judgment interest in any subsequent execution proceedings, for which notice

126. *Blue Ridge Invs.*, 902 F. Supp. 2d at 381–82.

127. 79 F. Supp. 3d 213 (D.D.C. 2015).

128. *Id*. at 215.

129. *Id.* at 218 (citing 28 U.S.C. § 1961(a) (2012)).

130. *See id.*; *see also* Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 665 F.3d 1091, 1101 (9th Cir. 2011). According to the court, "[a] money judgment consists of two elements: (1) an identification of the parties for and against whom judgment is being entered, and (2) a *definite* and *certain* designation of the amount which plaintiff is owed by defendant." *Miminco*, 79 F. Supp. 3d at 218 (citing *Cubic Def. Sys.*, 665 F.3d at 1101).

131. *Miminco*, 79 F. Supp. 3d at 218–19 ("This Court declines to graft new requirements onto the award's plain terms given that a court's confirmation of an ICSID award should entail nothing more than ministerial verification that the award is genuine. . . . [T]he *ex parte* nature of these proceedings makes the Court especially reluctant to exercise its discretion and award pre-judgment interest not included in the arbitral award.").

to the award debtor was required.[132]

The *Miminco* court did not expressly address whether ex parte confirmation proceedings were the equivalent of a civil case in a district court pursuant to the language of 28 U.S.C. § 1961(a). The precedent it relied upon involved lengthy litigation over an arbitration award that had been confirmed under the New York Convention.[133] In that case, the court concluded that the mandatory statutory language requiring money judgments does not permit an exercise of discretion not to award the interest, suggesting that as long as a judgment recognizing an arbitral award is a money judgment, 28 U.S.C. § 1961(a) requires the award of post-judgment interest.[134] The *Miminco* court's decision does not state whether post-judgment interest under 28 U.S.C. § 1961(a) would apply equally to a money judgment confirming an arbitral award when the award itself, and thus the judgment confirming it, already provides for post-award interest.

VI. TIMING ISSUES

ICSID awards are final and binding on the parties, subject only to the remedies contained in the ICSID Convention.[135] Those remedies are supplementary decisions and rectification (for omitting questions and typographical or arithmetic errors),[136] interpretation,[137] revision (if new facts come to light),[138] and annulment.[139] There are deadlines for pursuing each

132. *Id.* at 219 n.7.

133. *See Cubic Def. Sys.*, 665 F.3d at 1094–95.

134. *Id.* at 1101–02.

135. ICSID Convention, *supra* note 1, at arts. 53–54.

136. *Id.* at art. 49 ("The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award.").

137. *Id.* at art. 50 ("If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.").

138. *Id.* at art. 51 ("Either party may request revision of the award by an application in writing addressed to the Secretary-General [within 90 days] on the ground of discovery of some fact [affecting the award].").

139. *Id.* at art. 52 ("Either party may request annulment of the award . . . on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.").

remedy[140] except interpretation, and each remedy can give rise to a stay of enforcement of the award.[141] Where an applicant seeks revision or annulment, for example, the request for the remedy operates as a provisional stay of enforcement.[142]

The availability and timing of post-award remedies under the ICSID Convention, which contemplates a potential stay of enforcement, may be contrasted with the mandatory and immediate nature of the Convention's recognition and enforcement provisions.[143] It is evident that timing issues may arise in the event that an award debtor seeks a post-award remedy while the award creditor seeks enforcement.[144] Nothing in the Convention expressly precludes an award creditor from seeking recognition or enforcement of an ICSID award before the expiration of the time periods provided for seeking post-award remedies. Thus, an award creditor may potentially seek enforcement before the question of a stay of enforcement of the award would have been considered.

Commentators have expressed concern regarding the risk of concurrent proceedings should award creditors commence enforcement proceedings shortly after issuance of an award, notwithstanding the prospect or even the existence of, e.g., annulment proceedings.[145] Once a stay of enforcement has been put into effect provisionally or otherwise granted, the ICSID award is no longer considered final and thus is not eligible for enforcement as a final award under the Convention.[146]

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140. Parties may request a supplementary decision or rectification only within 45 days after the date of the award, revision within 90 days after discovery of a new fact and three years after the date of the award, and annulment within 120 days after the date of the award. *Id.* at arts. 49(2), 51(2), 52(2). If corruption is alleged as the ground for annulment, parties may apply for annulment only within 120 days after discovery of the corruption and within three years after the date of the award. *Id.* at art. 52(2).

141. *Id.* at arts. 49(2), 51(4), 52(5).

