U.S. Department of Justice

United States Attorney
Southern District of New York

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New York, New York 10007

March 30, 2016

By ECF

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
500 Pearl Street
New York, New York 10007

Re: *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, Docket No. 15-707

Dear Ms. Wolfe:

By invitation of the Court and pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States (the "government") respectfully submits this memorandum brief as *amicus curiae*.

Interest of the United States

The United States has strong interests in ensuring the proper interpretation and implementation of the Convention on the Settlement of Investment Disputes (the "ICSID Convention"), to which the United States is a party, including that investors with ICSID awards against foreign sovereigns be able to convert those awards into judgments without judicial review of the underlying merits, consistent with the Convention. The government's interpretation of that treaty is "entitled to great weight." *Medellín v. Texas*, 552 U.S. 491, 513 (2008) (quotation marks omitted). Moreover, because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), the United States also has a

significant interest in the proper application of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330 and 1602 *et seq.* (the "FSIA"), including its provisions giving foreign sovereigns notice and an opportunity to respond in actions against them in U.S. courts. U.S. courts' treatment of foreign states can also have consequences for the reciprocal treatment of the United States in foreign courts.

Questions Presented

By letter dated January 14, 2016, this Court requested the State Department's views on three questions:

1. Does the enabling statute for the ICSID Convention, 22 U.S.C. § 1650a, embody a grant of subject matter jurisdiction over an action to enforce an International Centre for the Settlement of Investment Disputes ("ICSID") award against a foreign sovereign that is outside the scope of the FSIA, or does the FSIA provide the sole source of subject matter jurisdiction over such an action? In other words, does the FSIA provide the sole jurisdictional "road map" that an ICSID award creditor must follow to convert a valid ICSID award against a foreign sovereign into a federal judgment, or is some other process available?

2. Does either the ICSID Convention's enabling statute or the FSIA permit a federal court to "borrow" procedural rules of the forum state, including provisions for *ex parte* proceedings, for the judicial recognition of ICSID arbitral awards?

3. Does the ICSID Convention's enabling statute permit a federal district court to modify, under 28 U.S.C. § 1961, the interest rate adopted by an ICSID arbitral panel to be paid on an ICSID award?

The government's responses, as further explained below, are as follows. (1) 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. (2) Neither 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. (3) The district court correctly held that the interest rate provided in the ICSID award is a pecuniary obligation that must be enforced.

Background

A. The ICSID Convention and implementing legislation

The ICSID Convention, which entered into force in 1966, is a multilateral treaty that establishes a regime for arbitrating investment disputes between sovereigns and private investors. ICSID has jurisdiction over investment-related legal disputes between states that are party to the Convention and nationals of other member states when both parties to the investment dispute consent to ICSID's jurisdiction. ICSID Convention art. 25(1). Where an ICSID tribunal has jurisdiction and issues an award, its determinations set forth in the award are binding on the disputing parties and not subject to review except as provided under the ICSID Convention. *Id.* art. 53(1) (ICSID awards "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"); *see id.* arts. 50-52 (parties may request that an award be interpreted, revised, or annulled). The finality of ICSID awards, under which they are subject to review only in the self-contained system set out in the ICSID Convention, is a key benefit of ICSID arbitration. To that end, Article 54(1) of the ICSID Convention requires contracting states to recognize ICSID awards in their courts "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." *Id.* art 54(1). "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." *Id.*

The ICSID Convention provides that a party seeking recognition or enforcement of the award "shall furnish to a competent court . . . a copy of the award certified by the Secretary-General." *Id.* art. 54(2). "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."

Id. art. 54(3). "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." *Id.* art. 55.

In 1966, Congress enacted the Convention on the Settlement of Investment Disputes Act, Pub. L. 89-532 (the "ICSID Act"), to implement the ICSID Convention. Section 3(a) of the ICSID Act, codified at 22 U.S.C. § 1650a(a), provides: "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." Section 3(b), codified at 22 U.S.C. § 1650a(b), provides: "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."

