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A Hardy Case Makes Bad Law

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ARTICLE

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ABSTRACT

This Article is the first ever to analyze a direct clash between the inherent power of US courts regarding the enforcement of judgments and the obligations of the United States as one of the 163 member countries of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, commonly known as the "ICSID Convention." The ICSID Convention includes a self-enforcement mechanism whereby the courts of the member countries are obligated to enforce the pecuniary obligations in multi-million (and sometimes over one billion) dollar ICSID arbitration awards as though they were court judgments of the domestic courts of that state, which includes domestic procedures for recognition and enforcement of domestic court judgments. Neither Congress nor the United States Supreme Court has addressed or resolved conflicts between US domestic law regarding enforcing court judgments and US

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obligations under the ICSID treaty. A recent draft of the forthcoming RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION *also notes that no cases have yet addressed this issue. However, this issue arose recently in the DC District Court case, Hardy Exploration & Production (India) Inc v. Government of India, Ministry of Petroleum & Natural Gas, 314 F.Supp.3d 95 (D.D.C. 2018). The appeal of the DC District Court decision was withdrawn by the appellant before any briefs were filed in the DC Circuit; thus, this still remains a lacuna in US law.*

This Article invents and analyzes two hypothetical case studies involving ICSID arbitration awards based on past cases in which a US court applied domestic law or domestic public policy to an investment treaty arbitration award enforced under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention" with 159 member countries. This Article guides US judges regarding the appropriate way to handle investment arbitration awards by using two New York Convention New York Convention arbitral awards as examples. This Article provides guidance regarding how US judges should handle those two awards had they instead been rendered under the ICSID Convention instead, in light of the self-enforcement obligations described above. The theoretical exercise presented in this Article provides future US courts with options to balance their obligations under the ICSID treaty with their inherent power over the enforcement of court judgments.

Keywords: treaties, restatement, international commercial arbitration, procedure, enforcement, courts, judgments, international arbitration, investment arbitration, investment treaty arbitration, ICSID, New York Convention, comity, public policy, sovereign immunity, and FSIA.

I. INTRODUCTION TO INVESTMENT TREATY ARBITRATION

The old adage, that "a hard case makes bad law,"[1] rings especially true in the realm of investment treaty arbitration, which is rife with hard cases. Investment treaty arbitration can be defined in many ways, but for the purpose of this Article, an investment treaty arbitration is an international arbitration decided by a tribunal of private citizens (not judges employed by the state) involving a national government as a respondent (defendant) under either a contract relating to foreign direct investment, or an international treaty (such as a free-trade agreement) providing for international arbitration, or both.[2] Much ink has been spilled about the virtues and vices of the decision-making process of investment arbitration tribunals.[3] For the purposes of this Article, the

1. *Cf.* N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend"); Winterbottom v. Wright (1842) 152 Eng. Rep. 402, 405 (K.B.) (J. Rolfe concurring) ("This is one of those unfortunate cases in which. . . it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been observed, are apt to introduce bad law").

2. *See generally*, Julian Davis Mortenson, The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law, 51 HARV. INT'L L.J. 257 (2010); Claudia Salomon et al., *Investment Treaty Arbitration: A Primer,* LATHAM & WATKINS (July 29, 2013), https://www.lw.com/thoughtLeadership/LW-investment-treaty-arbitration-primer [https://perma.cc/NC2P-LMT4].

3. For a discussion of some of the arguments in favor of investment arbitration, see generally Charles N. Brower & Stephan W. Schill, *Is Arbitration A Threat or A Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471 (2009); Stephan Schill, *The Virtues of Investor-State Arbitration*, EJIL: TALK! (Nov. 19, 2013), https://www.ejiltalk.org/the-

Author will make the assumption that the decision-making process of such investment arbitration tribunals is generally sound in order to focus on the final stage of the process – what happens after the arbitral award has been rendered.

To determine what happens after the arbitral award has been rendered, it is first important to distinguish between three sources of law that may apply to the arbitration award. First, the governing law is the substantive law that the parties may choose to designate in their contract; the arbitrators will apply this law to the merits of the parties' dispute along with the *lex mercatoria*, which consists of global business norms and practices.[4] Second, the law applicable to the arbitration proceedings is a combination of the arbitration law designated by the parties (if any), the arbitration law of the legal seat of arbitration, and the arbitral rules designated by the parties.[5] Third,

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virtues-of-investor-state-arbitration/ [https://perma.cc/5YQT-5WNP]. For a discussion of some of the arguments of against investment arbitration, see, e.g., Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom*, CORPORATE EUROPE OBSERVATORY (Nov. 2012), https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf [https://perma.cc/G7ZH-PH5F]; Chris Hamby, *Secrets of a Global Super Court: A BuzzFeed News Investigation*, BUZZFEED.COM, https://www.buzzfeed.com/badge/globalsupercourt [https://perma.cc/Z7P8-TMMJ] (last visited Nov. 13, 2019).

4. *Cf.* RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. & INVESTMENT ARB., § 2.2, cmt. b. (AM. LAW INST. Nov. 2019 version of Proposed Final Draft), available at https://www.ali.org/news/articles/restatement-us-law-international-commercial-and-investorstate-arbitration-approved/ [https://perma.cc/L5P8-JZS4]. Within the broad framework established by federal sources, both state law and foreign law nevertheless regularly perform a central function in the enforcement of agreements to arbitrate. Depending on the applicable choice-of-law rules and rules of preemption, state law or foreign law may supply the rules of decision—typically rules of contract law—on the basis of which the existence and validity of arbitration agreements are determined. *See* the choice-of-law directives indicated in § 2.9(d) and §§ 2.12 through 2.21. Those choice-of-law rules may lead a court to apply state law, foreign law, or a rule derived from general principles of contract law (functioning as a species of federal common law). The applicable law may also be found in an international treaty to which the United States is a party, such as the Vienna Convention on the International Sale of Goods (1980)") (italics and citations in original) [hereinafter RESTATEMENT]; International Court of Arbitration, ICC Award in Case No. 2090 in 1976 (anonymized) ("…*lex mercatoria*, understood as that body of international trade usages which inform the interpretation of international commercial contracts."), available at https://www.westlaw.com/Document/ICA01DB2B19814F4AB117F4D1D914E6FC/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (Westlaw sign-in required).

5. *Cf.* RESTATEMENT § 1.3, cmt. c ("[A]n arbitral proceeding is ordinarily governed by the arbitration law of the jurisdiction in which it is seated. It would, for example, be subject to any mandatory rules in the arbitration law of the seat. Similarly, the grounds for vacating or setting aside the award would be those in the arbitration law of the seat").

the law of enforcement is the law that a court asked to confirm, recognize, enforce, or execute the award will apply to make that decision.[6] The law of the court that may be asked to confirm, recognize, enforce, or execute the arbitral award cannot be determined in advance or included in the contract, because it depends on which party wins the arbitration and where the losing party's assets or property might be located. In addition, there may be more than one enforcing court involved if assets are located in multiple countries and, therefore, more than one law of enforcement may apply. Finally, enforcing courts are obligated not to rehash the merits of ICSID arbitration awards.[7] This Article addresses a problem involving the law of enforcement with respect to enforcing ICSID arbitral awards in US courts. Arbitral tribunals do not have the power to enforce their own awards.[8] Instead, there are two ways in which arbitral awards are effectuated. One is that the parties voluntarily comply with the award. The other way is that the winning party engages the machinery of a domestic court to enforce the arbitrator's award under the domestic laws in the place where that court is located. While investment arbitration parties often voluntarily comply with the arbitral award, it is sometimes necessary for one of the parties to file an action with a court either to assist in enforcing the award or to ask the court to vacate the award. Moreover, the US court system is often the venue of choice for winning parties seeking to vindicate their rights under investment arbitration awards in part due to US courts' either enthusiastic or dogmatic pro-arbitration stance, which

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6. *Cf.* RESTATEMENT § 4.1 (discussing the various convention-based and statutory sources of law applicable to the enforcement of international arbitration awards under applicable Conventions and the Federal Arbitration act in the United States); RESTATEMENT § 4.16, cmt. e. ("The language of the Conventions makes clear that the content of public policy is determined by the law of the jurisdiction where recognition or enforcement is sought").

7. *Cf.* RESTATEMENT Ch. 5, Introductory Note; *see* RESTATEMENT § 1-1 Definitions, cmt. r.3 ("Also central to the [ICSID] Convention regime is a relatively unqualified obligation imposed on courts of contracting States to enforce awards; those courts are not entitled to decline enforcement on public policy grounds, or on the other bases permitted, for example, under the New York and Panama Conventions").

8. *See, e.g.*, Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 1 (2003) ("The continued success of the modern international arbitration system depends on the willingness of nation-states to cede control over the substantive outcomes of international economic disputes while lending their support to the enforcement of arbitral agreements and awards"); Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429, 429 (2013) ("A final [award] marks an important milestone in the lifecycle of a[n arbitration] case, but it is by no means the end of the journey").

developed over the past century under extraordinary yet deliberate circumstances, the explanation of which is beyond the scope of the Article.[9] Furthermore, the International Centre for Settlement of Investment Disputes ("ICSID")—the arbitration institution that was created pursuant to the ICSID Convention to administer Convention disputes—is headquartered in the World Bank's headquarters in Washington, D.C., so the DC courts are often the "courts of first resort" for parties seeking to enforce or vacate ICSID awards in the United States.

Despite the pro-arbitration stance of US courts, confirming an arbitration award in the United States is not easy *per se*. A winning party must petition the court, and there are limited grounds upon which a court can decline to confirm the award. However, the court's answer is normally affirmative, and the majority of arbitral awards are confirmed in US courts, even if the award brings about a seemingly harsh outcome. Because the default is "yes," the hard cases addressed in this Article are the cases wherein the court potentially has the power to say "no" to confirming an arbitral award.

