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## **Jurisdictional And Forum Requirements For ICSID Award Recognition Against Foreign Sovereigns: Recent Developments And Debates**

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# Commentary

## Jurisdictional And Forum Requirements For ICSID Award Recognition Against Foreign Sovereigns: Recent Developments And Debates

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### I. Introduction

In a pair of recent decisions, the U.S. Court of Appeals for the Second Circuit became the first federal appellate court to rule on several important issues concerning the interplay between the U.S. Foreign Sovereign Immunities Act (the "FSIA") and recognition of arbitral awards made pursuant to the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" or "Convention"). In doing so, it resolved a sharp conflict between courts in the Southern District of New York, which had adopted a practice of *ex parte* recognition of ICSID awards without regard to the requirements of the FSIA, and courts in the Eastern District of Virginia and the District of Columbia, which, like the Second Circuit, held that the FSIA's jurisdiction, service, notice, and venue requirements must first be observed.

In *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, issued on July 11, 2017, the court held that the FSIA is the sole basis for jurisdiction over a foreign state in U.S. courts in actions to enforce ICSID awards. In doing so, it rejected the argument that the statute implementing the ICSID Convention fits within an exception to the FSIA's service and venue requirements, on which the Southern District courts had relied. The Second Circuit agreed in this regard with the views expressed by the United States government, which submitted an amicus brief.

The legal and practical significance of the decision was underscored by the Second Circuit's reaffirmation of it in *Micula v. Romania*, decided on October 23, 2017. In the *Micula* case, after the petitioners were denied *ex parte* enforcement of their ICSID award in the District of Columbia, they sought and obtained such an *ex parte* order in the Southern District of New York. The Second Circuit reiterated *Mobil Cerro Negro's* holdings, both in vacating the district court's *ex parte* judgment and in questioning whether venue was proper in New York under the FSIA.

This article discusses (1) the relevant provisions of the FSIA and the ICSID Convention and its implementing legislation, including in particular the scope of the FSIA exception pertaining to prior international agreements, (2) the district court precedent that existed before *Mobil Cerro Negro* and *Micula*, (3) the court's decision in *Mobil Cerro Negro* and its reliance on the views of the United States, as well as its reiteration of those

principles in *Micula*, and (4) the effect that both decisions will have on how ICSID awards are enforced in the United States in the future.

## II. The Two Federal Statutes At Issue

The ICSID Convention and its U.S. implementing statute, 22 U.S.C. § 1650a (1966) (the “ICSID Enabling Statute”), provide for the recognition and enforcement of ICSID monetary awards against foreign states in U.S. courts. Ten years after passing the ICSID Enabling Statute, Congress adopted the FSIA<sup>1</sup> to address the absence of “comprehensive provisions in [U.S.] law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state.”<sup>2</sup> The FSIA expressly authorizes suits against foreign sovereign defendants in U.S. courts, but only under certain limited circumstances and pursuant to strictly prescribed procedures. How to interpret and reconcile these two statutes lies at the heart of the debate over whether the FSIA’s jurisdictional and forum requirements apply to actions to enforce ICSID awards in the U.S. courts.

### A. The ICSID Convention And The ICSID Enabling Statute

The ICSID Convention is a multilateral treaty, developed by the precursor institution to today’s World Bank, that is intended to foster development through the promotion of private international investment.<sup>3</sup> It was opened for signature in 1965, and entered into force in the United States on October 14, 1966.<sup>4</sup> Among other things, the ICSID Convention established the International Centre for Settlement of Investment Disputes, located within the World Bank, which promulgates rules for arbitration of investment disputes between a contracting state and a national of another contracting state when the parties agree to ICSID arbitration, and administers such arbitrations.<sup>5</sup>

Unlike other arbitration awards that may be subject to annulment in domestic courts, the Convention provides that parties may seek annulment of an ICSID award only by applying to an annulment committee convened by ICSID itself.<sup>6</sup> An ICSID arbitral award thus “shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in [the] Convention.”<sup>7</sup>

The Convention also addresses domestic courts’ involvement in recognition, enforcement and execution of

awards. It requires that each Contracting State “shall recognize” an award under the Convention “as binding” and “enforce the pecuniary obligations imposed by that award . . . as if it were a final judgment of a court in that State.”<sup>8</sup> In the case of contracting states with federal constitutions, such as the United States, the award may be enforced “through its federal courts,” and the contracting state “may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”<sup>9</sup> This provision was intended to promote uniformity in countries with otherwise heterogeneous state or regional judiciaries and, according to testimony by then-Deputy Legal Advisor for the Department of State Andreas F. Lowenfeld before a Congressional sub-committee, the provision was purposefully inserted by the United States “in order to be able to provide in the United States for a uniform procedure for enforcement of awards rendered pursuant to the convention.”<sup>10</sup>

Under the Convention, “[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,”<sup>11</sup> and “[n]othing in Article 54 [of the Convention] 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.”<sup>12</sup>

As Lowenfeld testified:

That means suits on arbitral awards in the United States will be tied to the U.S. practice. That practice may be changing from time to time with different courts deciding the applicability of sovereign immunity rules . . . Basically what this convention says is that the district court shall have jurisdiction over the subject matter. As to whether it has jurisdiction over a party, there is nothing in the convention that will change the defense of sovereign immunity. If somebody wants to sue Jersey Standard in the United States, on an award, no problem. If somebody wants to sue Peru or the Peruvian Oil Institute, why it would depend on whether in the particular case that entity would or would not be entitled to sovereign immunity.<sup>13</sup>