B. Factual and procedural background

As the Court is aware, this case arises out of an investment dispute between Venezuela and subsidiaries of ExxonMobil Corporation ("Mobil"). On October 9, 2014, an ICSID arbitral tribunal issued an award in favor of Mobil. Venezuela was ordered to pay Mobil approximately $1.6 billion plus 3.25% interest, compounded annually, from June 27, 2007, until payment is made in full (the "Award"). (Joint Appendix ("JA") 162). However, the award was conditioned on Mobil's commitment and obligation to repay to Venezuela amounts that a Mobil entity had recovered under a related arbitration award entered by the International Court of Arbitration of the International Chamber of Commerce ("ICC"). (JA 77-78, 154-55, 162).

The following day, Mobil filed an *ex parte* petition in the U.S. District Court for the Southern District of New York seeking recognition of the Award under Article 54 of the ICSID Convention and the Convention's enabling statute. Mobil argued that "[r]ecognition of a state court judgment is a clerical function that does not require notice until after a judgment has been entered," and that the court should borrow the judgment registration procedure of the forum state, Article 54 of New York's Civil Practice Law and Rules ("CPLR"), which does not require advance notice to the debtor. (JA 16). Mobil sought entry of a federal court judgment in the amount of $1,600,042,482 plus 3.25% interest from June 27, 2007, until the date of full payment. (JA 20-21). Judge J. Paul Oetken, sitting in Part I, held an *ex parte* hearing on the petition, granted it, and entered final judgment in that amount. (JA 258-59). Later that day, Mobil sent Venezuela a letter, notifying it of the judgment and demanding payment.

On October 14, 2014, Venezuela moved to vacate the judgment as void for lack of jurisdiction under the FSIA. (JA 260). While the motion was pending, Venezuela filed an application with the ICSID arbitral panel, asking that the Award be reduced to account for approximately $907 million that Venezuela's state-owned oil company had paid to satisfy the ICC arbitration award. (JA 422).

On February 13, 2015, the district court (Paul A. Engelmayer, J.) issued a decision denying Venezuela's motion to vacate. (JA 482-531). The district court noted that, in four prior cases brought in the Southern District of New York to enforce an ICSID arbitral award against a foreign sovereign, the district courts had recognized the award and entered judgment against the foreign sovereign in *ex parte* proceedings under procedures borrowed from New York state law. (JA 491-94). In accordance with those decisions, the district court held that ICSID's enabling statute does not provide a procedure for recognizing ICSID awards as federal court judgments,

and that it was appropriate to fill this gap by using New York's *ex parte* registration procedure. The district court reasoned that federal courts have "discretion to borrow from state law when there are deficiencies in the federal statutory scheme." (JA 496 (quoting *Hardy v. N.Y. City Health & Hosp. Corp.*, 164 F.3d 789, 793 (2d Cir. 1999))). According to the district court, Congress's use of the term "full faith and credit" in § 1650a reveals its intent that ICSID awards be automatically recognized rather than subjected to contested litigation. (JA 498, 525). Because the substance of the Award could not be challenged under the Convention, the district court reasoned that requiring Mobil to institute a plenary action was unnecessary and would merely permit Venezuela to delay enforcement. (JA 511; *see* JA 526). The court also suggested that Venezuela did not need advance notice of Mobil's action to enforce the Award because it could still challenge any effort by Mobil to attach or execute against Venezuelan assets. (JA 500-01, 528).

The district court also rejected Venezuela's arguments based on the FSIA. First, the district court reasoned that it had subject matter jurisdiction under the FSIA because Mobil's efforts to recognize the ICSID award came within the FSIA's exceptions to sovereign immunity for actions to confirm arbitration awards, 28 U.S.C. § 1605(a)(6)(B), and for matters in which the sovereign state has waived immunity, *id.* § 1605(a)(1). (JA 504-06). The court also suggested that the "treaty exception" to the FSIA's grant of sovereign immunity might apply as well. (JA 506-07). Section 1604 of the FSIA provides that, "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." The district court reasoned that the ICSID Convention might be an "existing international agreement" within the meaning of § 1604,

noting that the ISCID Convention and its implementing legislation predated the FSIA by approximately a decade. (JA 506-07). The district court construed § 1604 to evince Congress's "intention not to disturb . . . the provisions of the ICSID Convention and enabling statute that contemplated domestic lawsuits against foreign sovereigns to enforce arbitral awards." (JA 506; *see* JA 507, 512).