Most courts reviewing petitions to confirm international arbitration awards apply a combination of domestic law and international treaty law to the question of whether to confirm the award. While the domestic law may vary from country to country, most countries have some form of domestic arbitration statute or a specific statute that relates directly to international arbitration. In the United States, there is more than one domestic statute that could apply. The most famous arbitration statute in the United States is the Federal Arbitration Act ("FAA"), passed by Congress in 1925.[10] Chapter 1 of the FAA regulates domestic arbitration awards in the United States.[11] This statute also incorporates by reference two treaties to which the United States is a party. The first treaty is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention," which enables a party to give effect to an arbitration award in 159 member

9. For a history of arbitration law in the United States as far back as the 1925 Federal Arbitration Act, see generally Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002); Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115 (2016).

10. *See* 9 U.S.C. §§ 1-307 (2018).

11. *See* 9 U.S.C. §§ 1-16 (2018).

states and quasi-state regions and is incorporated by reference into Chapter 2 of the FAA.[12] The second treaty is the 1975 Inter-American Convention on International Commercial Arbitration, commonly known as the "Panama Convention", which enables a party to give effect to an international *commercial* arbitration award in 19 countries in the Americas and is incorporated by reference in to Chapter 3 of the FAA.[13] As its name suggests, the Panama Convention is not typically used to enforce investment arbitration awards.[14] Thus, the remainder of this Article focuses primarily on the New York Convention and one other treaty that is not referenced in the FAA, which is the ICSID Convention.

The United States is one of the 163 member states and quasi-state regions that are parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, commonly known as the "ICSID Convention."[15] The ICSID Convention, discussed in greater detail in Part II of this Article, allows corporations or individuals to sue a member state for redress of grievances that infringe upon their rights as "investors" within the meaning of the investment treaties and free trade agreements that provide for international arbitration as the dispute resolution mechanism. The ICSID Convention includes a self-enforcement mechanism whereby the courts of the member countries are obligated

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12. *See* 9 U.S.C. §§ 201-08 (2018). The term *member state* is used throughout this Article for clarity and brevity to encompass both recognized states and non-state or quasi-state regions that are members of the Convention. Examples of non-state or quasi-state regions that are members of the Convention include Palestine, Taiwan, and Hong Kong.

13. *See* 9 U.S.C. §§ 301-07 (2018).

14. If an investment arbitration award is rendered pursuant to a contract, and all the parties are nationals or governments of the states that are parties to the Panama Convention, then it may perhaps be possible to enforce an investment arbitration under the Panama Convention, but only if the contract involved a *commercial transaction* within the meaning of art. 1 of the Convention. A discussion of whether an investment contract is a *commercial transaction* that falls within the scope of the Panama Convention is beyond the scope of this Article.

15. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; *List of Contracting States and Other Signatories of the Convention (as of April 12, 2019)* ICSID, https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf [https://perma.cc/PNV9-THA8] (last visited Nov. 13, 2019). The term *member state* is used throughout this Article for clarity and brevity to encompass both recognized states and non-state or quasi-state regions that are members of the Convention. Examples of non-state or quasi-state regions that are members of the Convention include Palestine, Taiwan, and Hong Kong.

to enforce the arbitration awards rendered by the arbitrators as if they were court judgments of the domestic courts of that state. This is completely separate and independent from the domestic system of law and courts in these countries, except with regard to the procedure for enforcing arbitral awards rendered under the treaty. The treaty provides that the member countries shall treat the pecuniary obligations in the arbitral award as if they were a final judgment of a court in that state.[16] This means that courts in the member countries can apply domestic procedures for recognition and enforcement of domestic court awards to the recognition and enforcement of the ICSID arbitral award.

The self-enforcement mechanism also means that the ICSID treaty was designed such that the courts of the member states would merely verify the veracity of the award and then enforce it as if it were a court judgement, without inquiring into the underlying merits of the case. Conflicts between US domestic law regarding enforcing court judgments and US obligations under the ICSID treaty have not yet been tested in actions to enforce ICSID arbitration awards in US courts. Recently, however, courts in the United States have inquired into the merits of non-ICSID investment arbitration awards when determining whether to enforce them, for example, because the awards violated domestic procedural or public policy norms, or because the court determined that the remedy in the award infringed upon the sovereignty of a foreign state.[17] Because the United States is a favored jurisdiction for the enforcement of international arbitration awards due to the independence of its judicial system, it is only a matter of time before these same types of issues will arise in the context of enforcing an ICSID arbitration award, which would lead to a direct clash between the obligations of the United States under the ICSID treaty and the inherent power of the US court system regarding the enforcement of judgments.

Since this issue has not yet been tested in US courts, this Article conducts a case study by analyzing two recent cases in which a US court applied domestic law or domestic public policy to an investment treaty arbitration award enforced under the New York Convention (arguably the most successful international arbitration award enforcement convention with 159 parties) at the post-award phase and offers theories about how US courts would handle the same awards in those two cases had they instead been rendered under the ICSID

16. *Id.* art. 54.
17. *Id.* art. 55.

Convention, in light of the self-enforcement obligations described above. The first case, *BG Group v. Argentina*, involved the US Supreme Court applying domestic arbitration law and the common law of contract principles to enforce an investment arbitration award under the New York Convention.[18] The second case, *Hardy Exploration v. India*, involved the DC District Court applying the doctrines of public policy, comity, sovereign deference, and a version of the "Golden Rule" to decline enforcement of an investment arbitration award under the New York Convention.[19] This Article offers theories about how US courts would handle the same awards discussed in the case studies had they instead been rendered under the ICSID Convention, in light of the self-enforcement obligations described above. The theoretical exercise presented in this Article is intended to provide future US courts with options to balance their obligations under the ICSID treaty with their inherent power over the enforcement of court judgments.

In addition to the aforementioned complexities, the Reader should also note the potential for confusion regarding terminology; hence, this Article introduces additional working definitions at this stage. The terms "confirm" or "recognize" mean to deem the arbitral award valid and to provide a judicial "stamp of approval" for the arbitral award.[20] Similarly, "confirmation" and "recognition" are the corresponding noun forms.[21] Moreover, in domestic US litigation, the terms "enforce" and "execute" are used interchangeably.[22] In contrast, "enforce" in the international context means for a court to convert an arbitral award into a judgment of that court.[23] "Enforcement" (i.e. the noun form) is a

18. *See generally* BG Grp., PLC v. Republic of Arg., 572 U.S. 25 (2014).

19. *See generally* Hardy Expl. & Prod. (India) Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F.Supp.3d 95 (D.D.C. 2018). The appeal of the DC District Court decision was withdrawn before any briefs were filed in the DC Circuit.

20. Confirm, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. To give formal approval to . . . . 2. To verify or corroborate. . . . 3. To make firm or certain . . . ."); Recognition, *id.* ("1. Confirmation that an act done by another person was authorized. *See* RATIFICATION. 2. The formal admission that a person, entity, or thing has a particular status; esp., a country's act in formally acknowledging the existence of another country or national government.") (capitalization in original).

21. *Id.*

22. *Compare Enforce, id.* ("1. To give force or effect to (a law, etc.); to compel obedience to. 2. Loosely, to compel a person to pay damages for not complying with (a contract)."), *with Execute, id.* ("3. To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form . . . . 5. To enforce and collect on (a money judgment) . . . .") (parentheses in original).

23. *See, e.g.*, John McDermott, *The Survey of Methods for the Enforcement of Foreign Judgments and Foreign Arbitral Awards in the Asia-Pacific Region*, 12 LOY. L.A. INT'L &

required step before an arbitral award can be "executed." Congress and US courts sometimes seem to confuse the above three terms and use them interchangeably.[24] This confusion is one of the sources of the "bad law" problem referenced earlier in this Introduction.[25] "Execution" has the same meaning that it has in the context of domestic court judgments, that is to use the police power of the government in which the executing court sits in order to seize and sell assets to pay the monetary portion of the judgment or award.[26] Similarly, the terms "vacate," "set aside" and "annul" mean to overturn or invalidate an arbitral award, which is essentially equivalent to how these words are used in the domestic US litigation context.[27]

With those definitions in mind, this Article proceeds as follows. Part II explains how investment arbitration awards are enforced under US domestic law. Part III presents two case studies involving investment treaty arbitration awards enforced under the New York Convention and analyzes how the court might have handled the case differently had these been ICSID Convention arbitration awards instead. The case study of *BG Group v. Argentina* addresses the application of domestic arbitration law and the common law of contract principles to enforce a non-ICSID investment arbitration award.[28] The case study of *Hardy Exploration v. India* addresses the application of the doctrines of public policy, comity, sovereign deference, and a version of the "Golden Rule,"[29] to decline enforcement of a non-ICSID

COMP. L. REV. 114, 115 (1989) ("The basis for recognition and enforcement of foreign judgments under the *common law* is the doctrine of obligation, whereby the foreign judgment is treated as an implied promise to pay the amount of the judgment. To enforce the foreign judgment, a suit is brought on the foreign judgment in order to obtain a *domestic* judgment in the same amount.") (italics in original).

24. *See, e.g.*, 22 U.S.C. § 1650A (2018); Hardy Expl. & Prod. (India) Inc v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F.Supp.3d 95 (D.D.C. 2018). Both the statute and the *Hardy* case are discussed later in this Article.

25. *See supra* note 1.

