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# Recognition and Enforcement of ICSID Awards in the United States

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## I Introduction

There is little doubt that arbitration awards generally, as well as those specifically arising from arbitrations under the International Convention on the Settlement of Investment Disputes ('ICSID'), can reach gargantuan proportions. One need look no further than the recent, historic \$50 billion award issued by a tribunal seated in The Hague under the auspices of the Permanent Court of Arbitration (PCA) in favor of the Yukos Oil Company shareholders. The attorneys' fees and costs added to the Yukos award alone exceeded \$60 million leaving the Russian Federation exposed to a \$50.6 billion award for its breach of its international obligations under the Energy Charter Treaty (ECT).

Large arbitration awards could lead to recognition and enforcement proceedings in the United States. Indeed, the United States may be a likely forum for enforcement proceedings not only because of its commercial centrality but also because of recent legal developments which removed certain obstacles so as to give judgment-creditors the ability to use US discovery procedures to locate the existence of a sovereign's assets for eventual execution.<sup>1</sup> This article presents an overview of the legal issues relevant to the recognition and execution of arbitration awards obtained against sovereign states or their instrumentalities in the United States. The discussion will focus upon – but not exclusively – ICSID awards.

## II ICSID Recognition, Enforcement and Execution

Arbitration awards under the ICSID differ from other arbitration awards since they are not, by the terms of the ICSID Convention, subject to any judicial review or challenge. Challenge of an ICSID award is generally limited to a request for annulment by an annulment committee convened under the ICSID System.<sup>2</sup>

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<sup>1</sup> *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 189 L. Ed. 2d 234, 2104 WL 2675854 (U.S. 2014).

<sup>2</sup> See Art. 52.

Recognition of the Award is also streamlined by the ICSID Convention such that national courts of Contracting States are instructed to ‘recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.’ Thus, the obligation of recognition applies to the entire award but the obligation to enforce arises only with respect to pecuniary obligations.<sup>3</sup> In the United States recent cases have allowed recognition proceedings to go forward as a summary *ex parte* proceeding.<sup>4</sup>

Article 54 of the Convention requires all member States to recognize and enforce an ICSID award. Article 54 provides in full:

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

In the United States, the Federal Courts have exclusive jurisdiction over actions to recognize and enforce ICSID awards.<sup>5</sup>

‘Enforcement’ or ‘execution’<sup>6</sup> of an ICSID award – terms used loosely here to refer to the procedures and remedies available to the award-creditor when the award-debtor refuses to pay the recognized award voluntarily – are governed by the laws of the country where enforcement is sought.<sup>7</sup> Those procedures could include post-award discovery of assets, issuance of restraining notices, issuance of writs of execution, and enlisting a marshal or sheriff to seize assets.<sup>8</sup> However, in circumstances where an award-debtor is a sovereign state or one of its agencies or instrumentalities, it may avail itself of the protection afforded sovereigns under that domestic

<sup>3</sup> See I. Uchkunova, O. Temnulcou, (2014) Vol. 29 ICSID Review, 187, 189 (hereinafter the ‘ICSID Review’).

<sup>4</sup> See, e.g., *Micula v. Gov’t of Romania*, F. Supp. 3d, 2015 U.S. Dist. Lexis 102907 (S.D.N.Y. Aug. 5, 2015) (summary *ex parte* proceedings suffice for recognition of ICSID arbitral awards), citing *Mobil Cerro Negro Ltd. v. Bolivarian Rep. of Venezuela*, F. Supp. 3d, 2015 U.S. Dist. Lexis 17919 (S.D.N.Y. Feb. 13, 2015).

<sup>5</sup> 22 U.S.C. § 1650a(b).

<sup>6</sup> Recognition is, in essence, the process to authenticate and verify the ICSID award in order to give it *res judicata* effect. Recognition precedes enforcement. *Id.* at 192.

<sup>7</sup> Art. 54 (3).

<sup>8</sup> See Section 4, *infra*.

law. In the United States, a foreign sovereign subject to execution of an award is entitled to avail itself of the protections provided under the United States Foreign Sovereign Immunities Act ('FSIA').