Second, the district court held that Mobil was not required to comply with the FSIA's service or venue requirements. (JA 508-29). The district court recognized that Mobil's noncompliance with the FSIA's service provision, 28 U.S.C. § 1608, would deprive the district court of personal jurisdiction over Venezuela as to any claim for which the district court had subject matter jurisdiction under the FSIA. (JA 509). The district court also recognized that Mobil had not complied with the FSIA's venue requirements, because it had not shown any nexus to the Southern District of New York. (JA 509); *see* 28 U.S.C. § 1391(f)(1)-(3). Again, however, the district court reasoned that the FSIA was not intended to displace existing practice, which the district court believed included the use of summary, uncontested procedures to recognize and enforce ICSID awards. (JA 511-13).

In reaching this conclusion, the district court again relied on § 1604's treaty exception, although the court recognized that it was "addressed to the existence of immunity, not the mechanics by which an action is to be brought against a non-immune sovereign." (JA 512). The court also suggested that the FSIA was inapplicable because its provisions presupposed contested litigation, not "the non-substantive, mechanistic context of ICSID award recognition." (JA 512-13). Finally, the district court relied on the history and purposes of the ICSID Convention and its implementing legislation, which the district court believed would be furthered by permitting recognition and enforcement in *ex parte*, summary proceedings. (JA 514-25). The district court

noted that the ICSID Convention substantially limited the grounds upon which award debtors could contest recognition, unlike the broader challenges permitted under the earlier Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). (JA 516-21). The district court also pointed to Congress's direction to federal courts in the implementing legislation to "give full faith and credit" to the pecuniary obligations imposed by an ICSID award "as if the award were a final judgment of a court of general jurisdiction of one of the several States." (JA 521-25). The district court read this text as incorporating the rule that, when one state court's judgment is sought to be recognized in another state, there need not be personal jurisdiction over the judgment debtor. (JA 523).

The district court accordingly concluded that it would be "deeply problematic" to require an ICSID award creditor to bring a plenary action under the FSIA to enforce the award, and that this "would bring the FSIA into grave tension with the objectives of the ICSID Convention and of Congress . . . to put in place an expedited and automatic recognition procedure." (JA 524). The district court held that "[t]he procedures applicable to the recognition process are instead those authorized by the ICSID enabling statute," and that that statute permits ICSID award creditors to seek recognition of an award through summary, *ex parte* procedures under state law. (JA 529). The district court therefore denied Venezuela's motion to vacate the judgment recognizing the award. However, the district court stayed enforcement of the judgment pending resolution of Venezuela's application to the ICSID panel to revise the Award. (JA 530).[1]

[1] Venezuela's request for revision was denied in June 2015. *See Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 – Revision Proceeding, Decision on Revision (June 12, 2015). However, Venezuela also filed a request to annul the Award (JA 546-47), and enforcement of the award remains stayed pending resolution of that application, *see Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case

Shortly after the district court issued its opinion, Venezuela moved to amend the judgment to provide that the interest rate on the judgment would be the rate specified by 28 U.S.C. § 1961, which sets the post-judgment interest rate in federal civil cases, rather than the 3.25% rate specified in the Award (and incorporated into the Part I judgment). In an opinion issued on March 4, 2015, the district court denied Venezuela's motion, ruling that the 3.25% interest rate was one of the "pecuniary obligations" imposed by the Award that the court must enforce under 22 U.S.C. § 1650a. (JA 729).

ARGUMENT

POINT I

The FSIA Governs an Action to Recognize and Enforce a Valid ICSID Award Against a Foreign Sovereign

A. The FSIA is the sole source of a federal court's jurisdiction to recognize and enforce a valid ICSID award against a foreign state

The district court erred in holding that the ICSID implementing legislation, 22 U.S.C. § 1650a, provides an exception to the FSIA's exclusive grant of subject matter jurisdiction. The FSIA, enacted by Congress in 1976, "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden*, 461 U.S. at 488. As the Supreme Court has stated numerous times, the FSIA is the exclusive source of subject matter jurisdiction for actions against foreign states. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393-94 (2015); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) ("[T]he text and structure of the FSIA

No. ARB/07/27 – Annulment Proceeding, Committee's Decision on Stay of Enforcement of the Award ¶ 10 (Sept. 17, 2015).

demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."). Accordingly, the FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden*, 461 U.S. at 493.