To implement the ICSID Convention, Congress in 1966 enacted the ICSID Enabling Statute, which provides in full:

### Arbitration awards under the Convention

#### (a) Treaty rights; enforcement; full faith and credit; nonapplication of Federal Arbitration Act

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

#### (b) Jurisdiction; amount in controversy

The district courts of the United States (including the courts enumerated in section 460 of Title 28) shall have exclusive jurisdiction over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.<sup>14</sup>

### B. The Foreign Sovereign Immunities Act

In 1976, Congress passed the FSIA, which became the first U.S. statute governing the application of the foreign sovereign immunity doctrine.<sup>15</sup> Prior to such passage, when a lawsuit was filed against a foreign sovereign, the State Department would submit a recommendation to the court with regard to sovereign immunity; most often, the State Department embraced the “restrictive” principle of sovereign immunity, under which immunity exists for “sovereign or public acts (*jure imperii*)” but does not extend to commercial or “private acts (*jure gestionis*).”<sup>16</sup>

Seeking to alleviate the diplomatic “pressures” that the U.S. government faced from foreign governments seeking immunity from suit in U.S. courts, Congress decided to codify the restrictive principle of sovereign immunity in the FSIA.<sup>17</sup> The FSIA also sought to “provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state” and to “conform the execution immunity rules more closely to the jurisdiction immunity rules.”<sup>18</sup> Without these reforms and the uniform procedures

they establish, Congress feared that “disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.”<sup>19</sup> This was particularly true in the case of execution immunity because Congress was concerned about how other countries would treat execution attempts against the U.S. government’s assets abroad. The FSIA thus mandates that a foreign sovereign’s claim to immunity “should . . . be decided . . . in conformity with the principles set forth in [the FSIA].”<sup>20</sup>

Consistent with this mandate, the Supreme Court has required that the FSIA’s “comprehensive set of legal standards governing claims of immunity . . . must be applied . . . in *every* action against a foreign sovereign,”<sup>21</sup> and it has also held that the FSIA provides “the sole basis for obtaining jurisdiction over a foreign state.”<sup>22</sup>

By later amendment, the FSIA expressly provides that a U.S. court may exercise subject matter jurisdiction over claims seeking to confirm an arbitral award against a foreign sovereign where the award is or may be governed by an international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.<sup>23</sup>

In order to obtain personal jurisdiction over the foreign sovereign, the FSIA permits four methods of service. These are: (1) by delivery of process in accordance with a special arrangement between the plaintiff and foreign state; (2) in the absence of a special arrangement, in accordance with an applicable international convention on service (such as the Hague Service Convention<sup>24</sup>); (3) if neither of the first two options are possible, then by mailing process with return-receipt to the head of the sovereign’s ministry of foreign affairs; (4) if the latter cannot be made within 30 days, then by sending process to the U.S. Secretary of State for transmittal through diplomatic channels to the foreign state.<sup>25</sup>

Additionally, the FSIA governs “the venue of all civil actions brought in district courts of the United States” against a sovereign.<sup>26</sup> It allows for venue either in a district where a “substantial part” of the disputed events occurred or disputed property is located; where a sovereign’s vessel or cargo is located; or where a sovereign’s agency or instrumentality is licensed, if the action is brought against that agency or instrumentality.<sup>27</sup> If none of these circumstances apply, then the action must be brought in the United States District Court for the District of Columbia.<sup>28</sup>

Another provision of the FSIA that has factored significantly in the debate concerning the interplay with the ICSID Convention is 28 U.S.C. § 1604. Section 1604 provides that the FSIA's jurisdictional rules are "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act" (the "FSIA Proviso").<sup>29</sup>

The Supreme Court adopted a strict interpretation of the FSIA Proviso in *Argentine Republic v. Amerasia Shipping Corp.*<sup>30</sup> That case involved two Liberian corporations who sued the Republic of Argentina for damages in a U.S. federal court under the Alien Tort Statute ("ATS") after their oil tankers were bombed in international waters between Argentina and the Malvinas Islands.<sup>31</sup> Plaintiffs argued that the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention, which pre-date the FSIA, qualified under the FSIA Proviso as exceptions to sovereign immunity.<sup>32</sup> The Court disagreed, and interpreted the FSIA Proviso to mean that prior international agreements prevail only when such agreements "expressly conflict with the immunity provisions of the FSIA."<sup>33</sup> Where there is no express conflict between the FSIA and a pre-existing international agreement, the FSIA's rules apply, but in the case of such a conflict, then a court will need to interpret whether and how the two laws interact.<sup>34</sup>

### C. Statutory Interpretation Issues

The conflict in the cases addressed by the recent Second Circuit decisions concerns how to interpret and reconcile the FSIA, on the one hand, and the ICSID Convention and ICSID Enabling Statute, on the other, as concerns actions to enforce ICSID awards. If the FSIA applies, it would require, among other things, that a plaintiff initiate a plenary action in a proper venue (which might only be D.C.), serve process by one of the four methods expressly permitted by the FSIA in order to obtain personal jurisdiction over the sovereign, and allow the sovereign up to 60 days to serve a responsive pleading.<sup>35</sup> On the other hand, if the FSIA is deemed to be inapplicable and the ICSID Enabling Statute is used to apply procedures allowed for the enforcement of state-court judgments, then plaintiffs might be free to take advantage of local rules permitting *ex parte* proceedings and expedited procedures, and may have more options in choosing the venue in which to commence suit.