### III U.S. Foreign Sovereign Immunities Act

One of the founders of the ICSID Convention has said that the drafters of the convention sought to create 'a complete, exclusive and closed jurisdictional system, insulated from national law' with respect to the arbitration proceedings, awards, and review of award.<sup>9</sup> Yet this insulation has not fully protected ICSID awards from the impact of national law which governs the procedures and substantive issues concerning the enforcement (collection) of an ICSID award. As recently noted, the application of local law and execution of ICSID judgments is

[...] implicit in the equalization of ICSID awards to local final judgments<sup>10</sup> and this is aimed to respect the variety of legal techniques followed in individual States.<sup>11</sup> This means that actual enforcement will require intimate knowledge of the peculiarities of local laws, and consequently, the results obtained may also vary from one jurisdiction to the other. Summoning the respondent State may be necessary at the stage of enforcement.<sup>12</sup>

In the United States, the most relevant national law that needs to be considered when dealing with governmental entities as award-debtors is the FSIA. That federal statute controls the questions of whether a sovereign state or its instrumentalities are immune from execution and whether certain property is subject to seizure. These issues will be addressed in turn.

#### 1 Subject Matter Jurisdiction

Generally, the FSIA creates the presumption that sovereign states, political subdivisions, and governmental agencies and instrumentalities are immune from civil claims, including proceedings to enforce judgments.<sup>13</sup> A plaintiff can only overcome this presumption by demonstrating that an exception to the immunity or a treaty obligation applies.<sup>14</sup> The FSIA is the 'sole basis'<sup>15</sup> by which U.S. courts can entertain proceedings against sovereign states, political subdivisions, and governmental agencies and instrumentalities.

<sup>9</sup> Christina Binder et al., *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (OUP 2009) at 323.

<sup>10</sup> Schreuer et al. (n 6) 1148.

<sup>11</sup> *Ibid* 1149.

<sup>12</sup> ICSID Review(n 3) at 194. (citations omitted).

<sup>13</sup> See 28 U.S.C. § 1603.

<sup>14</sup> See, e.g., 28 U.S.C. § 1605 (identifying exceptions), 28 U.S.C. § 1604 (identifying international agreements).

<sup>15</sup> *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683 (1989).

With regard to ICSID awards, the U.S. legislature specifically implemented the ICSID Convention by enacting 22 U.S.C. § 1650a which provides in pertinent part:

An award of an arbitral tribunal [under the ICSID Convention] [...] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed [...] 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>16</sup>

However, U.S. courts have held that this provision does *not* address whether there is subject matter jurisdiction over the dispute (i.e. whether a sovereign is immune to US court intervention) but rather only makes clear that issues of whether there is such jurisdiction is a question exclusive to the U.S. federal courts as opposed to the state court system established under state law.<sup>17</sup> The subject matter jurisdiction over an ICSID enforcement proceedings is governed by the FSIA.<sup>18</sup> Several U.S. courts have found that enforcement proceedings of ICSID awards fall within the immunity exception<sup>19</sup> set forth at 28 U.S.C. § 1605(a)(6)(b) which provides that a:

[...] foreign state shall not be immune from the jurisdiction of courts of the United States [...] in any case [...] in which the action is brought [...] to confirm an award made pursuant to such an agreement to arbitrate, if [...]. the agreement or award is [...] governed by a treaty [...] calling for the recognition and enforcement of arbitral awards.

Another FSIA immunity exception applicable to ICSID awards has been found in the FSIA's implied waiver provision set forth at 28 U.S.C. § 1605(a).<sup>20</sup> For example, the United States Court

<sup>16</sup> 22 U.S.C. § 1650a(a).

<sup>17</sup> See, e.g., *Continental Casualty Co. v. The Argentine Republic*, 893 F. Supp.2d 747, 750 (E.D. Va. 2012) ('§ 1650a(b) simply makes clear that jurisdiction of matters arising under the statute is exclusive in the federal courts').