As the Supreme Court held in *Amerada Hess*, the FSIA's grant of jurisdiction supplants earlier-enacted grants of subject-matter jurisdiction that might have applied to an action against a foreign state. 488 U.S. at 438, 443 (holding that, following enactment of FSIA, a federal court could not exercise jurisdiction over a foreign sovereign under the Alien Tort Statute). Thus, although 22 U.S.C. § 1650a(b) gives federal district courts (and the U.S. Court of Federal Claims) "exclusive jurisdiction over actions and proceedings [to enforce an ICSID award], regardless of the amount in controversy," that grant of jurisdiction does not apply to actions against foreign sovereigns after the passage of the FSIA. Section 1650a retains its effect "with respect to defendants other than foreign states," *Amerada Hess*, 488 U.S. at 438, supplying a district court's subject matter jurisdiction over actions to enforce ICSID arbitral awards against private parties. The ICSID enabling statute provides the substantive right and the applicable legal standard, and it also requires that all enforcement actions be brought in federal, rather than state, courts. But following the enactment of the FSIA, the ICSID enabling statute cannot be the basis for a federal court's exercise of jurisdiction over a foreign sovereign.[2]

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[2] The legislative history of the ICSID enabling statute indicates that before the FSIA was enacted—contrary to the district court's assumption that the ICSID Convention and statute "contemplated domestic lawsuits against foreign sovereigns" without overcoming a foreign state's immunity—Congress understood that the ICSID statute itself would not provide jurisdiction over a foreign sovereign. (JA 506-07). As the Deputy Legal Adviser of the

The district court suggested that the FSIA might be inapplicable because the ICSID Convention comes within 28 U.S.C. § 1604's proviso that its grant of sovereign immunity is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." (JA 506). But the Supreme Court made clear in *Amerada Hess* that § 1604's treaty exception applies only "when international agreements expressly conflict with the *immunity* provisions of the FSIA." 488 U.S. at 442 (quotation marks and alterations omitted, emphasis added). Nothing in the ICSID Convention contradicts the FSIA's immunity rules. To the contrary, the Convention expressly notes that it has no effect on domestic law regarding the immunity of foreign states. ICSID Convention art. 55 ("Nothing in Article 54 [governing recognition or enforcement of an award] 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."). Thus, there is no implied exception to the FSIA's exclusivity as the source of jurisdiction over actions for recognition of an ICSID award against foreign sovereigns.

Department of State—which negotiated the Convention for the United States, along with the Department of the Treasury—testified:

> 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.

(JA 302 (*Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int'l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 57 (1966) (statement of Andreas F. Lowenfeld, Deputy Legal Adviser, Dep't of State))).

B. An action against a foreign sovereign to recognize and enforce an ICSID arbitral award must comply with the FSIA's service and venue requirements

The district court also held that even if the exclusive means to bring an action to enforce an ICSID arbitral award against Venezuela is under the FSIA, Mobil was not required to comply with the FSIA's service of process or venue requirements. That too was error.

In addition to setting out the exclusive terms upon which a U.S. court can exercise subject matter jurisdiction in an action against a foreign state, the FSIA provides that a court has personal jurisdiction over a foreign state only if an exception to immunity in § 1605 applies and the plaintiff has effectuated service pursuant to § 1608. *See* 28 U.S.C. § 1330(b). Section 1608(a) specifies four methods for serving process on a foreign state: first, by "delivery of a copy of the summons and complaint in accordance with any special arrangement[s]" between the parties; or, if no special arrangements exist, by delivery "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(a)(1), (2). If service cannot be made by either of these methods, the clerk of court may mail a copy of the summons and complaint and a notice of suit to the foreign state's foreign minister; and finally, if service cannot be made within thirty days by that method, the clerk of court may send copies of those same documents to the Department of State, which transmits them "through diplomatic channels to the foreign state." 28 U.S.C. § 1608(a)(3), (4). These procedures, which are construed strictly and applied sequentially, are the sole means for serving process on a foreign state. *Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001) (citing H.R. Rep. No. 94-1487, at 24 (1976)); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154-55 (D.C. Cir. 1994).