Critical to the statutory interpretation analysis is whether the ICSID Convention and its Enabling Statute are deemed to conflict with the FSIA's immunity provisions so as to implicate the FSIA Proviso's exception for "existing international agreements to which the United States is a party at the time of enactment of this Act."<sup>36</sup> In this regard, both the FSIA and the ICSID Enabling Statute were intended to create uniformity in the federal courts' treatment of their subject matter. The FSIA was developed to promote "uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."<sup>37</sup> Similarly, the ICSID Enabling Statute divested state courts of jurisdiction over enforcement of ICSID awards so as to promote uniformity for such enforcement.<sup>38</sup> As the United States District Court for the Eastern District of Virginia has explained, however, "this statute is not itself a grant of subject matter jurisdiction; rather, . . . § 1650a(b) simply makes clear that jurisdiction of matters arising under the statute is exclusive in the federal courts."<sup>39</sup>

Which interpretation of these laws best promotes the objective of uniformity became the subject of inconsistent court decisions over the years, as discussed below.

## III. Case Law Concerning The Application Of The FSIA To ICSID Award Recognition

### A. The Development Of The District Court Split

The practice in the Southern District of New York of granting *ex parte* applications to enforce ICSID arbitral awards dates back at least thirty years.<sup>40</sup> The first decision to address specifically whether *ex parte* proceedings are available to a creditor seeking to recognize and enforce an ICSID award was not until 2009, however, in *Siag v. Arab Republic of Egypt*.<sup>41</sup>

In *Siag*, after the award creditor filed an *ex parte* application with a proposed order and judgment of \$133 million, the court requested the applicant to submit a short brief "addressing whether the putative judgment debtor, Egypt, is entitled to notice and an opportunity to be heard before judgment is entered."<sup>42</sup> In an opinion that did not address the FSIA, the court granted the *ex parte* application, relying on the ICSID Enabling Statute, which states that "[t]he 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.”<sup>43</sup> The court determined that in treating an ICSID arbitration award as it would the final judgment of a state court, it could adopt the procedures of New York’s CPLR, which allow *ex parte* recognition of the judgment (and in this case, the ICSID award), without the need for a separate plenary action on the judgment (or award).<sup>44</sup>

In the years that followed *Siag*, judges in the Southern District continued to grant *ex parte* applications to enforce ICSID awards against foreign sovereigns.<sup>45</sup> However, judges in other district courts took a different approach to the question of whether the FSIA applies to actions to recognize and enforce ICSID awards.

The first of these was *Continental Casualty Co. v. Argentine Republic*,<sup>46</sup> decided in 2012, where an ICSID award creditor initiated a plenary action in the Eastern District of Virginia, seeking recognition of a \$2.8 million ICSID arbitral award against the Republic of Argentina.<sup>47</sup> The *Continental Casualty* court explained that “Congress mandated that the proper method of enforcement of an ICSID arbitral award is the same as the enforcement of a state judgment, which is a suit on the judgment as a debt.”<sup>48</sup> But the court held that jurisdiction for such an action arose only under the FSIA, and the FSIA’s venue rules also controlled.<sup>49</sup> The court rejected Continental’s argument that because it sought only recognition or confirmation under the ICSID Enabling Statute and not enforcement of the arbitral award, it could bring its action in any federal court. The court rejected Continental’s theory as being inconsistent with congressional limits in the FSIA, and also rejected that there was any relevant distinction between award recognition or confirmation and award enforcement.<sup>50</sup> Because there was no connection between the award or the underlying events and the Eastern District of Virginia, the court transferred the case to the United States District Court for the District of Columbia in accordance with the FSIA.<sup>51</sup>

### **B. The Southern District Of New York Decision In *Mobil Cerro Negro***

Despite the ruling in *Continental Casualty*, the Southern District of New York did not change its approach, leading in 2015 to a lengthy opinion in *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*.<sup>52</sup>

The case concerns the 2007 expropriation by the Bolivarian Republic of Venezuela (“Venezuela”) of interests in certain oil projects that were owned by a group of ExxonMobil entities (“Mobil”). That year, Mobil commenced an ICSID arbitration against Venezuela to challenge the expropriation. In 2014, the ICSID tribunal awarded Mobil over \$1.6 billion plus interest. The next day, Mobil sought recognition of the award in the Southern District of New York, and it did so by initiating *ex parte* proceedings under New York’s CPLR Article 54, which provides expedited procedures for registering out-of-state court judgments in New York.<sup>53</sup>

Venezuela filed a motion to vacate the judgment, arguing that the ICSID Enabling Statute does not authorize borrowing New York’s *ex parte* recognition procedures and that the FSIA’s requirements relating to subject matter jurisdiction, personal jurisdiction (including service of process), and venue are applicable.<sup>54</sup>