142. Broches, *supra* note 4, at 290 n.11 ("In the case of all three 'internal' remedies the Tribunal or the Committee (as the case may be) may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. In the cases of revision and annulment a request by the applicant for a stay of enforcement will operate as a provisional stay pending a ruling on that request.").

143. *See also* N.Y.C. Bar, *supra* note 43, at 210 (noting that the ICSID Convention contemplates swift recognition and enforcement of awards and entry of judgment). *Compare* ICSID Convention, *supra* note 1, at arts. 49–52, *with id.* at arts. 53–54 (comparing the limited window of time for appropriate remedial action with the otherwise immediate, binding authority of the award).

144. *See* N.Y.C. Bar, *supra* note 43, at 210.

145. *Id.* at 218.

146. *See* SCHREUER ET AL., *supra* note 1, at 1111–13.

The implementing statute in the United States, 22 U.S.C. § 1650a, does not expressly address this timing issue. It does provide, however, for the enforcement of pecuniary obligations imposed by an award rendered pursuant to Chapter IV of the Convention (which includes Articles 49–55) that "shall be enforced."[147] This language appears both to permit an award creditor to commence enforcement proceedings prior to any resort to ICSID post-award remedies by an award debtor and to permit concurrent judicial enforcement and ICSID remedial proceedings in the absence of a stay of enforcement issued pursuant to ICSID procedures. Two recent U.S. enforcement cases illustrate this point.

In *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, the award creditors filed an ex parte petition seeking recognition of an ICSID award against Venezuela the day after the ICSID tribunal issued the award.[148] The court rendered a judgment confirming the award, and the award creditors—consistent with New York state procedure—notified Venezuela by letter of the entry of the judgment and demanded payment.[149] Shortly thereafter, Venezuela filed a motion to vacate the judgment and sought revision of the award by the ICSID tribunal, whereupon the ICSID Secretary-General issued a stay of enforcement of the award.[150] The district court denied Venezuela's motion to vacate the confirmation judgment but stayed enforcement of the court's judgment pending resolution of the revision application that was pending before ICSID.[151]

In *Micula S.D.N.Y.*,[152] the petitioner filed an ex parte request for confirmation of an ICSID award against Romania after Romania had filed an application for annulment but had failed to meet the ICSID ad hoc committee's condition for continuation of a stay of enforcement of the award.[153] The district court noted that "[a]ccordingly, Petitioners presently have a valid ICSID award susceptible to recognition and enforcement in the national courts of ICSID's member states, including the United States" and denied Romania's motion to vacate or stay the court's judgment confirming

147. 22 U.S.C. § 1650a (2012).

148. *See* Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela, 87 F. Supp. 3d 573, 575 (S.D.N.Y. 2015).

149. *Id*.

150. *Id*. at 576.

151. *Id.* at 602. Venezuela subsequently filed a petition for annulment of the ICSID award. *Id.* at 601.

152. *Micula S.D.N.Y.*, 15 Misc. 107, 2015 WL 4643180, at *1 (S.D.N.Y signed Aug. 5, 2015).

153. *Id.* at *1–2.

the award.[154]

In each of these cases, the award creditor sought confirmation of the ICSID award through issuance of a judgment; neither case involved execution proceedings.[155] In the *Mobil* case, there was no prospect of concurrent execution proceedings pending resolution of the revision application before ICSID, and in any event, as the *Mobil* court noted, any efforts to attach Venezuelan assets in order to execute the judgment would require judicial permission.[156]

Thus, it may be considered whether the prospect of concurrent proceedings, at least insofar as proceedings to confirm or recognize an ICSID award are concerned, is a genuine subject of concern. An award creditor may wish to obtain a U.S. court judgment as a means of encouraging compliance with the award.[157] Execution on a judgment cannot occur without reasonable notice to permit voluntary compliance.[158] While the applicable notice periods do not correspond directly with the deadlines for pursing remedies before ICSID, an award debtor must have time to consider whether it will pursue remedies before ICSID and notify the court if it chooses to do so before any steps can be taken to execute upon assets.[159]

To the extent that there is concern regarding annulment proceedings that are concurrent with enforcement proceedings, it can be noted that in at least two instances courts have issued judgments confirming ICSID awards that subsequently were annulled by ICSID ad hoc committees.[160] Thus, it

154. *Id.* at *1, *9. The court also denied Romania's request for a stay of enforcement of the judgment pending the appeal of the *Mobil* case and noted that Romania had not sought a stay pending appeal of its own case, apparently because such a stay would have required posting of a bond. *Id.* at *5–6 (holding that a stay without the posting of a bond as assurance would be "unfair and would impose a hardship on Petitioners, who state they are concerned that Romania will remove assets subject to attachment").