Furthermore, 28 U.S.C. § 1391(f) imposes venue requirements for suits under the FSIA. An action (except a suit in admiralty) against a foreign state must be brought either in the district

court for the District of Columbia, or in a judicial district in "which a substantial part of the events or omissions giving rise to the claim occurred, or [where] a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(f)(1).

The district court reasoned that these requirements do not apply in actions to recognize ICSID awards. According to the court, the FSIA's treaty exception and the FSIA's use of terms that "presuppose" litigation over contested issues demonstrate that "Congress did not have ICSID award recognition in mind when it prescribed service, venue, and other requirements for lawsuits against sovereigns." (JA 512). Neither of those arguments is persuasive.

First, as noted above, the treaty exception only applies "when international agreements expressly conflict with the immunity provisions of the FSIA." *Amerada Hess*, 488 U.S. at 442 (quotation marks and alterations omitted). As the district court itself recognized, the exception is "addressed to the existence of immunity, not the mechanics by which an action is to be brought against a non-immune sovereign." (JA 512). The district court nevertheless construed § 1604 to "fairly reflect[] an intention not to revise existing law or practice in an area governed by treaty." (JA 512). But the mechanics of enforcing ICSID awards are not and never were governed by treaty. Rather, the ICSID Convention reserves the means of enforcement to member states, which enforce awards in the same way that they enforce domestic judgments. ICSID Convention art. 54(1). Article 54(1) thus clearly envisions that domestic law and procedures will apply to enforcement proceedings. In a U.S. court, actions to enforce arbitral awards against foreign sovereigns must conform to the requirements of the FSIA. The treaty exception thus provides no support for the district court's conclusion that Congress did not intend for the FSIA to apply in the ICSID award recognition context. (JA 512).

The district court further reasoned that the FSIA presupposes contested litigation, and thus does not apply to "the non-substantive, mechanistic context of ICSID award recognition." (JA 513). But the fact that the FSIA refers to certain types of contested matters (such as personal injury actions) or refers to limitations on discovery does not imply that other types of actions are excluded from the FSIA. Indeed, the FSIA expressly encompasses actions to enforce international arbitral awards, *see* 28 U.S.C. § 1605(a)(6), which typically are not fully contested litigation. In enacting that provision, Congress provided no exception to the FSIA's other requirements, including that the foreign state defendant be served in accordance with § 1608. Once again, the FSIA is the comprehensive and exclusive statutory scheme for bringing suit against a foreign state in U.S. courts. *Verlinden*, 461 U.S. at 488.

Notably, bringing an action under the FSIA to recognize an ICSID award rendered against a foreign state is not an overly burdensome process, and does not interfere with the recognition or enforcement of such awards as envisioned by the Convention. The award creditor files a complaint, serves the debtor in one of the manners permitted under § 1608, and then, after the debtor has had the opportunity to respond, seeks a judgment by filing a motion on the pleadings or a motion for summary judgment as permitted by the Federal Rules of Civil Procedure. Because an ICSID award is binding on the parties and not subject to review (except within ICSID), the award debtor may raise no substantive defenses and discovery is unnecessary. Courts may employ case management techniques as necessary to further expedite enforcement proceedings, and ensure that frivolous defenses and dilatory tactics are not allowed to unduly delay the enforcement of an ICSID award.

Finally, the district court reasoned that it was not required to have personal jurisdiction over Venezuela under 28 U.S.C. § 1330(b), and hence Mobil was not required to comply with

the service requirements in 28 U.S.C. § 1608, because "[p]ersonal jurisdiction ordinarily is not required in recognition proceedings." (JA 529 n.36). But the federal requirements for exercising jurisdiction over a foreign state in U.S. courts preempt any inconsistent state-law principles governing personal jurisdiction over out-of-state defendants. As explained above, the service requirements of § 1608 must be complied with in every action against a foreign sovereign and are strictly construed. *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154-55. These statutory provisions, rather than any inconsistent procedural rules of the forum state, govern the process for initiating an action to enforce an ICSID award against a foreign sovereign.