26. *See, e.g.*, 28 U.S.C. § 3202(e) (1990) ("Sale of Property.—The property of a judgment debtor which is subject to sale to satisfy the judgment may be sold by judicial sale, pursuant to sections 2001, 2002, and 2004 or by *execution* sale pursuant to section 3203(g). If a hearing is requested pursuant to subsection (d), property with respect to which the request relates shall not be sold before such hearing.") (emphasis added).

27. *Cf. Vacate, supra* note 20 (1. To nullify or cancel; make void; invalidate . . . .") *with Set Aside, id.* ("(Of a court) to annul or vacate (a judgment, order, etc.)") (parentheses in original).

28. *See generally BG Grp. PLC*, 572 U.S. 25 (2014).

29. *See Golden Rule*, MERRIAM-WEBSTER DICTIONARY (online), available at https://www.merriam-webster.com/dictionary/golden%20rule [https://perma.cc/G38A-RABW]

investment arbitration award.[30] Part III also discusses the implications of the results of the two case studies and the hypothetical scenarios. Part IV concludes.

II. ENFORCING INVESTMENT ARBITRATION AWARDS UNDER US DOMESTIC LAW

The ICSID Convention is a treaty that was originally signed in 1965 and went into force in 1966.[31] Over 3500 separate investment treaties now exist worldwide,[32] many of which allow for investors to choose the ICSID Convention's system of international arbitration by which to bring a claim against an ICSID member state. There are 163 ICSID member states at the time of this writing and the number is still growing gradually.[33] For example, Mexico signed onto the ICSID Convention in 2018, Iraq in 2015, and Canada in 2013, among other new signatories in recent years.[34] Traditionally, states have ratified the ICSID Convention as well as other bilateral and multilateral investment treaties in order to attract foreign direct investment into their territories from foreign corporations and individuals.[35] Those foreign

("a rule of ethical conduct referring to Matthew 7:12 [in The Bible] and Luke 6:31 [in The Bible]: do to others as you would have them do to you").

30. *See* Hardy Expl., 314 F.Supp.3d. 95, 114 ("Third, while the doctrine of international comity does not generally counsel against the confirmation of arbitral awards, as India has indicated [in its written brief], confirmation of this award would 'raise the specter of the opposite situation coming to pass; namely, a foreign court confirming (or the court going further and granting injunctive relief directly) against the United States for acts it has taken within its own borders or respecting its own territory.' Given that the United States has not waived its sovereign immunity in its own courts against specific performance in contract cases, it would defy comprehension that it would be in compliance with US public policy to create a situation in which a foreign court could order the US to specifically perform its portion of a contract.") (internal citations omitted) (parentheses in original).

31. *See generally* ICSID Convention, *supra* note 12.

32. *See e.g.*, Emma Lindsay & LaDawn Burnett, *International Investment Arbitration in Africa: Year in Review 2016*, BRYAN CAVE, https://www.bryancave.com/images/content/9/3/v2/93577/International-Investment-Arbitration-YiR-Africa-2016.pdf [https://perma.cc/2VLU-X4UU] (last visited Nov. 13, 2019) (survey of investment treaties mentioning that around 3,500 such treaties existed worldwide in 2016).

33. *See List of Contracting States and Other Signatories of the Convention (as of April 12, 2019)*, *supra* note 15.

34. *Id.*

35. *See generally*, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1-20 (W. Michael Reisman et al. eds., 2d ed. 2014) (explaining the history of the foreign direct investment, foreign investment disputes, investment treaties, and international arbitration under investment treaties).

corporations and individuals are always claimants in the investment arbitration system, vindicating their rights as set forth in the investment treaties and free trade agreements.[36] Correspondingly, the member states are always respondents in ICSID arbitrations, and they rarely have been able successfully to bring counterclaims against investors, in part due to jurisdictional constraints present in the corresponding investment treaties, which some have argued is a flaw in the system.[37] Thus, enforcing an ICSID award usually means a traditional court ordering a foreign sovereign member state to comply with the award—an exertion of judicial power that, in the United states, invokes the Foreign Sovereign Immunities Act ("FSIA"). [38]The FSIA exempts foreign governments from suit against them unless one of a list of exceptions applies.[39] The FSIA specifically includes an exception to sovereign immunity in situations where the foreign sovereign has waived sovereign immunity to participate in arbitration proceedings and, correspondingly, to enforce the resulting arbitration award.[40] It is settled law in the United States that arbitration proceedings under the ICSID Convention and the resulting arbitration awards meet the requirements of the exception in the FSIA.[41] Thus, US courts clearly have the power to enforce ICSID arbitration awards against foreign sovereigns. How then do US courts accomplish this enforcement against their fellow member states?

The unique innovation of the ICSID system is that member states are obligated to enforce the ICSID award immediately upon presentation of a certified copy of the arbitration award to one of the member state's local courts or to some other governmental body vested

36. *Cf.* ICSID Convention, *supra* note 12, at art. 25.

37. For the key arguments criticizing the jurisdictional structure of the investment treaty arbitration system, see, e.g., Pia Eberhardt & Cecilia Olivet, *supra* note 3; Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1 J. INT'L DISP. SETTLEMENT 97–122 (2010).

38. *See* 28 U.S.C. § 1602 (2018).

39. *See* 28 U.S.C. § 1605 (2018) (stating that a foreign sovereign is immune from suit unless one of the enumerated exceptions in this section applies).

40. *See* 28 U.S.C. § 1605(a)(6) (2018).

41. *Cf.* Micula v. Government of Romania, 2015 WL 4643180, *3 (S.D.N.Y. 2015) ("As fully discussed in *Mobil*, given the spirit of the ICSID Convention [to which the United States is a party], the language of its enabling statute, *the clear exceptions to the FSIA that apply* and precedent in this District, the expensive and time-consuming process of a plenary proceeding to recognize an ICSID award in the United States is unnecessary as a matter of law.") (emphasis added).

with the authority to enforce the award.[42] A member state cannot refuse to *recognize* an ICSID award.[43] With respect to *enforcement*, the member States cannot refuse to enforce the monetary obligations in the ICSID award.[44] In addition, a US court cannot use the *forum non conveniens* doctrine to decline enforcement of an ICSID award.[45] The distinction between *recognition* and *enforcement* of an arbitration award is fraught, but for the purposes of this Article, the terms will be treated as interchangeable in accordance with US domestic law.[46] *Execution*, however, is a distinct term.[47]

The ICSID Convention also allows member states with a federal structure to treat the ICSID award as if it were a final judgment of one of the individual states within the federal system.[48] At the request of the United States, language was included in the Convention to allow member states to impose their individual domestic requirements for the recognition and enforcement of final judgments upon the ICSID

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42. *See* Abby Cohen Smutny et al., *Enforcement of ICSID Convention Arbitral Awards in U.S. Courts*, 43 PEPP. L. REV. 649, 656 (2016).

43. *Id.* at 653.

44. *Id.* at 653–54.

45. *See* RESTATEMENT § 5-6(a)(4) ("Actions to enforce an ICSID Convention award are not subject to stay or dismissal on forum non conveniens grounds").

46. *See, e.g.*, Smutny et al., *supra* note 42, at 658 ("Commentators have observed, however, that in some instances the term recognition is equated with enforcement, while in other instances enforcement has been equated to execution. Some commenters suggest that because authentic French and Spanish texts of the ICSID Convention use the same word for both 'enforcement' and 'execution,' the words should be interpreted to have the same meaning in the English text of Article 54 —although whether that meaning refers to execution or 'a broad concept embracing all steps covered by Art[icle] 54' might not be clear"). RESTATEMENT § 5-5, cmt. b.iii ("Enforcement or recognition of awards must be distinguished from execution. As far as execution of ICSID Convention awards is concerned, i.e., the actual taking of possession of the property of the losing party, Article 54(3) of the Convention expressly provides that '[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought'") (parentheses, quotations, and brackets in original); 22 U.S.C. § 1650A (2018) (implementing the ICSID Convention and using only the word "enforcement").

47. *See, e.g.*, RESTATEMENT § 5-5, cmt. b.iii ("Enforcement or recognition of awards must be distinguished from execution. As far as execution of ICSID Convention awards is concerned, i.e., the actual taking of possession of the property of the losing party, Article 54(3) of the Convention expressly provides that '[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.'") (parentheses, quotations, and brackets in original).

48. *See* ICSID Convention, *supra* note 12, art. 54; Smutny, Smith, & Pitt, *supra* note 42, at 654.

award.[49] The United States likely requested this provision because of its dual federal and state court systems and the existing practice in the United States of arbitration awards enforcement in both systems according to the FAA.[50] It is crucial to note, however, that Congress specifically exempted ICSID awards from the application of the FAA.[51]

In fact, one additional helpful way to understand the ICSID Convention is to understand it according to what it is *not*. As mentioned above, the ICSID Convention is *not* an FAA treaty. The FAA already incorporates the New York Convention and the Panama Convention[52] to enforce international *commercial* arbitration awards, typically involving two private parties, which may include a state acting in its commercial capacity rather than its governmental capacity. Neither of those Conventions applies to ICSID arbitration awards.[53] One interesting thing to note about the New York and Panama Conventions is that they both include a "public policy" exception to the enforcement of an international arbitration awards—a feature that the ICSID Convention does not include.[54]

Thus, can a federal court decline to enforce an ICSID award due to public policy? The answer is unclear and has not yet been tested in a US court. In Part III below, this Article presents a hypothetical

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49. *See* Smutny et al., *supra* note 42, at 654 ("The drafting history of the ICSID Convention reveals that this provision was included at the request of the United States").

50. *See generally* Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act applies in state court as well as federal court, despite language in the statute to the contrary).

51. *See* 22 U.S.C. § 1650A (2018) ("The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention") (parentheses in original).

52. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, T.I.A.S. No. 6997 [hereinafter New York Convention]; 9 U.S.C. §§ 201-08 (2018) (incorporating the New York Convention into the Federal Arbitration Act); Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 24384 [hereinafter Panama Convention]; 9 U.S.C. §§ 301-307 (2018) (incorporating the Panama Convention into the Federal Arbitration Act).

53. *See* 22 U.S.C. § 1650A (2018) ("The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.") (parentheses in original).

54. *See* RESTATEMENT § 1, cmt. c1 ("Also central to the [ICSID] Convention regime is a relatively unqualified obligation imposed on courts of contracting States to enforce awards; those courts are not entitled to decline enforcement on public policy grounds, or on the other bases permitted, for example, under the New York and Panama Conventions . . . ").

scenario based up on the facts of a real case as a way to explore this presently theoretical question.

The United States framework for the law applicable to the enforcement of ICSID awards is as follows. According to the implementing statute, courts have exclusive jurisdiction to enforce ICSID arbitration awards; state courts cannot hear these actions.[55] In addition, there is complete federal preemption of state law regarding enforcing ICSID arbitration awards.[56] What should US federal courts do if they have to apply non-existent federal rules governing the execution of ICSID convention awards?[57] Given complete federal preemption and the exclusive jurisdiction of federal courts, can federal courts ever employ state law to fill in the gaps? [58] Presently, where federal law preempts state law but does not provide an answer, state law *is indeed* being used to fill in the gaps, particularly with respect to the procedural aspects of enforcing an investment treaty arbitration award.[59] For example, state statutes of limitations apply to the enforcement of court judgments of sister states; thus, those same state statutes of limitations apply to the enforcement of an ICSID convention award as a sister state court judgment.[60] However, it is not clear

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55. *Cf.* RESTATEMENT § 5-6(A)(1) ("When Congress implemented the ICSID Convention in 22 U.S.C. § 1650a, it included an express grant to federal courts of subject matter jurisdiction to enforce ICSID Convention awards and declared that jurisdiction to be exclusive."); *with id.* at cmt. a.i ("However, according to the prevailing view, taken by the Court of Appeals for the Second Circuit, § 1650a's grant of exclusive subject matter jurisdiction is superseded by the subsequently enacted Foreign Sovereign Immunities Act (FSIA). Thus, the FSIA and that statute alone, confers federal subject matter jurisdiction in actions against a foreign State or instrumentality to enforce ICSID Convention awards. Under the FSIA, jurisdiction in actions against Foreign States and instrumentalities is not exclusive, though actions brought in state court are removable to federal court").

56. *See* RESTATEMENT § 1-9, cmt. c ("Although there are no known cases on point, federal law preempts state law grounds for post-award relief as applied to ICSID Convention awards").

57. *Cf.* RESTATEMENT § 1-6, Reporters' Notes c ("An ICSID Convention arbitration instead is governed by the ICSID Convention and its implementing legislation (22 U.S.C. § 1650a). The Restatement provides that "[a] court enforces an agreement to submit an investor–State dispute to arbitration, whether conducted on an ICSID Convention or a non-ICSID Convention basis, through any of the means available for enforcing an agreement to arbitrate set forth in § 2.1." See § 5.2. To the extent state law grounds for declining to enforce an agreement providing for ICSID Convention arbitration are applicable, see § 5.1(a)(4), presumably they would be evaluated under the preemption analysis set out in this Section") (parentheses, citations, and brackets in original).

58. *Cf. id.*

59. *Cf. id.*

60. *See* RESTATEMENT § 5-6(A)(5), Reporters' Notes a.v ("[T]he ICSID implementing statute, 22 U.S.C. § 1650a, specifically provides that the FAA does not apply to the enforcement

whether state law can be employed in all contexts in which federal law is silent with respect to the enforcement of an ICSID award.[61] This Article explores this question further through the two case studies presented in Part III.

III. APPLYING DOMESTIC LAW TO ENFORCEMENT OF INVESTMENT ARBITRATION AWARDS

A. BG Group v. Argentina: An Easier Case under ICSID

1. *BG Group v. Argentina* under the New York Convention

In its 2014 decision in *BG Group PLC v. Argentina*, the US Supreme Court considered an arbitration award rendered against Argentina in an UNCITRAL bilateral investment treaty arbitration seated in Washington, D.C., which Argentina had challenged in the federal courts at the seat of arbitration, which were the DC District and Circuit courts.[62] The pertinent issue on appeal was a challenge to the jurisdiction of the arbitral tribunal, which in essence required the court to make an inquiry into the merits of the underlying dispute – which is

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of ICSID Convention awards. But neither the ICSID Convention nor its implementing statute establishes a limitations period either. Under these circumstances, courts have treated the enforcement of ICSID Convention awards, for limitations purposes, in the same way they treat the enforcement of final judgments of a sister-state court… ICSID Convention Article 54(1) supports that position; it provides only that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Thus, [a federal district] court found that "[b]ecause ICSID Convention awards are to be treated as final judgments of a state court—rather than as arbitration awards—the most analogous state statute of limitations is that which governs the enforcement of a final money judgment from the court of another state") (quotation in original).

61. *Cf.* RESTATEMENT § 1-6, Reporters' Notes c ("An ICSID Convention arbitration instead is governed by the ICSID Convention and its implementing legislation (22 U.S.C. § 1650a). The Restatement provides that "[a] court enforces an agreement to submit an investor–State dispute to arbitration, whether conducted on an ICSID Convention or a non-ICSID Convention basis, through any of the means available for enforcing an agreement to arbitrate set forth in § 2.1." See § 5.2. To the extent state law grounds for declining to enforce an agreement providing for ICSID Convention arbitration are applicable, see § 5.1(a)(4), presumably they would be evaluated under the preemption analysis set out in this Section") (parentheses, citations, and brackets in original).

62. *See BG Grp. PLC*, 572 U.S. at 25. The *BG Group v. Argentina* arbitration proceeded according to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html [https://perma.cc/FTL8-62BK].

something that would not be allowed had this been an arbitration under the ICSID treaty, for the reasons discussed in Part II of this Article.

The question before the Court was whether BG Group had to satisfy a specific precondition before the arbitral tribunal could properly assert jurisdiction over its dispute against Argentina, or whether instead the tribunal could waive the precondition in light of the unusual facts of the case.[63] The precondition in the relevant bilateral investment treaty between the United Kingdom and Argentina was a requirement that BG Group had to attempt litigation in the Argentine domestic court system for a minimum of eighteen months prior to filing an arbitration.[64] The unusual facts of the case that led to the arbitral tribunal waiving this precondition and asserting jurisdiction were that the dispute arose out of the Argentine economic crisis, during which time the Argentine government had taken measures which made it impracticable at best and impossible at worst for claimants with claims like BG Group's claim to effectively litigate in the Argentine court system.[65] As a result, the arbitral tribunal decided that enforcing the precondition in the treaty would have led to "'absurd and unreasonable result[s].'"[66] The arbitral tribunal ruled that it had jurisdiction and rendered a US$185 million award against Argentina.[67]

BG Group filed a motion to confirm the award and Argentina filed a motion to vacate the award in the DC District Court, which was the proper venue under the FAA for an arbitral award to either be

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63. *Id.*

64. *See* 1990 Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, U.K.-Arg., art. VIII, Dec. 11, 1990, 1765 U.N.T.S. 38., *available at* https://arbitrationlaw.com/sites/default/files/free_pdfs/uk-argentina_bit.pdf [https://perma.cc/L58F-9LZA] [hereinafter U.K.-Arg. BIT].

65. *BG Grp. PLC*, 572 U.S. at 30–31 ("The panel pointed out that in 2002, the President of Argentina had issued a decree staying for 180 days the execution of its courts' final judgments [and injunctions] in suits claiming harm as a result of the new economic measures. In addition, Argentina had established a 'renegotiation process' for public service contracts, such as its contract with MetroGAS, to alleviate the negative impact of the new economic measures. But Argentina had simultaneously barred from participation in that 'process' firms that were litigating against Argentina in court or in arbitration. These measures, while not making litigation in Argentina's courts literally impossible, nonetheless 'hindered' recourse 'to the domestic judiciary' to the point where the Treaty implicitly excused compliance with the local litigation requirement. Requiring a private party in such circumstances to seek relief in Argentina's courts for 18 months, the panel concluded, would lead to 'absurd and unreasonable result[s]'") (internal citations omitted).

66. *Id.* at 31 (brackets in original).

67. *Id.* at 31.

confirmed or vacated when the arbitration was seated in D.C..[68] The DC District Court confirmed the award on the ground that, as a matter of US arbitration law, the question of whether a precondition to arbitral jurisdiction was satisfied was a question for the arbitral tribunal to decide, and that the arbitral tribunal's decision was entitled to the deference of the court; thus, the District Court confirmed the arbitral award.[69] The DC Circuit reversed the decision and vacated the award on the grounds that the court should interpret the precondition in the treaty *de novo*, without deference to the view of the arbitrators, and ruled that BG Group should have complied the requirement and "'commence[d] a lawsuit in Argentina's courts and wait[ed] eighteen months before filing for arbitration.'"[70]

The US Supreme Court granted certiorari and reversed again, thereby confirming the arbitral award.[71] It is important to remember, however, that confirmation—like recognition and enforcement—is not the same as execution; Argentina did not immediately have to pay US $185 million as a result of this case, and BG Group ended up having to take its confirmed award elsewhere for execution.[72] The majority opinion articulated several rationales for this decision. First, the majority ruled that this issue raised a question of procedural arbitrability and that such a question was for primary determination by the arbitrators. The majority based its ruling on its declaration that "[a]s a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."[73]

Justice Sotomayor filed an opinion concurring in part, in which she took issue with the majority's characterization of the "conditions of consent" in the United Kingdom-Argentina treaty and how the term

68. *See* 9 U.S.C. § 204 (2018) (addressing venue and providing that an action to confirm or vacate an award under the New York Convention may be brought "in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.") In the *BG Group* case, the place of arbitration was Washington D.C., so the DC District Court was the appropriate venue for both motions to be filed.