The district court rejected Venezuela’s arguments, holding that under the ICSID Enabling Statute, a federal district court may use the forum state’s recognition procedure.<sup>55</sup> The court reasoned that the ICSID Convention contemplates that award “execution . . . is subject to contracting states’ domestic laws, which may vary,”<sup>56</sup> and that the ICSID Enabling Statute, in turn, “does not specify the procedural mechanism by which an arbitral award is to be converted into a federal judgment.”<sup>57</sup> The court was persuaded by the Southern District’s prior practice of granting *ex parte* enforcement of ICSID awards under state law procedures. In particular, it drew upon the reasoning in *Siag*, which the court stated “recognized that, while an ICSID award creditor may seek recognition *ex parte*, it may alternatively elect to file a plenary action.”<sup>58</sup> In asserting that its decision to permit *ex parte* recognition is not prejudicial to sovereigns, the court noted that the sovereign remains free to challenge the award substantively before an ICSID annulment committee, and the sovereign would be free to resist post-judgment attachment or execution efforts, in which the court conceded that the FSIA’s rules and procedures concerning immunity would apply.<sup>59</sup>

In addition, the court relied on the FSIA Proviso, which it interpreted as “evin[ing] an intention to leave existing practice under international treaties undisturbed.”<sup>60</sup>

In this regard, the court identified “significant tension” between the FSIA and “the intentions of the Convention and the enabling statute as to the process of recognition.”<sup>61</sup> Analyzing the legislative history of the ICSID Enabling Statute, it noted in particular Congress’s departure from the Federal Arbitration Act (the “FAA”). The court emphasized that “Congress’s use of ‘full faith and credit’ in the ICSID enabling statute is significant, because that term has an acquired meaning” that is extremely favorable toward recognizing judgments.<sup>62</sup> The court likewise took note that the grounds provided by the New York Convention for rejecting enforcement of an international commercial arbitration award are not available for ICSID awards.<sup>63</sup> The court believed that adhering to the FSIA’s procedural and jurisdictional requirements would, in contrast, merely provide sovereign defendants with an avenue for delay.<sup>64</sup>

### C. Forum Shopping During The Circuit Split

Venezuela appealed the *Mobil Cerro Negro* decision, and while the appeal was pending, proceedings involving an award against the Government of Romania – *Micula v. Government of Romania* – put the district court split in sharp relief and underscored the need for uniformity in the federal courts with regard to the requirements for enforcing ICSID awards against foreign sovereigns.

The award creditors of Romania first sought an *ex parte* judgment on the ICSID award in the District Court for the District of Columbia, which denied the application in a detailed opinion on May 18, 2015 (“*Micula I*”). The *Micula I* court determined that “the court’s reading of the statute in *Continental Casualty Co.* is more consistent with [the ICSID Enabling Statute’s] text and structure.”<sup>65</sup> Analyzing both the plain language and legislative history of the ICSID Enabling Statute, the court stated that “the only available method for converting an ICSID award into a domestic judgment [is] through the same method by which a state court judgment could be enforced in federal court,” which is “a plenary proceeding.”<sup>66</sup> Therefore, one “must file a plenary action, subject to the ordinary requirements of process under the Foreign [Sovereign] Immunities Act, to convert [an] ICSID award . . . into an enforceable domestic judgment.”<sup>67</sup>

Dissatisfied with the District of Columbia court’s decision, some of the *Micula I* plaintiffs filed *ex parte*

proceedings a few days later in the Southern District of New York to recognize the same ICSID award (“*Micula II*”). There, they succeeded in obtaining a different result. Disregarding the District of Columbia’s decision, the Southern District judge allowed the *Micula* plaintiffs to proceed under New York state’s expedited procedures, ruling that Romania’s argument “is rejected thoroughly and persuasively in *Mobil Cerro Negro Ltd.*” and further stating that “[a]s fully discussed in *Mobil*, given the spirit of the ICSID Convention[,] . . . 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.”<sup>68</sup>

### D. The Second Circuit Decisions In *Mobil Cerro Negro* and *Micula*

Venezuela’s appeal of the *Mobil Cerro Negro* decision was decided against this backdrop. In the Second Circuit, Venezuela argued against the lower court’s decision on the basis that the ICSID Enabling Statute does not provide the court with “an alternative statutory basis to the FSIA for federal court subject matter jurisdiction,” because “the FSIA is clear that it is exclusive, . . . the FSIA was passed subsequent to Section 1650a, . . . there is nothing in the ICSID Convention that purports to limit sovereign immunity,” and Congress did not intend that “in this one isolated instance, the FSIA would not apply.”<sup>69</sup>

In recognition of the U.S. government’s interest in the issues, after oral argument was held, the Second Circuit requested the government to submit its views, which the government did in an *amicus curiae* brief dated March 30, 2016.<sup>70</sup>