POINT II

Neither the ICSID Convention's enabling statute nor the FSIA permits a federal court to "borrow" procedural rules of the forum state that permit *ex parte* proceedings

For much the same reasons, the district court was not permitted to "borrow" state-law procedures that permit *ex parte* proceedings to recognize an arbitral award against a foreign state and enter a U.S. judgment against that foreign state. As explained above, *ex parte* proceedings with no notice to the foreign state defendant conflict with the FSIA. The proper procedure for the recognition and enforcement of an ICSID award in the United States is through the commencement of an action that complies with the FSIA.

The district court concluded that borrowing state-law *ex parte* procedures was necessary because requiring plenary actions would be "in tension" with the ICSID Convention and its enabling statute.[3] (JA 514). But there is no such tension: neither the Convention nor the statute

[3] The district court relied on *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009), which similarly enforced an ICSID award *ex parte* by applying New York CPLR Article 54. *Siag*, in turn, relied upon *Keeton v. Hustler Magazine, Inc.*, 815 F.2d 857 (2d Cir. 1987), to conclude that it was permitted to adopt the CPLR procedure as a means of registering the ICSID award. 2009 WL 1834562, at *2. But *Keeton* concerned an action to register a federal (not state) court judgment in a New York court, which action was subsequently

requires or forbids any particular set of procedures for the enforcement of an ICSID award. To the contrary, in providing that enforcement mechanisms may differ in contracting states (including those with federal systems of government), the Convention recognizes that enforcement will be a matter of domestic law. As the drafters of the ICSID Convention explained at the time of adoption, "[b]ecause 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." *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965) ¶ 42, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf; *see Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) ("In interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation."). That conclusion accords with the Supreme Court's repeated observation that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard v. Greene*, 523 U.S. 371, 375 (1998); *accord Medellín*, 552 U.S. at 517; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006).

Equally, the legislative history of the ICSID Convention's enabling statute, 28 U.S.C. § 1650a(a), does not support the district court's conclusion that Congress intended for ICSID awards to be enforced through an "automatic" *ex parte* process.[4] (JA 521). As the General

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removed to federal court. In contrast, an ICSID award must be treated as if it were a state-court judgment, making *Keeton* inapposite and the logic of *Siag* unpersuasive.

[4] The district court relied heavily on the negotiating history of the ICSID Convention and its differences from the earlier New York Convention in concluding that recognition of ICSID

Counsel of the Department of the Treasury (which, along with the Department of State, negotiated the ICSID Convention on behalf of the United States) testified to Congress, "[t]o give full faith and credit to an arbitral award as if it were a final judgment of a court of one of the several States means that an action would have to be brought on the award in a U.S. district court to enforce the final judgment of a State court." (JA 288 (*Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int'l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 43 (statement of Fred B. Smith, General Counsel, Department of the Treasury))). The same understanding is reflected in the House and Senate Committee Reports regarding the enabling statute. H.R. Rep. No. 89-1741, at 3-4 (1966) ("If an action is brought in a U.S. district court to enforce the final judgment of State court, it is, of course, given full faith and credit in the Federal court. Section 3(a) would give the same status to an arbitral award."); (JA 331, S. Rep. 89-1374, at 4 (1966) (same)). The legislative history does not suggest that enforcement of ICSID awards in the United States must be "automatic" or *ex parte*, which would represent a departure from what appears to have been prevailing federal court practice with respect to the enforcement of state court judgments.[5]

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awards is "automatic." (JA 514-21). But a court's inability to review the merits of an ICSID award does not compel the use of an "automatic" or *ex parte* procedure for recognizing such an award. Indeed, the Convention leaves the mechanism for recognition up to each contracting state. Some have provided for *ex parte* registration procedures, *see, e.g.*, U.K. Civil Procedure Rules, Part 62.21; Australia Federal Court Rule Order 68, while others have not, *see, e.g.*, Singapore Arbitration (International Investment Disputes) Act (Chapter 11). In any event, the history of the Convention does not detract from the conclusion that the FSIA governs and its requirements must be followed.