69. *BG Grp. PLC*, 572 U.S. at 31–32.

70. *See id.* at 32.

71. *See id.* at 45. The vote among the Justices was 7-2.

72. *See id.* at 45 (reversing the DC Circuit decision, resulting in confirming the validity of the arbitral award, which is not the same as execution or payment).

73. *See id.* at 37.

"consent" should be construed in treaties, generally.[74] Notably, both the majority and concurring opinions examined the United States Korea Free Trade Agreement in which they construed the section titled "Conditions and Limitations on Consent [to Arbitration] of Each Party" in that treaty more narrowly (i.e., making arbitral jurisdiction more challenging to obtain) than the Court had construed the arbitration provision in the United Kingdom-Argentina treaty at issue in the *BG Group* case.[75]

Chief Justice Roberts filed a dissenting opinion, joined by Justice Kennedy,[76] in which he criticized the majority opinion for applying international *commercial* arbitration principles—including ordinary contract law—to an investment treaty arbitration in which the arbitration agreement does not even involve privity between the parties.[77]

Due to this lack of privity, Justice Roberts argued that the requirement to litigate in Argentine courts for eighteen months prior to filing an arbitration was actually a precondition to Argentina's consent to arbitration.[78] Since the requirement was not fulfilled, Argentina therefore did not consent to arbitration with BG Group; therefore, a valid arbitration agreement did not exist between BG Group and Argentina; thus, the resulting arbitral award should be vacated due to this jurisdictional defect.[79]

Because the parties chose to arbitration under the UNCITRAL rules rather than the ICSID Convention for their arbitration,[80] however,

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74. *See id.* at 45–49.

75. *See id.* at 39, 47.

76. *See id.* at 49–64.

77. For a discussion of why the arbitration agreement in an investment treaty is "arbitration without privity," see generally Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. L. J. 232 (1995).

78. *See BG Grp. PLC*, 572 U.S. at 49-64 (Roberts, J., dissenting).

79. *Id.*

80. It is important to note that most (and likely all) investment treaties do not require the claimant to articulate or document a particular reason for choosing one arbitration regime (e.g., UNCITRAL) over another (e.g., ICISID). In the spirit of the hypothetical scenarios posed in this Article, the Author offers the following wild speculation about the reasons that BG Group chose to file its case under UNCITRAL rather than ICSID: enforcing awards against Argentina can be extremely difficult and Argentina was becoming increasingly disillusioned with the ICSID convention such that, in 2012, Argentina had expressed an interest in repudiating the ICSID convention, although it never did follow through legislatively and remains a party to the ICSID convention to this day; in contrast, the New York Convention is a relatively uncontroversial means to enforce a traditional monetary arbitral award. *See* Leon E. Trakman & David Musayelyan, *The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice:*

the award was confirmed under the New York Convention.[81] This choice enabled the US Supreme Court to apply domestic US arbitration law to enforcement of the award, because the New York Convention is incorporated into the FAA, Chapter 2, as discussed above.[82] The Supreme Court also invoked ordinary common law regarding contracts, declaring that the "treaty is a contract,"[83] which is a debatable presumption,[84] but one that was essential to the overarching rationale that the majority of the Supreme Court adopted.

Furthermore, it is crucial to note that the US Supreme Court applied ordinary contract interpretation principles to a bilateral investment treaty as a *bystander* to the treaty, since the United States is not a party to the United Kingdom-Argentina treaty invoked in the arbitration. Consequently, this Author theorizes that US Supreme Court would have viewed this question differently had the award been rendered pursuant the ICSID treaty, of which the United States is a member state. This can be inferred by the way in which both the

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The Resurgence of Qualified Investor–State Arbitration, 31 ICSID REVIEW - FOREIGN INV. L. J. 194, 197-204 (2016). ("[I]n 2012, Venezuela and Argentina announced their plans to terminate their participation in the ICSID Convention. . . . Venezuela's withdrawal was finalized in July of 2012 while Argentina is yet to announce its future ISA policies . . . . [W]hile Argentina had initially supported Venezuela's initiative and in 2012 proposed a parliamentary bill to terminate its ICSID membership, at the time of writing [i.e., 2016], no decision has been made with regard to its withdrawal from ICSID. It is reasonable to suggest that the recent ISA decisions rendered in Argentina's favour [sic] and its on-going negotiations with the ICSID and the International Monetary Fund (IMF), mediated by the United States, have encouraged Argentina to reconsider its policy. The country has 55 active BITs and has not terminated any of these treaties"). The question of why a claimant may choose one investment arbitration regime over another when filing a case is ripe for further research.

81. Both the United Kingdom and Argentina are parties to the New York Convention. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, UNITED NATIONS, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 [https://perma.cc/5SFB-U2BM] (last visited Nov. 13, 2019).

82. *See* 9 U.S.C. §§ 201-208 (2018).

83. *See BG Grp. PLC*, 572 U.S. at 37 ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent").

84. *Id.* at 49 ("The Court begins by deciding a different case, 'initially treat[ing] the document before us as if it were an ordinary contract between private parties.' *Ante*, at 1206. The 'document before us,' of course, is nothing of the sort. It is instead a treaty between two sovereign nations: the United Kingdom and Argentina. No investor is a party to the agreement. Having elided this rather important fact for much of its analysis, the majority finally 'relax[es] [its] ordinary contract assumption and ask[s] whether the fact that the document before us is a treaty makes a critical difference to [its] analysis.' *Ante*, at 1208. It should come as no surprise that, after starting down the wrong road, the majority ends up at the wrong place").

majority and concurring opinions interpret the arbitration consent provisions in the United States-Korea treaty more restrictively—an interpretation that may prove to be favorable to the United States if a dispute arises between the United States and a Korean investor in the future. Perhaps it is far easier to declare that someone else's treaty is a mere contract than to declare that your own treaty is one!

2. Hypothetical: *BG Group v. Argentina* under the ICSID Convention

To transform this case into a hypothetical scenario, assume that the only change to the facts above is that the parties had chosen arbitration under the ICSID Convention. This is by no means a far-fetched hypothetical scenario.[85] The parties could have chosen ICSID arbitration according to the United Kingdom-Argentina BIT,[86] and both the United Kingdom and Argentina were parties to the ICSID Convention at the time of this dispute.[87] Additionally, the fact that they chose Washington DC as the seat of arbitration was likely no accident. ICSID arbitrations are typically seated in Washington D.C., and the hearings are often held in the offices of the World Bank. Moreover, the parties likely wanted recourse to the DC courts, which are courts that are sophisticated in matters relating to investment treaty arbitration, because their jurisdiction encompasses the ICSID headquarters as the usual seat for ICSID arbitrations.

Had the parties chosen ICSID arbitration, the final result would likely have been the same—the award would have been confirmed or

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85. This Article is not the first ever to explore this question in relation to the *BG Group* case, but it is the first ever to explore this question with respect to the *Hardy* case. Prior research exploring this question with respect to the *BG Group* case was published in 2014 just before and just after the US Supreme Court rendered its decision in March 2014. *Cf.* Jonathan Lim & Luis Miguel Velarde Saffer, *BG Group v. Argentina: Would ICSID Arbitration Have Been Different?*, KLUWER ARB. BLOG (Feb. 4, 2014), http://arbitrationblog.kluwerarbitration.com/2014/02/04/bg-group-v-argentina-would-icsid-arbitration-have-been-different/ [https://perma.cc/Q6HD-S8PP]. J.W. Lim & L.M. Velarde Saffer, *Opportunities and Risks in the Upcoming BG Group v Argentina Decision*, 11 TRANSNAT'L DISP. MGMT. (2014) (published in June 2014 by the same authors as the aforementioned blog post), https://www.transnational-dispute-management.com/article.asp?key=2111 [https://perma.cc/S9WP-ZMSE].

86. *See* U.K.-Arg. BIT, *supra* note 64, art. 8(3)(a).

87. *See List of Contracting States and Other Signatories of the Convention (as of April 12, 2019)* ICSID, https://icsid.worldbank.org/en/Documents/icsiddocs/List of Contracting States and Other Signatories of the Convention - Latest.pdf [https://perma.cc/PNV9-THA8] (last visited Nov. 13, 2019).

recognized. The award itself was not unreasonable (in light of the typical size of investment treaty arbitration awards and their attendant cost allocations), and there were no other procedural irregularities.[88] The crucial difference is that the US Supreme Court would *not* have been able to apply ordinary contract law in its decision, because the ICSID treaty requires courts in the member states to enforce ICSID Convention awards without inquiring into the jurisdiction of the arbitral tribunal.[89] Nor would it have been able to apply the FAA or the New York Convention, because Congress has explicitly stated that those two bodies of law do *not* apply to the enforcement of an ICSID Convention arbitration award.[90]

What rule could the Court have applied—or could future courts apply—in a case like this in the absence of recourse to the FAA, the New York Convention, arbitration law, or contract law, generally? Here, the result would not have changed, because the default rule under the ICSID Convention is to confirm the award, as the Supreme Court did here, despite the disagreement among the Justices regarding the reasoning. The Court would have had an explicit obligation under the ICSID Convention to confirm the award at face value and *not* to inquire into any allegations that the arbitral tribunal lacked jurisdiction. Instead, the sole method for challenging the jurisdiction of an arbitral tribunal under the ICSID Convention is through an *ad hoc* annulment committee organized by the ICSID Secretariat.[91] Thus, the entire analysis conducted by the DC District, DC Circuit, and US Supreme Court regarding arbitration law and contract law – which this Article argues is part of the inherent power of the court when enforcing judgments and arbitral awards – would have directly conflicted with the United States' obligations under the ICSID treaty.