The government’s brief supported the position that the “FSIA is the sole source of subject matter jurisdiction over an action to enforce an ICSID award against a foreign sovereign and its rules must be followed.”<sup>71</sup> It pointed to the 1966 testimony of the Deputy Legal Adviser of the Department of State during the House subcommittee hearing on the ICSID Enabling Statute as showing that “Congress understood that the ICSID statute itself would not provide jurisdiction over a foreign sovereign.”<sup>72</sup> With regard to the lower court’s reliance on the FSIA Proviso, the government cited to *Amerada Hess*, in which the Supreme Court explained



that the proviso applies “only when international agreements expressly conflict with the *immunity* provisions of the FSIA.”<sup>73</sup> No such conflict is present, the government argued, because the Convention itself expressly notes that nothing in Article 54 of the Convention “shall be construed as derogating from the law in force in any Contracting State relating to immunity of . . . any foreign State from execution.”<sup>74</sup> Citing congressional testimony by the Department of the Treasury and Department of State, as well as House and Senate Committee Reports, the government also explained its position that “[n]either the ICSID Convention’s enabling statute nor the FSIA permits a federal court to ‘borrow’ procedures from state law that permit an *ex parte* proceeding.”<sup>75</sup>

Persuaded by the U.S. government, on July 11, 2017, the Second Circuit reversed the district court and vacated the *ex parte* judgment recognizing the ICSID award against Venezuela.<sup>76</sup> The Second Circuit held that “the FSIA provides the sole source of jurisdiction – subject matter and personal – for federal courts over actions brought to enforce ICSID awards against foreign sovereigns” and that “the FSIA’s service and venue requirements must be satisfied before federal district courts may enter judgment on such awards.”<sup>77</sup> While the court found that the arbitration-related exception to immunity in the FSIA could supply a basis for subject matter jurisdiction, it vacated the judgment on the basis that the FSIA’s service and venue requirements were not satisfied.<sup>78</sup>

On the issue of subject matter jurisdiction, the Second Circuit highlighted the Supreme Court’s “emphatic and oft-repeated declaration in *Amerada Hess* that the FSIA is the ‘sole basis for obtaining jurisdiction over a foreign state in our courts’” and its emphasis on the “comprehensive” nature of the FSIA.<sup>79</sup> “The comprehensiveness of the FSIA’s framework,” the court reasoned, “suggests that [the ICSID Enabling Statute] should not be read as providing an independent basis for courts to exercise subject matter jurisdiction over foreign sovereigns, or, at the very least, should no longer be read as providing such a basis, even if it once did.”<sup>80</sup>

With respect to the effect of the FSIA Proviso, the court stated that “the question is not free from doubt,” but ultimately relied on the principle that “international agreements that predate the FSIA are excluded from the Act’s reach only when they expressly conflict with

the Act’s immunity provisions.”<sup>81</sup> Finding no such express conflict in the case of the ICSID Enabling Statute, and relying heavily on the legislative history “that suggests that Congress expected actions under [the ICSID Enabling Statute] to be governed by sovereign immunity,” the Second Circuit held that ICSID award holders are not exempted from complying with the FSIA’s jurisdictional requirements.<sup>82</sup>

The court found additional support for its conclusions in the Supreme Court’s reasoning in *Amerada Hess*, which “rejected the argument that the ATS [Alien Tort Statute] – which, like [the ICSID Enabling Statute], predates the FSIA – continued to confer subject matter jurisdiction over a foreign sovereign after the FSIA’s enactment.”<sup>83</sup> The Second Circuit continued, “[t]o the extent the ATS ever provided a source of subject matter jurisdiction over foreign sovereigns, the *Amerada Hess* Court found it could no longer confer that authority after the passage of the FSIA, nor did Congress’s failure to repeal the ATS when it enacted the FSIA counsel otherwise . . . . The same is true here.”<sup>84</sup>

The Second Circuit next considered whether the FSIA’s service and venue requirements are applicable to ICSID award enforcement proceedings. The court rejected the district court’s finding that the FSIA “leaves congressional intent unclear” with respect to service and venue requirements, stating instead, “[w]e find no such ambiguity in the FSIA’s text.”<sup>85</sup> Given that the FSIA explicitly mentions “suit for ‘recognition and enforcement of arbitral awards,’” and the statute’s lack of any “provision for summary procedures” as to such suits, the Second Circuit held that the FSIA’s service and venue requirements must be satisfied before a federal district court may recognize an ICSID award in a judgment against a foreign sovereign.<sup>86</sup> The court emphasized that “it is not [the ICSID Enabling Statute’s] silence on enforcement of ICSID awards that guides our reasoning. Rather, we accord conclusive weight to the affirmative and sweeping provisions in the FSIA’s comprehensive statutory scheme and the observation that the FSIA makes no provision for summary procedures in any instance.”<sup>87</sup>

Giving “particular deference to the [treaty] interpretation favored by the United States,” the Second Circuit rejected the district court’s concerns that requiring compliance with the FSIA would undermine the ICSID Convention and its enabling statute.<sup>88</sup> In

analyzing the legislative history, the Second Circuit found that the ICSID Enabling Statute is in fact consistent with the FSIA. As the court noted, a plenary action to enforce an ICSID award simply requires commencing an action, service, proper venue, and the sovereign's opportunity to appear and file responsive pleadings. The court reasoned that these basic procedural protections do not introduce substantive defenses to the award in conflict with the ICSID Convention and its enabling statute, nor do they deny an ICSID award the "full faith and credit" required by the ICSID Enabling Statute. To the contrary, when enforcing state court judgments (to which the statutory language refers), federal courts typically require the filing of a plenary action with notice.<sup>89</sup> In accordance with this reasoning, the Second Circuit ultimately held that "[the ICSID Enabling Statute] mandates enforcement of ICSID awards in federal court through an action on the award and not through an *ex parte* order."<sup>90</sup> By "requiring compliance with the FSIA," enforcement of ICSID awards would have "a greater prospect of consistency across the nation," aligned "with the values of predictability and federal control that foreign affairs demands and that the FSIA was designed to promote."<sup>91</sup>