[5] At the time of § 1650a(a)'s passage, federal court practice appears to have been to enforce state court judgments through a civil action with notice to the judgment creditor. *See, e.g.*, *Midessa Television Co. v. Motion Pictures for Television, Inc.*, 290 F.2d 203, 204 (5th Cir. 1961). Courts that have addressed the issue more recently have generally concluded that a federal court can only enforce a state court judgment through a civil action with notice to the judgment creditor. *See, e.g.*, *Caruso v. Perlow*, 440 F. Supp. 2d 117, 119 (D. Conn. 2006); *Continental Casualty Co.*

Likewise, the district court erred in its interpretation of the "full faith and credit" obligation in § 1650a. Under § 1650a, the pecuniary obligations of an ICSID arbitral 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." According to the district court, the phrase "full faith and credit" in § 1650a means that an *ex parte* registration process can be used. In the district court's view, Congress's use of this term of art is significant because "[u]nder the full faith and credit doctrine, for a sister state's judgment to be recognized, it is not necessary that there be personal jurisdiction over the judgment debtor in the recognizing court"; instead, "a mechanistic process of interstate registration is commonly used." (JA 521-23). But the district court appears to have conflated the full-faith-and-credit doctrine with the procedures for registering and enforcing a state-court judgment in another state under the Uniform Enforcement of Judgments Act. The full-faith-and-credit doctrine simply requires that final judgments rendered in one state have preclusive effect and be immune from collateral attack in every other state. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). It does not require the adoption of practices as to the "time, manner, and mechanisms for enforcing judgments." *Id.* at 235.

In addition, contrary to the district court's view that an action under the FSIA—which allows the defendant to respond prior to judicial recognition of the award—would serve no purpose but delay, there are practical benefits to requiring the use of such a process. While district courts may be unable to substantively review ICSID awards, they can be called upon to

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v. Argentine Republic, 893 F. Supp. 2d 747, 753 (E.D. Va. 2012). *But see GE Betz, Inc. v. Zee Co.*, 718 F.3d 615, 623-25 (7th Cir. 2013) (permitting registration of state-court judgment in federal court under summary procedure of 28 U.S.C. § 1963). The *GE Betz* court recognized that its decision was contrary to the view of many district courts and that it addressed a question not decided by any other federal court of appeals.

consider certain limited procedural issues in connection with their enforcement.[6] And in such situations, giving the award debtor notice of the recognition action and an opportunity to respond before the judgment is entered is both efficient and necessary to protect the rights of foreign governments. In *Blue Ridge Investments, LLC v. Republic of Argentina*, 735 F.3d 72, 77-78 (2d Cir. 2013), for example, the plaintiff did not attempt to employ *ex parte* procedures when seeking recognition of its award, and instead provided notice to the award debtor, Argentina. This allowed the foreign state to assert certain procedural defenses to enforcement, including that the plaintiff, an assignee of the award creditor, lacked standing to enforce the award; that the action on the award was barred by *res judicata*; and that the action to enforce the award was time-barred. Here, providing notice to Venezuela under the FSIA would have allowed the foreign state to raise, before entry of judgment, the issue of whether it was appropriate to enforce the face value of the arbitral award without taking into account the amounts that Mobil

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[6] As discussed above, an ICSID award is binding on the parties and not subject to substantive review, except through the limited avenues available within the ICSID system. Pursuant to Article 52 of the ICSID Convention, a specially appointed *ad hoc* committee of arbitrators may annul an ICSID award on the following limited grounds: (a) the Tribunal was not properly constituted, (b) the Tribunal manifestly exceeded its powers, (c) there was corruption on the part of a member of the Tribunal, (d) there was a serious departure from a fundamental rule of procedure, or (e) the award failed to state the reasons on which it is based. ICSID Convention, art. 52. It would be inconsistent with the ICSID Convention and the ICSID Act for a district court to inquire into the merits of the award, or review an award on the grounds set out in Article 52 of the ICSID Convention. For instance, a court would not be able to inquire into the arbitral tribunal's jurisdiction—a topic that is addressed in the "excess of power" provisions of Article 52 of the ICSID Convention. Likewise, the ICSID Act precludes a court from applying the provisions of the Federal Arbitration Act ("FAA")—including the grounds for review set out in section 10—when enforcing an ICSID award. *See* 22 U.S.C. §1650a(a) ("The Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the convention."); (JA 289 (*Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int'l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 43 (statement of Fred B. Smith, General Counsel, Department of the Treasury) (testifying that the FAA "would permit courts to vacate an arbitral award on certain grounds, such as the corruption of one of the arbitrators, which under article 52 of the convention ought to be raised through the annulment proceedings provided for in the convention"))).

apparently received under the ICC arbitral award. Furthermore, Venezuela could have requested that the district court stay entry of the judgment until the ICSID tribunal ruled on Venezuela's application to revise the award. None of these issues relates to attachment or execution on the award, and it is uncertain whether Venezuela would have been permitted to raise them in a future proceeding in which Mobil sought to execute on or attach Venezuela's property.