Overall, however, *BG Group v. Argentina* is an easy case to translate into a hypothetical ICSID Convention award. A different road would have been taken in the court's reasoning, but the destination

88. For an exhaustive empirical examination of costs in investment treaty arbitration, see generally SUSAN FRANCK, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION (2019).

89. *See* RESTATEMENT § 1-1, cmt. r.3 ("Also central to the [ICSID] Convention regime is a relatively unqualified obligation imposed on courts of contracting States to enforce awards; those courts are not entitled to decline enforcement on public policy grounds, or on the other bases permitted, for example, under the New York and Panama Conventions").

90. *See* 22 U.S.C. § 1650a (2018) ("The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention") (parentheses and citation in original).

91. *See* ICSID Convention, *supra* note 12, art. 52.

would have been the same – the award would have been confirmed. In contrast, the next case study is considerably more difficult to reconcile with the ICSID Convention.

B. Hardy Exploration v. India: A Harder Case under ICSID

1. *Hardy Exploration v. India* under the New York Convention

On June 7, 2018, in *Hardy Exploration v. India*, the DC District Court declined to enforce an investment arbitration award because, among other reasons, it determined that granting specific performance against a foreign state and granting the corresponding interest provision in the award would undermine US public policy to respect to the territorial integrity and sovereignty of other states.[92] On November 27, 2018, before the parties had filed any briefs in the DC Circuit court, *Hardy* unilaterally withdrew its appeal petition without stating its reasons for doing so.[93] Presently, the status of the arbitral award is unknown.

The investment arbitration had been initiated pursuant to a contract between Hardy Exploration and India called a Production Sharing Agreement ("PSC") for the extraction, development and production of oil and natural gas in a particular ocean location off the southeastern coast of India, referred to as the "Block" in the court's opinion.[94] The timing of the appraisal and assessment period was at issue because the parties disputed whether either oil or natural gas had been discovered at the site.[95] As a result, India revoked Hardy's rights to develop the Block, and Hardy attempted to negotiate with India for

92. *See Hardy Expl. & Prod. (India), Inc*, 314 F.Supp.3d at 113; Lacey Yong, *Specific Performance Award Against India Cannot be Enforced, says DC Court*, GLOBAL ARBITRATION REVIEW (June 8, 2018), https://globalarbitrationreview.com/article/1170382/specific-performance-award-against-india-cannot-be-enforced-says-dc-court [https://perma.cc/TN8G-Z3R2].

93. *See* Motion for Withdrawal Without Consent, 1, Hardy Expl. & Prod. (India), Inc v. India, Ministry of Petroleum & Nat. Gas, No. 18-7093 (D.C. Cir.). Presumably, this motion was granted, and the case was dismissed, because it no longer appears on the DC Circuit's Docket and no judgment was rendered in the DC Circuit.

94. *See Hardy Expl. & Prod. (India), Inc*, 314 F.Supp.3d at 99-100. For an explanation of the policy changes in India that enabled Hardy Exploration to acquire the "blocks," see Muhammad Azhar, *New Exploration Licensing Pol'y (NELP) in India*, 35 OPEC ENERGY REV. 174, 175-76 (2011).

95. *See Hardy Expl. & Prod. (India), Inc*, 314 F.Supp.3d at 99.

approximately one year to no avail.[96] Hardy then commenced arbitration in Kuala Lumpur, Malaysia pursuant to Article 33 of the PSC to resolve the question regarding the appraisal and assessment period of the Block.[97] The arbitral tribunal consisted of three former Chief Justices of the Supreme Court of India,[98] which is highly unusual because most parties in investment arbitration opt for tribunal members with different nationalities than the parties.[99]

The arbitral tribunal issued an award ordering "that 'the parties shall be immediately relegated to the position in which they stood prior to the order of the relinquishment and the block shall be restored to [Hardy].'"[100] This was tantamount to an order of specific performance against India.[101] In addition, the tribunal ordered India to pay pre-award interest at a rate of nine percent per year up to the date of the award and then eighteen percent per year thereafter until India paid the award, and ordered India to pay some of Hardy's arbitration costs.[102] India paid the arbitration costs portion of the award, but did not comply with any other parts of the award.[103] India and Hardy filed several petitions in the Delhi High Court and, afterwards, in the Supreme Court of India to set aside or enforce the award, respectively, between 2013 and 2016.[104] While awaiting delayed decisions in the Indian courts, in January 2016, Hardy filed a petition in the DC District court which the court's opinion calls a "petition for enforcement" even though the title of Hardy's filing was "Petition to Confirm Arbitration Award," and India used both the terms in its response to Hardy's petition, which further illustrates the confusion surrounding the use of these terms, as mentioned in the Introduction to this Article.[105]

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96. *See id.* at 101.

97. *Id.*

98. *Id.*

99. *See, e.g.*, ICSID Convention, *supra* note 12, art. 39 ("The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties").

100. *See Hardy Expl. & Prod. (India) Inc*, 314 F.Supp.3d at 101.

101. *See id.* at 109-14 (discussing the tribunal's order that India specifically perform by restoring the Block to Hardy).

102. *See id.* at 101.

103. *See id.* at 101-02.

104. *See id.* at 102.

105. *See id.* at 102 ("Due to this delay, HEPI decided to avail itself of the enforcement powers of this Court as well, and in January 2016 filed the instant petition for *enforcement* of

The DC District Court decided that it did not need to stay Hardy's enforcement action, meaning that it did not need to wait for the Supreme Court of India to make a decision on the pending petitions.[106] The court then noted that the New York Convention provides that a court may decline the enforcement of an international arbitration award if it is "contrary to the public policy of the country."[107] In contrast, it is important to note that the ICSID Convention contains no analogous public policy-related provision.[108] The Court in Hardy cited several cases from the US Supreme Court, the DC Circuit and the Second Circuit to fashion the following comprehensive rule regarding the application of the public policy exception in the New York Convention:

> "The goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." Due to the "'emphatic federal policy in favor of arbitral dispute resolution' . . . the FAA affords [a] district court little discretion in refusing or deferring enforcement of foreign arbitral awards." Courts in this circuit have repeatedly held that "courts should rely on the public policy exception only 'in clear-cut cases' where 'enforcement would violate the forum state's most basic notions of morality and justice.' " The public policy defense under Article V(2)(b) of the New York Convention is to be construed narrowly and is available only where an arbitration award "tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of

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the arbitral award. See Pet'r's Pet. to *Confirm* Arbitration Award ['Pet'r's Pet.'], ECF No. 1. Following briefing and an order from this Court regarding proper service of India, India filed its response to HEPI's petition, arguing that the Court should decline to *enforce* the arbitral award because *confirming* both the specific performance and interest aspects of the Award would violate U.S. public policy") (citations and brackets in original) (emphasis added).

106. *See id.* at 108.

107. *Id.* at 107 (citing the New York Convention's public policy exception to enforcement, located in art. V(2)(b)).

108. *Cf.* Smutny et al., *supra* note 35, at 666 ("Notably, although Contracting States to the ICSID Convention are not bound to enforce non-pecuniary obligations, they are not prohibited from doing so. In practice, however, as Broches observed, there are 'practical difficulties involved in the enforcement of non-pecuniary awards,' and the drafters of the Convention had concerns that enforcement by one state's courts of an obligation of another state to perform or abstain from performing a specific act in some instances would not be permitted on public policy grounds").

> personal liberty or of private property." Such a public policy must be "explicit" and "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents." The "provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy,' " and it does not provide that awards that might contravene U.S. interests may be resisted on such grounds. The public policy exception cannot be used to simply question the merits of the underlying award.[109]

The Court went on to provide the following formulation regarding the task before it in this case:

> Therefore, the Court must determine whether the confirmation of the specific performance and interest portions of the arbitral award violate the United States' most basic notions of morality and justice, defined by its laws and legal precedents . . . . This case presents the Court with a unique opportunity to balance two important U.S. public policy values: respect for the sovereignty of other nations and respect for foreign arbitral agreements.[110]

The Court then addressed only one of India's arguments with respect to specific performance, and it agreed with India regarding "the United States' public policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their own sovereign territories."[111] On that basis alone, the court declined "confirmation" (switching wording again) of the specific performance portion of the word.[112] The Court also examined the exceptions in the FSIA and concluded that the statute offered no authority regarding whether the court could order specific performance against a foreign government, regardless of whether such performance would take place inside or outside of the United States.[113] The Court noted that other examples in which United States courts have ordered extraterrestrial specific performance have been against corporations or against sovereigns in litigation, rather than international arbitration.[114] After examining a few of these examples, the Court concluded that:

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109. *Hardy Expl. & Prod. (India) Inc*, 314 F.Supp.3d at 109 (internal citations omitted).

110. *Id.* at 109.

111. *Id.* at 110.

112. *Id.* at 110 ("The Court therefore finds that India has met its burden of demonstrating that confirmation of the specific performance portion of the award would be contrary to U.S. public policy, and therefore the Court declines to confirm this portion of the award").

113. *See id.* at 111.

114. *See id.* at 111-12.