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., *Blue Ridge Investments v. Republic of Argentina*, 735 F.3d 72, 85 (2d Cir. 2013); *Continental Casualty, infra*, 893 F.Supp.2d 750; *Funnkotter v. Republic of Zimbabwe*, No. 09 Civ. 8168(CM), 2011 WL 666227 at \*2 (S.D.N.Y. 2011) ('the immunity exception in Section 1605(a)(6)(B) applies because the Netherlands, Zimbabwe, and the United States are signatories to the Convention on the Settlement of Investment Disputes and Petitioners' arbitration award was obtained pursuant to that treaty'); see also, *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 at \*6 (S.D.N.Y. 2009) (entering a judgment recognizing an ICSID Convention award against Egypt); see also *Liberian E. Timber Corp. v. Government of Republic of Liberia*, 650 F.Supp. 73, 76 (S.D.N.Y. 1986) (prior to enactment of § 1605(a)(6)(B) court found that 'Liberia, as a signatory to the Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention'); see also *Maritime Int'l Nominees Est. v. Republic of Guinea*, 693 F.2d 1094, 1103 n.14 (D.C.Cir.1982) (discussing, without deciding, whether a foreign state's entering into the ICSID Convention 'waive[d] its immunity from proceedings enforcing ICSID awards').

<sup>20</sup> The implied waiver exception provides that:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case... in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver [...].  
28 U.S.C. § 1605(a)(1).

of Appeals for the Second Circuit concluded that Argentina waived its sovereign immunity by becoming a party to the ICSID Convention.<sup>21</sup>

## 2 Property Subject to Execution

Under the FSIA, the extent to which property retains immunity from execution depends on whether the award-debtor is a sovereign state (or its political subdivision) or whether it is an agency or instrumentality thereof.

### a) *Property belonging to a sovereign (or political subdivision)*

If property belonging to a foreign state or political subdivision is used 'for a commercial activity in the United States,' then that property can be subject to attachment or seizure if one of the following additional conditions are met:

- (i) the sovereign waived or impliedly waived its immunity from attachment or seizure.
- (ii) the subject property was used for the commercial activity upon which the claim is based.
- (iii) the judgment establishes rights in the property which has been taken in violation of international law or exchanged for such property.
- (iv) the judgment gives rise to a judgment establish rights in property acquired by succession or gift or which is immovable (but not used for purposes of establishing a diplomatic mission on the residence of the head of same).
- (v) property or auto insurance proceeds or similar contractual indemnity obligations.
- (vi) in the instance of an arbitration award, the attachment or execution conforms to the corresponding arbitration agreement.
- (vii) the judgment is imposed against the foreign state for non-immune state-sponsored terrorism.

Again note that these conditions do not apply unless the subject property itself is used for commercial activity in the United States.<sup>22</sup>

Courts have grappled with the meaning and application of whether a sovereign's property was used for a 'commercial purpose' in the United States. One leading case has stated that the analysis requires a court to look at the use of the property in a 'holistic' fashion taking into account 'the circumstances surrounding the property' and its 'past and present commercial use.'<sup>23</sup> This is hardly a bright line test.

<sup>21</sup> See *Blue Ridge*, 735 F.2d at 84. See, also, *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir.1993) quoting Article III of the CFREAA. (by becoming a party to the Convention on the Recognition and Enforcement of Arbitral Awards ('CFREAA'), a foreign sovereign implicitly waived its immunity because the terms of the CFREAA provided, inter alia, that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon...')

<sup>22</sup> See *Liberian Eastern Timber Corp. v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986) (tonnage fees being collected by Liberian agents were deemed tax revenues and not for commercial activity).

<sup>23</sup> *AF Cap, Inc. v. Republic of Congo*, 383 F.3d 361, 369–70 (5th Cir. 2004).

Examples of decisions in this area provide better guidance on the meaning of what constructive property used ‘for a commercial purpose.’