155. *See Micula S.D.N.Y.*, 2015 WL 4643180, at *2; *Mobil*, 87 F. Supp. 3d at 580.

156. *Mobil*, 87 F. Supp. 3d at 603.

157. *See* Menocal, *supra* note 44, at 340–41.

158. ICSID Convention, *supra* note 1, at art. 54.

159. *See supra* Part II.A.

160. *See* Sempra Energy Int'l v. Argentine Republic, No. M-82, slip op. at 1–2 (S.D.N.Y. Nov. 14, 2007) (noting that "Sempra Energy International . . . is entitled to immediate recognition and enforcement of the pecuniary obligations of the [a]ward" and ordering that the pecuniary obligations in the award be recognized and entered as a judgment as if the award were a final judgment of the court); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, ¶ 229 (Italaw June 29, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0776.pdf (annulling the award); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Sempra Energy

appears that the consequences of annulment were addressed in due course even in the case of concurrent enforcement proceedings.

Alternatively, as the New York City Bar Committee on International Commercial Disputes has noted, it is open to states to address concerns about timing issues and the risks of concurrent proceedings in their arbitration agreements.[161] The Committee's report notes, for example, that the United States included in its 2004 and 2012 model bilateral investment treaties a provision that prevents a disputing party from seeking enforcement of an ICSID award until either: (a) 120 days have elapsed from the date of the award without a party's request for revision or annulment, or (b) there has been completion of the revision or annulment proceedings.[162] Such a provision, for example, may be found in NAFTA's Article 1136,[163] and similar language was included in the United States bilateral investment treaties with Uruguay and Rwanda.[164]

International's Request for the Termination of the Stay of Enforcement of the Award, ¶¶ 6, 31 (Italaw Aug. 7, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0774.pdf (granting Sempra's request to lift the stay of enforcement due to Argentina's failure to place funds in escrow); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ¶¶ 1, 4, 114 (Italaw Mar. 5, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0772.pdf (granting Argentina's request for a provisional stay of enforcement pending the outcome of annulment proceedings on the condition that Argentina placed funds in escrow); *see also* Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic, No. M-82, slip op. at 1–2 (S.D.N.Y. Nov. 20, 2007) (noting that claimants "are entitled to immediate recognition and enforcement of the pecuniary obligations of the [a]ward" and ordering that the pecuniary obligations in the award be recognized and entered as a judgment as if the award were a final judgment of the court); Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Claimants' Second Request to Lift Provisional Stay of Enforcement of the Award, ¶¶ 1–7, 46 (Italaw May 20, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0298.pdf (noting that Argentina filed an application for annulment on February 21, 2008, that a provisional stay of enforcement was imposed, and maintaining the stay of enforcement pending the conclusion of annulment proceedings); Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 427 (Italaw July 30, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0299.pdf (annulling portions of the award); N.Y.C. Bar, *supra* note 43, at 222–24 (discussing and analyzing the *Sempra Energy* and *Enron* decisions).

161. N.Y.C. Bar, *supra* note 43, at 218–20.

162. *Id*.

163. North American Free Trade Agreement, Can.-Mex.-U.S., art. 1136, Dec. 17, 1992, 32 I.L.M. 289 (1993).

164. Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Promotion of Investment, U.S.-Uru., art. 34(6), Nov. 4, 2005, S. TREATY DOC. NO. 109-09 (2006); Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and

VII. CONCLUSION

This review of enforcement of ICSID awards in U.S. courts demonstrates that there are a number of important questions regarding the nature of the procedures to be applied that remain unresolved. The uncertainty stems from the fact that the U.S. implementing statute does not expressly address how an ICSID award may be recognized without ordering enforcement and the procedural peculiarities that arise from the requirement that an ICSID award be treated as a final state court judgment to be enforced in a federal court.[165] As the volume of ICSID awards has grown considerably in recent years, these issues have arisen prominently. Further decisions addressing these provisions will be necessary to settle these matters.

Reciprocal Protection of Investment, Rwanda-U.S., art. 34(6), Feb. 19, 2008, S. TREATY DOC. NO. 110-23; *see also* N.Y.C. Bar, *supra* note 43, at 218–20. As the Committee notes, this language has not yet been tested in any proceeding. *Id.*

165. *See supra* Part II.A.

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