> [T]his infringement on India's national sovereignty would contravene the United States' public policy interest in respecting the territorial integrity of other nations for several reasons . . . . [F]orced interference with India's complete control over its territory violates public policy to the extent necessary to overcome the United States' policy preference for the speedy confirmation of arbitral awards. After all, the issuance of "extraterritorial injunctions often raise serious concerns for sovereignty and enforceability which compel denial." The power to grant extraterritorial injunctions "should be exercised with great reluctance when it [would] be difficult to secure compliance . . . or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country."[115]

The Court then discussed the FSIA's grant of authority to enforce judgments and awards against foreign sovereign only with respect to "specific, domestic methods of ensuring that plaintiffs receive those damages, [which] demonstrates the United States' public policy commitment to respecting the sovereignty of foreign nations by only holding them liable for certain forms of relief."[116] The Court also noted that the FSIA does not mention specific enforcement or extraterritorial enforcement, except in cases of terrorism or expropriation, neither of which applied in the Hardy case.[117] The Court also seemed to invoke the "Golden Rule"—do unto others as you would have them do unto you—when it stated that

> [C]onfirmation of this award would "raise the specter of the opposite situation coming to pass; namely, a foreign court confirming (or the court going further and granting injunctive relief directly) against the United States for acts it has taken within its own borders or respecting its own territory." [citing India's submission] Given that the United States has not waived its sovereign immunity in its own courts against specific performance in contract cases, it would defy comprehension that it would be in compliance with U.S. public policy to create a situation in which a foreign court could order the U.S. to specifically perform its portion of a contract.[118]

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115. *Id.* at 113.
116. *Id.* at 113.
117. *See id.* at 114.
118. *Id.* at 114 (internal citation omitted).

The Court then concluded that Hardy's best recourse with respect the specific performance portion of the award was through the Indian Courts, and then moved on to address the interest provision in the award.[119] The Court concluded that:

> [B]ecause the two components of the award are inextricably intertwined, the Court also cannot award interest predicated on compliance with that [specific performance] component of the award. To order otherwise would be to impermissibly coerce India into complying with an order that this Court has determined it cannot issue. The Court cannot coerce through an interest award an action that it cannot order directly . . . . [T]he Court will . . . look at the functional effect of the proposed order before it, rather than just its form . . . . This portion of the award is so inseparable from the specific performance portion of the award, the confirmation of which would violate U.S. public policy, that the confirmation of the interest portion of the award must also be found, necessarily, to violate U.S. public policy. India may ultimately need to pay [Hardy] the millions of dollars in interest it now owes—but if it does, it will be because a court with the authority to enforce the entire arbitration award, including the specific performance portion, has ordered it to do so. Because this Court does not have such authority, it cannot order this payment.[120]

2. Hypothetical: *Hardy Exploration v. India* under the ICSID Convention

Although the ruling was not tested by an appeal,[121] the facts of this case and the reasoning of the DC District Court opinion are very instructive when converted into an ICSID Convention hypothetical scenario.[122]

Assume that, instead of arbitration under a contract, the tribunal was constituted under the ICSID Convention by invoking the protections of the bilateral investment treaty between India and the

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119. *See id.* at 114.

120. *Id.* at 115-16.

121. Hardy Exploration withdrew its appeal before the briefs were filed. See *supra* note 82.

122. Without access to the arbitration agreement contained in the "PSC" mentioned in the case, it is impossible to know which arbitration rules the parties chose. This information is not mentioned in the court documents, and the arbitral award is not publicly available. The Author proceeds on the assumption that this was *not* an ICSID case.

United Kingdom.[123] Should the DC District Court handle this new hypothetical set of facts differently than the *Hardy* case, simply because it would be an arbitration conducted under the ICSID treaty?

This Article has previously noted that the ICSID convention itself does not contain a public policy exception, unlike the New York Convention.[124] The ICSID convention was concluded in 1965, which was seven years after the New York Convention was concluded in 1958.[125] This implies that the drafters of the ICSID convention were well aware of the New York Convention's public policy exception and chose *not* to include a public policy exception in the ICSID Convention on purpose. Thus, in theory, the court should not be able to decline enforcement of an ICSID arbitration award on the basis of public policy as a treaty-based concept.[126]

However, since the ICSID Convention converts the arbitral award to a *judgment*,[127] it may perhaps be possible that the Court could decline to enforce on the ground that it would not enforce a court *judgment* that violates US public policy. The underlying question is whether the ICSID Convention is enforcing an arbitral award or is simply facilitating the conversion of an arbitral award to a court judgment that may be enforced as an ordinary court judgment would be. Regardless of the answer to that question, the drafters of the ICSID

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123. *See* 1994 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, U.K.-India, Mar. 14, 1994, *available at* https://arbitrationlaw.com/sites/default/files/free_pdfs/uk-india_bit.pdf [https://perma.cc/9EHF-8Z9B]. Both the United Kingdom and India are also parties to the ICSID Convention. *See List of Contracting States and Other Signatories of the Convention (as of April 12, 2019)* ICSID, https://icsid.worldbank.org/en/Documents/icsiddocs/List of Contracting States and Other Signatories of the Convention - Latest.pdf [https://perma.cc/PNV9-THA8] (last visited Nov. 13, 2019).

124. *Cf.* Smutny et, U.K.-Arg., art. VIII, Dec. 11, 1990, 1765 U.N.T.S. 38., al., *supra* note 35, at 665.

125. *See supra* note 52.

126. *See* RESTATEMENT § 1-1, cmt. r.3 ("Also central to the [ICSID] Convention regime is a relatively unqualified obligation imposed on courts of contracting States to enforce awards; those courts are not entitled to decline enforcement on public policy grounds, or on the other bases permitted, for example, under the New York and Panama Conventions").

127. *See* ICSID Convention, *supra* note 12, at art. 54 ("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").

convention seem to have taken this into account when they required that the member states can only apply their ordinary procedures for enforcing judgments to enforcing ICSID arbitration awards and exempted such awards from the other provisions of domestic law or other international treaties, including exempting the awards from the public policy exception.[128]

What if we add an additional variable to the hypothetical scenario: the seat of arbitration? A court at the seat of arbitration has far more power over the validity of an arbitral award than a court elsewhere. In the original case, the seat of arbitration was Kuala Lumpur, Malaysia, a fact that greatly diminished the power of the DC District Court over the award.[129] Furthermore, the Delhi High Court in India determined that it also did not have the power to set aside the award, because the seat of arbitration had been in Malaysia, but neither did the Delhi High Court enforce the award.[130] Thus, the DC District Court – despite its confusing terminology in the opinion – was likely limited to confirming or recognizing the award, not enforcing (or executing) the award as the terminology in the opinion may have suggested. Under the original facts of the Hardy case, the Court declined to even recognize the award, indicating the strength of the public policy exception in the New York Convention, which was incorporated into US domestic law through the FAA. Under the ICSID Convention, however, the DC District Court would not have been able to use the public policy exception at all.

Another twist on this hypothetical would be to examine the question of whether the DC District Court would take a different view of this problem in the future if the Supreme Court of India later confirms the award, or if a court in Kuala Lumpur – the seat of arbitration – confirms the award. The Author posits that if a court at the seat of arbitration were to confirm the award, the US Court would still likely decline to "enforce" it. Even if the Court hypothetically did "enforce" the award, such "enforcement" would basically be an empty blessing of the award, because the United States has no police power to execute a judgment or award of specific performance against a foreign sovereign under the FSIA or under general principles of international law.

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128. *Cf.* Smutny et al., *supra* note 35, at 665.

129. *See Hardy Exp. & Prod. (India) Inc*, 314 F.Supp.3d at 107 ("the Court will take India's word that Indian courts evaluate whether arbitral awards comport with Indian law when considering whether to enforce that award, a power that American courts do not have, until the award has actually been set aside by a competent authority").

130. *See id.* at 104.

For instance, it is doubtful that the United States military would involve itself in forcing India to relinquish the Block back to Hardy for a variety of reasons, not the least of which would be the political and possibly military backlash that would follow such an action. Thus, really only Indian courts can execute this arbitral award, regardless of the origin of the award. Perhaps this is one reason that the parties chose three former justices of the Supreme Court of India as their arbitrators.[131] Individuals of such a stature in that nation would likely be among the only private citizens who, when serving as arbitrators, would have enough respect and authority to be able to order India to surrender control over one of its natural resources. The retired justices probably *thought* that they had the power to render an award ordering the specific performance against the Government of India. They probably did not consider that the place of enforcement of the arbitral award might be outside of India, in which case the enforcing court would find it problematic to order India to specifically perform that portion of their arbitration award.

There is a second way in which the seat of arbitration could be a variable in this hypothetical. As mentioned earlier in this Article, Washington DC is the typical seat for most ICSID arbitrations, regardless of the nationalities or locations of the parties involved. Thus, a final twist on this hypothetical would be if the *Hardy* case had involved an ICSID arbitration seated in Washington DC with the same three Indian retired justices. This twist seemingly infuses the DC District Court with significant power with respect to this award. The tone of the Court's opinion – in which the court mentions "set aside" several times in the same breath as mentioning public policy – suggests that the Court would have either attempted to set aside the award if it had the power to do so or would simply decline to confirm it (as it did in the Hardy case), in which case the Indian courts or Malaysian courts could potentially still enforce it.[132] The entire analysis presupposes, however, that the traditional "legal seat" theory of arbitration applies to this hypothetical scenario.

In fact, the ICSID convention introduces two additional wrinkles. The first wrinkle is that, although DC is the literal "place" of arbitration in this hypothetical, ICSID arbitrations technically do not have a legal

131. *See id.* at 101 ("A tribunal of three former Chief Justices of the Supreme Court of India was empaneled to preside over these proceedings").

132. *See id.* at 104.

"seat" in the way that international commercial arbitrations do.[133] Thus, in reality, the DC Circuit would *not* have the power to set aside an ICSID Convention award, even if DC were the seat of arbitration. Instead, the DC Circuit could only decline to enforce the award, as it did in the original case opinion.