No – private pension funds for government employees transferred to government to terminate private options for social security benefits<sup>24</sup>

Yes – funds used to repay commercial debts<sup>25</sup>

Yes – funds used to facilitate sale of securities even though proceeds were to be used for government project

No – government tax revenues even though collected by private persons<sup>26</sup>

No – foreign antiques and artifacts held by a US university or museum<sup>27</sup>

Additional guidance can be found in a number of other cases which consider the term ‘commercial activity’ albeit in other sections of the FSIA.<sup>28</sup>

### **b) Agency or instrumentality**

The FSIA provides less protection to property belonging to a sovereign agency or instrumentality as compared to sovereign state (or political subdivision). As to the latter, the property can only be seized if it is in the U.S. and used for ‘commercial purpose in the United States.’<sup>29</sup> As to the former, any property in the United States belonging to the agency or instrumentality is subject to execution if the agency or instrumentality is engaged in commercial activity in the United States. The other additional conditions that need be satisfied in order to execute against an agency or instrumentality that is conducting commercial activity in the United States is where:

- (i) the agency or instrumentality has expressly or impliedly waived its immunity.
- (ii) the execution or attachment relates to a claim that falls under the commercial activity, expropriation, noncommercial tort and other exceptions not relevant here. (Again the property need not relate to the act underlying the claim.)

As noted earlier, as to instrumentalities and agencies, their property can be subject to attachment even if the property itself is not being used for the commercial activity at issue in the lawsuit. Rather, the test to be applied to agencies and instrumentalities is whether that entity itself is engaged in any ‘commercial activity’ in the United States. Such activity can be obvious – leasing of property, performing contracts, engaging in trade, borrowing money, issuing investing in securities, selling goods or services etc. Sometimes less so, especially if the activities are a blend of commercial and sovereign activity.

<sup>24</sup> *Aurelius Capital Partners, LP v. Republic of Arg.*, 584 F.3d 120, 131 (2d Cir. 2009).

<sup>25</sup> *EM Ltd. v. Republic of Arg.*, 865 F. Supp. 2d 415, 424 (S.D.N.Y. 2012).

<sup>26</sup> *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 251 (5th Cir. Tex. 2002).

<sup>27</sup> *Rubin v. Islamic Republic of Iran*, 2007 WL 2219105 (N.D. Ill. July 26, 2007).

<sup>28</sup> See 28 U.S.C. § 1603(d); see generally, Sanchez, *The Foreign Sovereign Immunities Act Deskbook, Chapter 10* (ABA 2013).

<sup>29</sup> See, e.g., *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002).

The relevant statute states:

A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.<sup>30</sup>

Again, not a particularly helpful definition. Guidance can be found in court decisions, although a recitation and analysis of the numerous decisions in this area is beyond the scope of this article. In essence, they will consider an activity as commercial ‘when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it.’<sup>31</sup> Further, U.S. Courts will look to the type of action and not the motive behind it. Thus, while a motive for a transaction may be to generate income for the sovereign’s use, if the transaction is of a commercial type then the activity will be deemed commercial in nature.<sup>32</sup>

### c) *Certain property exempt from execution*

There are certain types of property that are immunized from execution by the terms of the FSIA or international law. Those include funds belonging to foreign central banks re monetary authorities whose immunity is not waived, funds disbursed from international organizations to foreign states, and funds used for military purposes.<sup>33</sup> Diplomatic property is additionally protected by the 1961 Vienna Convention on Diplomatic Relations and Customary International Law.<sup>34</sup>

## IV Discovery Against Sovereigns in the US

In 2001, following a period of economic, social, and political turmoil, Argentina defaulted on more than \$80 billion of external debt, including bonds issued under the Fiscal Agency Agreement (the ‘FAA bonds’). Then in 2005, and again in 2010, Argentina offered the holders of the FAA bonds a ‘take it or leave it’ opportunity to exchange such bonds for a new series of bonds at 25-29 cents/dollar rate. As part of the exchange, FAA bond holders agreed to forgo various rights and remedies previously available under the terms of the Fiscal Agency Agreement. The prospectus of the exchange offer also clearly stated that Argentina had no intention of resuming payment on any of the FAA bonds and would oppose any efforts to collect on the defaulted FAA bonds. Although most bond holders agreed to voluntary restructurings, a group of distressed investors (part of the 7% of FAA bond holders who refused the exchange offer), commenced action to collect full value of the FAA bonds.

<sup>30</sup> 28 U.S.C. § 1603(d).

<sup>31</sup> *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992).