Several months later, on October 23, 2017, a different Second Circuit panel issued its ruling on Romania's appeal of *Micula II*. The court recognized that "[t]he issues presented in this appeal are virtually identical to those that this Court recently addressed in *Mobil Cerro Negro*."<sup>92</sup> The Second Circuit then reiterated *Mobil Cerro Negro*'s holdings, finding that (1) "the FSIA provides the sole basis for jurisdiction over Romania and sets forth the exclusive procedures for the recognition of the ICSID Award"; (2) "the Petitioners were required to file a plenary action, subject to the requirements of process, to convert the Award into an enforceable judgment against Romania"; (3) "[t]he district court thus lacked jurisdiction over Romania under the FSIA, and erred in declining to vacate its judgment as void"; and (4) "the Southern District of New York is an improper venue under the FSIA" where the record showed no connection to New York because "[t]he parties are foreign, the arbitration hearings were conducted in Paris, and the property at issue was located in Romania."<sup>93</sup>

#### IV. Conclusion

By preventing judgment before the sovereign state is given notice and an opportunity to be heard as provided

by the FSIA, the Second Circuit's decisions will enable courts to exercise due deliberation befitting entry of judgment against sovereign parties. Such deliberation can help avoid improvident judgments that could be the source of international friction, as the *Mobil Cerro Negro* case itself demonstrates. After the enforcement action was commenced in that case, the ICSID annulment committee annulled the vast majority of the award, leaving a relatively smaller award of about \$188 million.<sup>94</sup> The *ex parte* judgment, however, was for the pre-annulment amount of about \$1.6 billion, which could have led to unnecessary and provocative efforts at attachment and execution.

In addition, as the *Mobil Cerro Negro* court noted, even the original pre-annulment award expressed a "willingness to allow Venezuela to offset its liability under the Award by a significant debt owed it by Mobil in connection with certain payments earlier made to Mobil by the Venezuelan governmental entity PDVSA."<sup>95</sup> The Second Circuit cited the possibility of such an offset as an example of the kind of proper challenge to an ICSID award that a sovereign should be able to make in the context of a plenary proceeding, which the district court's *ex parte* procedures foreclosed.

The *Micula* case also shows why due deliberation is important. Following issuance of the ICSID award at issue, the European Commission issued a decision holding that if Romania paid the award, it would violate European state-aid law and Romania would be obligated to recover the funds.<sup>96</sup> The decision went so far as to order the *Micula* claimants to repay Romania any funds they received that qualified as such state aid.<sup>97</sup> While the role of the European Commission's ruling in award enforcement proceedings will be hotly debated, surely a court would want to know of the decision, and its potential public policy and comity implications, before entering judgment on the award. The FSIA's requirements of notice to the sovereign and a timely opportunity to be heard helps ensure that the court will be properly informed before dealing with a controversial issue like the one present in *Micula*.

*Mobil Cerro Negro* and *Micula* bookend an important precedent reaffirming the primacy of the FSIA and its stated goals of promoting comity with foreign nations and ensuring that U.S. courts follow a consistent approach in actions against sovereigns. As the U.S. government noted in its *amicus* brief in the *Mobil*

*Cerro Negro* case, adhering to the FSIA's requirements avoids "disparate treatment of cases involving foreign governments," which "may have adverse foreign relations consequences" and affect "the reciprocal treatment of the United States in foreign courts."<sup>98</sup>

Until recently, nearly all ICSID enforcement efforts have been brought in the Southern District of New York, which is bound by the Second Circuit's rulings, and in the District Court for the District of Columbia, whose rulings are in accord with the Second Circuit's. It remains to be seen whether ICSID award creditors will seek to blunt the impact of the *Mobil Cerro Negro* and *Micula* rulings by filing *ex parte* applications in courts outside of the Second Circuit and District of Columbia. If they do, the Second Circuit's decisions would provide a powerful basis for transferring the cases to the District of Columbia as the default venue for cases against foreign states,<sup>99</sup> as happened in *Continental Casualty*.<sup>100</sup>

In any event, since most ICSID awards involve sovereign conduct outside the United States with no connection to events in any U.S. judicial district, the recent Second Circuit decisions will likely lead to more ICSID enforcement proceedings being brought in the District of Columbia. This in turn may contribute further to the objective of the ICSID Enabling Statute to achieve uniform treatment of ICSID awards in U.S. courts.