The second and last wrinkle that this hypothetical adds to the scenario is the ICSID *ad hoc* annulment committee. Had this award been rendered by an ICSID tribunal, India would have been able to file a petition for annulment at the ICSID Secretariat, located in DC.[134] The annulment body constituted by ICSID would have the power to annul the award, similarly to a court at the "seat" of arbitration in a typical international commercial arbitration. Similarly, had Hardy filed the same petition to enforce at the DC District Court, India would have been able to file a counter-petition for a stay with the DC District Court to ask them to stay enforcement of the award pending the decision of the annulment committee.[135] Hypothetically, this Author believes that the annulment committee would look critically upon the *Hardy v. India* arbitral award and may even have annulled it and put in place a new tribunal to re-hear the case.[136] Thus, it is possible that the award would not have been submitted to the DC courts at all for recognition and enforcement.

This Article now turns to the interest awarded in the *Hardy* case. The court in the hypothetical ICSID arbitration scenario technically has the implied power to refuse to enforce the specific performance aspects of the award, because the ICSID treaty does not require enforcement of non-monetary remedies, which would include specific performance.[137] The treaty only requires courts to enforce the pecuniary obligations in the award.[138] However, the court also refused to enforce the interest

133. *See* RESTATEMENT § 1-1, Reporters' Notes cc.ii ("Awards not falling under the ICSID Convention may also be classified by nationality, as would occur with respect to commercial awards. Such awards are deemed rendered at the seat of arbitration, see subsection (oo) (definition of "seat"), and to carry the national affiliation of that seat for purposes of any reciprocity requirement that may obtain. . . . It is by contrast a non sequitur to speak in terms of an ICSID Convention award having a nationality; such awards are a-national") (cross-reference in original).

134. *See* ICSID Convention, *supra* note 12, art. 52.

135. *See* ICSID Convention, *supra* note 12, arts. 50, 51, 52.

136. *See* ICSID Convention, *supra* note 12, art. 52.

137. *See* ICSID Convention, *supra* note 12, art. 54.

138. *See* ICSID Convention, *supra* note 12, art. 54.

provisions in the award, which arguably is a pecuniary obligation.[139] The court justified this by saying that the interest provisions were a penalty and therefore infringed upon the sovereignty of the state, according to US public policy.[140] In other words, the court decided that the arbitral tribunal had attempted to use the interest award to further exacerbate the specific performance order as a punishment to India. It was possible for the court to decline to enforce the interest provision because the action to enforce the award was brought under the New York convention, which – as mentioned above – includes a provision that allows states to refuse to enforce an award if it violates their domestic public policy.

The ICSID Convention in contrast contains no such public policy exception and requires courts to enforce pecuniary obligations.[141] Thus, a court that would refuse to enforce the interest part of the award under the ICSID Convention would likely be violating the exact wording of the Convention with respect to the obligation to enforce the pecuniary provisions of the award, even if the court could somehow refuse to enforce the specific performance provisions. Similarly, the argument that the court could refuse to enforce the specific performance provisions might also be challenged on the ground that the specific performance in this award was part of the pecuniary compensation for the investor, Hardy, who was injured when the ICSID member state, India, took the Block away. Hence, if this were an ICSID award, then Hardy might be able to argue that the entire award was in fact pecuniary in nature—including the specific performance portion, because Hardy was going to engage in economic activity on the Block to generate pecuniary benefits. Thus, it is possible that if the ICSID Convention applied to this arbitration award, the court would have been in violation of the treaty had it declined to enforce the specific performance provision as well.

On the other hand, how can a US court order the Government of India to do anything without its permission? The ICSID treaty states that courts must enforce *pecuniary* obligations most likely because those obligations can be enforced outside of the territory of the member states. Many ICSID member states have physical and financial assets

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139. *See Hardy Expl. & Prod. (India) Inc*, 314 F.Supp.3d at 114-16 (analyzing the interest provision and declining to enforce it). *Cf.* ICSID Convention, *supra* note 12, art. 54 (obligating states to enforce pecuniary obligations in ICSID arbitral awards).

140. *See supra* note 139.

141. *See* ICSID Convention, *supra* note 12, art. 54.

in the territories of other member states. Thus, a winning investor could go to a different member country to enforce the award. Specific performance—and in particular, specific performance over India's physical territory in the *Hardy* case—meant that the United States court would be ordering a foreign government to do something *within its own territory* with respect to access and control of its own physical natural resources. This is far more problematic from a foreign relations perspective.

The DC District Court was confident of its decision in the *Hardy* case because it had the New York Convention public policy *escape hatch* that is reliable and relatively easy to trigger. This Author believes that the Court would have been tremendously conflicted regarding its enforcement obligations had this case been brought under the ICSID convention, because one of the hallmarks of sovereignty is that a government does not have to obey a foreign court with respect to actions within its own borders. This is another example of the clash between the ICSID treaty's enforcement obligations and the inherent power of the court system to enforce the public policy of the land.

A rejoinder to this counterargument might be that the ICSID Convention is a delegation of sovereign power to the international arbitrators that are chosen by the states to be on the roster of ICSID arbitrators to serve as the deciders of the disputes that arise under the treaty.[142] By extension, one could argue that the states have delegated sovereign power to the arbitrators through the ICSID treaty such that, when they render their award, the states impliedly agree to be bound.[143] The ICSID Convention provides that member states agree to comply voluntarily with awards rendered by ICSID arbitral tribunals.[144] Thus,

142. *Cf. e.g.*, Adam Feibelman, *Law in the Global Order: The IMF and Financial Regulation*, 49 N.Y.U. J. INT'L L. & POL. 687, 738 (2017) ("[Anne Marie] Slaughter's concept of vertical networks provides a useful template for considering the Fund's actual role. Her chief examples of supranational enforcement institutions within vertical governance networks are the International Criminal Court and the WTO's dispute resolution panels. These are, in Slaughter's terms, genuinely supranational organizations to which their members have ceded a meaningful degree of sovereignty. Structurally, the Fund serves a similar function as these other supranational institutions—enforcing state-level obligations and commitments made by participating states. Thus, financial regulation is not a model of global governance in which networks of regulators have completely replaced diplomats or ministers; rather, it is a more familiar, if complicated, example of collaborative effort between domestic regulators, state-level obligations, and international institutions representing a range of legal formality").

143. *Cf. id.*

144. *See* ICSID Convention, *supra* note 12, art. 53 ("Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention").

the action would only reach a domestic court if the state refuses to comply with the award voluntarily, as in the Hardy case.

This line of reasoning reveals a remarkable paradox. The ICSID Convention makes the courts of the member states the enforcers of obligations that the arbitrators were empowered by the member states to impose upon the members states, but which the arbitrators have no police power to enforce themselves against those same member states. If the courts of the member states could not enforce the ICSID arbitral awards, then the system would have no "teeth" and would essentially be futile. Hence the circular conundrum: the member states of the ICSID Convention delegated to the arbitrators the power to render awards that the courts can only enforce if the awards do not infringe upon the sovereignty that the states had delegated to the arbitrators through the ICSID Convention. At present, there is no solution to this conundrum, and it will likely not be addressed unless or until at *Hardy*-like arbitration award under the ICSID Convention is brought before a US court.

IV. CONCLUSION

The *Hardy* case is certainly a hard case in danger of making bad law. The conundrum presented is between Scylla and Charybdis.[145] *Either* the arbitrators are exceeding their powers in rendering an award granting specific performance against a member state, in which case the courts of other member states do not have to enforce the award, *or* the courts of other member states would have to assert an unprecedented level of extraterritorial authority in order to enforce the arbitral award rendered by the *Hardy* arbitrators. Which is it? The answer is unsettled, because there have not yet been any court cases in the United States to test this question. Neither will *Hardy* test this question, since the appeal has ended.

Nevertheless, it appears that the DC district court in the *Hardy* case has decided against the latter scenario, and in so doing, preserved the inherent authority of the court to decline to enforce judgments—including those converted from arbitral awards—that the court believes

145. *Cf. between Scylla and Charybdis*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/us/between_scylla_and_charybdis [https://perma.cc/5KFZ-DK8Q] (last visited Nov. 13, 2019) ("Greek Mythology(.) Used to refer to a situation involving two dangers in which an attempt to avoid one increases the risk from the other").

"violate the United States' most basic notions of morality and justice, defined by its laws and legal precedents."[146] While the facts of this case seem particularly unusual, this type of situation will likely arise more often as parties become emboldened to seek specific performance as a remedy in investment arbitration, rather than only money damages.

The foregoing discussion has tremendous implications regarding the courts of nations potentially infringing greatly upon the sovereignty of other nations in the name of complying with the demands of the ICSID treaty. The question is whether such a *modus operandi* is reasonable, and if so, whether it is sustainable, in light of the ever-shifting geopolitical dynamic of modern times. Investment treaty arbitration has been under fire for the past several years, and cases like the two above—or even worse, like the hypotheticals this Article posed following the *Hardy* case—might eventually lead to a coup d'état of the entire system of ICSID arbitration, at best in favor of an improved system or at worst as a move toward geopolitical chaos and a return to "gunboat diplomacy."[147] In the meantime, courts will need to find ways to discharge the obligations of their sovereigns under treaties like ICSID while also maintaining their integrity as, hopefully, apolitical institutions of "morality and justice, defined by [their] laws and legal precedents."[148]

146. *Hardy Expl. & Prod. (India) Inc*, 314 F.Supp.3d at 109.

147. *See generally*, R. DOAK BISHOP, JAMES CRAWFORD, & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY (2014) (explaining the history of *gunboat diplomacy* in Chapter 1).

148. *Hardy Expl. & Prod. (India) Inc*, 314 F.Supp.3d at 109.