<sup>32</sup> *Id.*

<sup>33</sup> 28 U.S.C. § 1611(a), (b).

<sup>34</sup> Vienna Convention on Diplomatic Relations (entered into force April 24, 1961) 500 UNTS 95.

The battle over the bonds continued in the United States District Court in New York and a number of the hold-out bondholders, including NML, obtained sizable judgments against the Republic of Argentina. In connection with those judgments, NML served subpoenas on two nonparty financial institutions (Bank of America and Banco de la Nacion Argentina), seeking documents relating to ‘all accounts maintained by or on behalf of Argentina *without territorial limitation*’). NML admittedly sought to get an understanding of Argentina’s ‘financial circulatory system.’ Argentina objected contending that the subpoenas effectively violate the FSIA.

The District court granted NML’s motion to compel the banks’ compliance with the subpoenas, holding that the extraterritorial discovery did not infringe on Argentina’s foreign sovereign immunity.<sup>35</sup> The United States Circuit Court of Appeals for the Second Circuit affirmed that decision and the U.S. Supreme Court granted review. The Supreme Court held that the FSIA does not bar post-judgment discovery into the overseas assets of a foreign state.<sup>36</sup> Thus, the two non-party financial institutions were required to disclose documents relating to all accounts maintained by or on behalf of Argentina – including assets and transactions in foreign states. In doing so the Court held that the FSIA does not limit post-judgment discovery to only those assets that U.S. courts can attach under FSIA (e.g. assets held and used for commercial purposes in the U.S.). The Court stated that because there is no provision in the FSIA ‘forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets,’ the Act does ‘not shield from discovery a foreign sovereign’s extraterritorial assets.’<sup>37</sup> The court therefore concluded that FSIA does not place any bar on NML’s discovery into Argentina’s foreign assets.

Note: the Supreme Court’s determination was limited to the immunity defense under the FSIA. It expressly declined to address whether the Federal Rules of Civil Procedure or state laws impose other limits on post-judgment and extraterritorial discovery into the assets of a judgment debtor. The Supreme Court also added that concerns about the international relations consequences of its decision, which had been raised by Argentina and echoed in an amicus brief filed by the solicitor general of the U.S., should be directed to congress, and not for the courts to decide.

## **V What Kind of Post-Award Discovery is Available in Such Cases?**

Judgment creditors are entitled to liberal post-judgment discovery in aid of the judgment or execution under federal or applicable state procedure. Federal Rule of Civil Procedure 69(a)(2) provides: ‘In aid of judgment or execution, the judgment creditor or successor in interest whose interest appears of record may obtain discovery from any person – including the judgment debtor – as provided in these rules or by the procedure of the state where the court is located.’

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<sup>35</sup> *NML Capital, Ltd. v. Republic of Arg.*, 2011 U.S. Dist. Lexis 99502, \*24 (S.D.N.Y. 2011).

<sup>36</sup> *Republic of Argentina v. NML Capital*, 134 S.Ct. at 2256.

<sup>37</sup> *Id.* at 2257.



Thus, judgment creditors are free to employ every means available to them under federal or state discovery rules, and to utilize the full panoply of discovery measures, to obtain execution of a judgment, including:

- requests for production of documents,
- interrogatories,
- depositions and
- subpoenas.<sup>38</sup>

Rule 69 may be employed in aid of any money judgment, including judgments confirming arbitration awards.<sup>39</sup>

The purpose of discovery under Fed. R. Civ. P. 69(a)(2) is to enable the judgment creditor to locate assets of the judgment debtor, wherever located, for satisfaction of the judgment. As a result, discovery under Rule 69 is ‘quite permissive,’<sup>40</sup> and judgment creditors are given the freedom to make broad inquiry to discover hidden or concealed assets.<sup>41</sup> Under Rule 69, the presumption is in favor of full discovery of any matters arguably related to the creditor’s efforts to trace the debtor’s assets and otherwise to enforce its judgment.<sup>42</sup> Because the scope of Rule 69 discovery includes any information reasonably calculated to lead to discovery of the judgment debtor’s assets, it may necessarily be aimed at nonparties who have information, including financial records, related to those assets.<sup>43</sup> However, discovery pertaining to the assets of non-judgment debtors is permissible only when there is a reasonable belief that they have received assets from the judgment debtor.<sup>44</sup> To obtain nonparty discovery, a threshold showing connecting the non-party with discoverable information is required.<sup>45</sup> Under federal common law, the judgment creditor must show either (1) ‘the necessity or relevance of the discovery sought’ or (2) that ‘the relationship between the judgment debtor and the nonparty is sufficient to raise a reasonable doubt about the bona fides of the transfer of assets.’<sup>46</sup>