## Endnotes

1. The FSIA is codified within 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602 et seq.
2. H.R. Rep. No. 94-1487, at 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6605.
3. International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* 11 (Apr. 2006), [https://icsid.worldbank.org/en/Documents/resources/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf).
4. *Id.*
5. *Id.*; *see also id.* art. 25. When an investment treaty so provides, an arbitration concerning an investment dispute under the treaty may be administered by ICSID. *See id.* art. 25(l) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.").
6. *Id.* art. 50-52.
7. *Id.* art. 53(l).
8. *Id.* art. 54(l); *see also* Convention on the Settlement of Inv. Disputes: Hearing Before the Subcomm. on Int'l Orgs. & Movements of the H. Comm. on Foreign Affairs, 89th Cong. 41 (1966) [hereinafter ICSID Hearing] ("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, 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.").
9. *ICSID Convention, Regulations and Rules*, *supra* note 3, art. 54(l).
10. ICSID Hearing, *supra* note 8, at 11 (statement of Andreas F. Lowenfeld, Deputy Legal Adviser, Department of State).
11. *ICSID Convention, Regulations and Rules*, *supra* note 3, art. 54(3).
12. *Id.* art. 55.
13. ICSID Hearing, *supra* note 8, at 18 (statement of Andreas F. Lowenfeld, Deputy Legal Adviser, Department of State).
14. 22 U.S.C. § 1650a.
15. H.R. Rep. No. 94-1487, *supra* note 2, at 8.
16. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting U.S. Attorney Gen. (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952) (announcing the State Department's formal policy shift away from a theory of absolute sovereign immunity). *See also* H.R. Rep. No. 94-1487, *supra* note 2, at 7.
17. H.R. Rep. No. 94-1487, *supra* note 2, at 7 ("[T]he bill would codify the so-called 'restrictive' principle of sovereign immunity ... The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from

- any adverse consequences resulting from an unwillingness of the Department to support that immunity.”).
18. *Id.* at 8.
  19. *Id.* at 13.
  20. 28 U.S.C. § 1602.
  21. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488, 493 (1983) (emphasis added).
  22. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).
  23. 28 U.S.C. §§ 1605(a)(6), added by Pub. L. 100–669 (Nov. 16, 1988).
  24. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361.
  25. 28 U.S.C. § 1608(a).
  26. 28 U.S.C. § 1391(a)(1). See, e.g., *Cont’l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 754 (E.D. Va. 2012) (“Section 1391(f) . . . governs where a ‘civil action against a foreign state as defined in section 1603(a) of this title may brought.’” (citation omitted)).
  27. 28 U.S.C. §§ 1391(f)(1)–(3).
  28. *Id.* § 1391(f)(4).
  29. *Id.* § 1604.
  30. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 (1989).
  31. *Id.* at 431–32.
  32. *Id.* at 441–42.
  33. *Id.* (emphasis added) (quotation omitted) (citing H.R. Rep. No. 94–1487, at 17).
  34. *Id.* An example given in the FSIA’s legislative history is the NATO Status of Forces Agreement, which provides its own regime for immunity of foreign states in respect of military operations and the conduct of their military members in the United States. See H.R. Rep. 94–1487, *supra* note 2, at 17 (“In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries . . . .”); see also Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 Stat. 1792, 199 U.N.T.S. 67.
  35. 28 U.S.C. § 1608(d).
  36. *Id.* § 1604.
  37. H.R. Rep. No. 94–1487, *supra* note 2, at 13.
  38. ICSID Hearing, *supra* note 8, at 11 (statement of Andreas F. Lowenfeld, Deputy Legal Adviser, Department of State) (explaining that the United States suggested Article 54(1) of the Convention to promote uniformity and that “[u]nder the bill, jurisdiction of the Federal courts would therefore be ‘exclusive’”).
  39. *Cont’l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 750 (E.D. Va. 2012).
  40. See, e.g., *Liberian E. Timber Corp. (LETICO) v. Government of the Republic of Liberia (In re Liberian E. Timber Corp.)*, No. M-68, 1986 U.S. Dist. LEXIS 31062 (S.D.N.Y. Sept. 5, 1986); *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 20, 2007); *Sempra Energy Int’l v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 14, 2007).
  41. *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009).
  42. *Id.* at \*1.
  43. *Id.* (citing 22 U.S.C. § 1650a(a)).
  44. *Id.* at \*2.
  45. See *Grenada v. Grynberg*, No. 11-MC-45 (S.D.N.Y. Apr. 29, 2011) (Batts, J.).
  46. *Cont’l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747 (E.D. Va. 2012). Cleary Gottlieb represented Argentina in the *Continental Casualty* case.
  47. *Id.* at 748.
  48. *Id.* at 754.
  49. *Id.* at 753–54.
  50. *Id.* at 752.
  51. *Id.* at 754.
  52. *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015).