Finally, adhering to the FSIA's requirements and declining to allow state-law rules inconsistent with those requirements to be borrowed in this context gains support from Congress's desire to avoid "disparate treatment of cases involving foreign governments," as this "may have adverse foreign relations consequences." H.R. Rep. 94-1487, at 13 (1976) (report accompanying FSIA). Indeed, the United States proposed the language incorporated into Article 54(1) that permits the enforcement of an ICSID award in federal courts "in order to be able to provide in the United States for a uniform procedure for enforcement" of ICSID awards. (JA 331, S. Rep. 89-1374, at 4 (1966)). Congress followed suit by giving federal district courts exclusive jurisdiction over actions to enforce ICSID awards, *see* 22 U.S.C. § 1650a(b), and requiring that they be treated like state court judgments, *id.* § 1650a(a), thus ensuring a uniform system of enforcement. Borrowing state-law rules to permit *ex parte* proceedings would undermine that consistent scheme.

POINT III

The ICSID Convention's enabling statute does not permit a federal district court to modify the interest rate adopted by an ICSID arbitral panel

The district court correctly rejected Venezuela's attempt to modify the interest rate that applies to the Award. The Award states that Venezuela must pay Mobil $1,600,042,482 plus 3.25% interest, compounded annually, from June 27, 2007, "up to the date when payment of this sums [*sic*] has been made in full." (JA 162 ¶ 404(h); *see* JA 159 ¶¶ 397-98 ("Post-award interest

will accrue from the date of the Award and until compensation has been paid in full.")). The ICSID Convention and the ICSID enabling statute both require that courts enforce the "pecuniary obligations" imposed by ICSID awards. ICSID Convention art. 54(1); 22 U.S.C. § 1650a(a). The enabling statute also provides that ICSID awards "create a right arising under a treaty of the United States." 22 U.S.C. § 1650a(a). The rate of interest applied to the principal of the Award is "pecuniary" as it translates directly into an amount of money Venezuela must pay. Indeed, the modification of that rate could lessen the total amount of the Award by millions of dollars.

Venezuela argues that, under the "merger doctrine," obligations owed under an arbitral award merge into the judgment at the time it is entered and that, from that time on, the mandatory interest rate provided in 28 U.S.C. § 1961 (currently much lower than 3.25%) must apply. According to Venezuela, § 1650a's requirement that courts enforce the "pecuniary obligations" of an ICSID award is not contrary to this approach because the Award did not distinguish between post-award interest and post-judgment interest.

Venezuela's arguments should be rejected because its interpretation of § 1961 and the merger doctrine conflicts with the United States' treaty obligations. Modification of the "pecuniary obligations imposed by [the] award" is beyond the authority granted to district courts by the ICSID enabling statute. "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of Foreign Relations Law § 114 (1987). Furthermore, the ICSID enabling statute expressly excludes application of the FAA, *see* 22 U.S.C. § 1650a(a), providing another reason that the merger doctrine applied under the FAA should not apply to judgments based on ICSID awards. The district court, like many other courts enforcing ICSID awards,

correctly applied the rate dictated by the arbitral tribunal, and not the § 1961 rate. *See, e.g.*, *Liberian Eastern Timber Corp. v. Republic of Liberia*, 650 F. Supp. 73, 75 (S.D.N.Y. 1986); *Grenada v. Grynberg*, No. 11 Misc. 45 (DAB) (S.D.N.Y. Apr. 29, 2011) (reproduced at JA 614). To do otherwise would permit an ICSID award that specifies the post-award rate of interest to be valued differently depending on the country in which the award creditor seeks to have it recognized. Applying only the interest rate provided for by the arbitral tribunal avoids this undesirable outcome.

Conclusion

The Court should adopt the interpretation of the FSIA and the ICSID enabling statute as described above.

Dated: New York, New York
March 30, 2016

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