## VI Enforcing Awards Against the United States and its Instrumentalities

Another scenario to be addressed is how one can enforce an arbitration award against the United States Government or its instrumentalities if they are the award-debtor. The question is not that complicated. Absent statutory consent, the US and its instrumentalities are immune

<sup>38</sup> See *ClearOne Commc’ns, Inc. v. Chiang*, 276 F.R.D. 402, 404 (D. Mass. 2011); *MagnaLeasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 561 (S.D.N.Y. 1977).

<sup>39</sup> See *Universitas Educ., LLC v. Nova Group, Inc.*, 2013 WL 3328746, at \*\*3–4 (S.D.N.Y. July 2, 2013).

<sup>40</sup> *Rep. of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2254 (2014),

<sup>41</sup> See *Universitas Educ.*, 2013 WL 3328746, at \*12.

<sup>42</sup> *ClearOne Commc’ns*, 276 F.R.D. at 404.

<sup>43</sup> *Universitas Educ.*, 2013 WL 3328746, at \*12.

<sup>44</sup> *Integrated Control Sys. Inc. v. Ellcon-National, Inc.*, 2003 WL 23514561, at \*4 (D. Conn. January 21, 2003).

<sup>45</sup> *NML Capital v. Rep. of Argentina*, 2014 WL 3898021, at \*13 (D. Nev. Aug. 11, 2014).

<sup>46</sup> *Id.* at \*14 (citations omitted).

from suit for money damages.<sup>47</sup> However, general statutory consent has been given by legislation known as the Tucker Act, which gives the Court of Federal Claims jurisdiction to render judgment upon any claim against the US (and its instrumentalities) founded either upon the Constitution, any Act of Congress or any regulation of an executive department, or upon express or implied contract with the US, or for damages in cases not sounding in tort.<sup>48</sup> The Tucker Act creates a remedy but not substantive rights (such rights come from the Constitution, Acts of Congress, executive regulations, and contracts) and should be looked at as the procedural means for obtaining money damages for rights created by other federal laws.<sup>49</sup>

Procedures for enforcing arbitration awards against the United States while untested, seems relatively straightforward since the ISCID Awards have been authorized by the 22 U.S.C. § 1650a which provides in pertinent part that '[a]n award of an arbitral tribunal [under the ICSID Convention] ...shall create a right arising under a treaty of the United States.' Moreover, it can be argued that international arbitration awards would be enforceable in accordance with the 1958 New York Convention. The 1958 New York Convention, and the legislation implementing it,<sup>50</sup> could also operate as a consent to suit by the US as it has been argued that if the U.S. declined to pay an arbitral award, the claimant could seek to enforce such award in a Tucker Act lawsuit seeking money judgments.

## VII Conclusion

Despite considerable efforts, ICSID awards will have to overcome the implication of local state law insofar as the enforcement of such awards are concerned. If such awards are pursued in the United States, careful consideration of the FSIA's application must be undertaken. The ability to attach and seize an award-debtor's assets will largely depend on the nature of the award-debtor (state vs. instrumentality) and the nature of the property present in the United States for seizure. If nothing else, the United States post-award discovery procedures make the FSIA analysis a worthwhile undertaking.

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<sup>47</sup> See e.g. *FD.I.C. v. Meyer*, 510 US 471, 475 (1994).

<sup>48</sup> 28 U.S.C. 1491.

<sup>49</sup> Claimant would follow the same Tucker Act procedures in prosecuting a claim against an instrumentality of the US as he/she would against the US itself.

<sup>50</sup> 9 USCS §§ 201 et seq.