53. N.Y. C.P.L.R. §§ 5401-08 (McKinney 2017); *Mobil Cerro Negro*, 87 F. Supp. 3d at 576.
54. *Mobil Cerro Negro*, 87 F. Supp. 3d at 586.
55. *Id.*
56. *Id.* at 579.
57. *Id.*
58. *Id.* at 580-81 (citing *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562, at \*2 n.1 (S.D.N.Y. June 19, 2009)).
59. *Id.* at 585.
60. *Id.* at 592.
61. *Id.* at 593.
62. *Id.* at 597.
63. *See, e.g., id.* at 594-96.
64. *Id.* at 600.
65. *Micula v. Government of Romania*, 104 F. Supp. 3d 42, 49 (D.D.C. 2015).
66. *Id.*
67. *Id.* at 52.
68. *Micula v. Government of Romania*, No. 15 Misc. 107 (Part I), 2015 WL 4643180, at \*3 (S.D.N.Y. Aug. 5, 2015). Similar *ex parte* petitions were filed in the Southern District of New York around this same time. In March 2015, in *Tidewater Investment SRL v. Bolivarian Republic of Venezuela*, investors sought *ex parte* enforcement of an ICSID award in the Southern District of New York. *Ex Parte* Pet. to Recognize ICSID Arbitration Award, *Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, No. 15 Civ. 1960 (S.D.N.Y. 2015), ECF No. 1. In May 2017, ICSID award holders initiated *ex parte* recognition proceedings in the Southern District Court of New York against the Kingdom of Spain in a case entitled *EISER Infrastructure Ltd. v. Kingdom of Spain*. Mem. of Law in Supp. of Pet'rs' *Ex Parte* Pet. to Recognize Arbitration Award, *EISER Infrastructure Ltd. v. Kingdom of Spain*, No. 17 Civ. 3808 (LAK) (S.D.N.Y. 2017), ECF No. 2.
69. Br. for Resp't-Appellant at 1, *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir. 2017), ECF No. 31.
70. Br. of United States of America as *Amicus Curiae* at 1, *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir. 2017), ECF No. 87.
71. *Id.* at 2.
72. *Id.* at 10 n.2 (citing ICSID Hearing, *supra* note 8, at 57).
73. *Id.* at 11 (citing *Amerada Hess*, 488 U.S. at 442).
74. *Id.* (citing *ICSID Convention, Regulations and Rules*, *supra* note 3, art. 55).
75. *Id.* at 2, 17 (citing H.R. Rep. No. 89-1741, at 3-4 (1966); S. Rep. No. 89-1374, at 4 (1966)).
76. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707, 2017 WL 2945603, at \*22 (2d Cir. July 11, 2017).
77. *Id.* at \*12.
78. *Id.*
79. *Id.* (quoting *Amerada Hess*, 488 U.S. 434).
80. *Id.*
81. *Id.* at \*13.
82. *Id.* at \*14; *see id.* at \*13 (citing, *inter alia*, H.R. Rep. 94-1487); *see also* H.R. Rep. 94-1487, *supra* note 2, at 21 ("Like other provisions in the bill, section 1605 is subject to existing international agreements . . . including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).").
83. *Mobil Cerro Negro, Ltd.*, 2017 WL 2945603, at \*13.
84. *Id.* at \*13-14.
85. *Id.* at \*14 (quoting *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573, 593 (S.D.N.Y. 2015)).
86. *Id.* at \*14-15 (quoting 28 U.S.C. § 1605(a)(6)).
87. *Id.* at \*14.
88. *Id.* at \*15 (citing *Medellin v. Texas*, 552 U.S. 491, 513 (2008); Br. of United States of America as *Amicus Curiae* at 1, *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir. 2017), ECF No. 87).



89. *Id.* at \*\*15-16, 19.
90. *Id.* at \*20.
91. *Id.* at \*16.
92. *Micula v. Government of Romania*, No. 15-3109-cv, 2017 WL 4772435, at \*2 (2d Cir. Oct. 23, 2017).
93. *Id.* On July 11, 2017, Venezuela submitted a letter to the district court citing *Mobil Cerro Negro* to renew its motion to vacate the *ex parte* judgment entered in *Tidewater*. Letter from Resp't to Hon. Andrew L. Carter Jr. at 1-2, *Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, No. 15 Civ. 1960 (S.D.N.Y. 2017), ECF No. 38. On July 12, 2017, Spain submitted a letter to the district court in *EISER*, citing the outcome in *Mobil Cerro Negro* to urge the court to grant Spain's already pending motion for vacatur. Letter from Resp't to Hon. Lewis A. Kaplan at 1-2, *EISER Infrastructure Ltd. v. Kingdom of Spain*, No. 17 Civ. 3808 (LAK) (S.D.N.Y. July 12, 2017), ECF No. 18. Then, one day after the *Micula II* decision issued, Spain renewed its request for vacatur. Letter from Resp't to Hon. Lewis A. Kaplan at 1-2, *EISER Infrastructure Ltd. v. Kingdom of Spain*, No. 17 Civ. 3808 (LAK) (S.D.N.Y. Oct. 24, 2017), ECF No. 26. On November 13, 2017, the court granted Spain's motion to vacate the judgment. Order, *EISER Infrastructure Ltd. v. Kingdom of Spain*, No. 17 Civ. 3808 (LAK) (S.D.N.Y. Nov. 13, 2017), ECF No. 27. With *Micula II* now concluded, the *Tidewater* judgment is also likely to be vacated.
94. Letter from Resp't-Appellant to Clerk of the Ct. at 1-2, *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir. 2017), ECF No. 102.
95. *Mobil Cerro Negro, Ltd.*, 2017 WL 2945603, at \*8 n.12; see also *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (Mar. 9, 2017).
96. Commission Decision (EU) No. 2015/1470 of 30 March 2015, arts. 1-2, 2015 O.J. (L 232) 43, 69.
97. *Id.*
98. Br. of United States of America as *Amicus Curiae* at 2, 20, *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir. 2017), ECF No. 87 (quoting H.R. Rep. 94-1487, at 13).
99. See 28 U.S.C. § 1391(f)(4).
100. *Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 754 (E.D. Va. 2012). ■



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