Varia

Recibido: 8 abril 2016
Aceptado: 30 noviembre 2016

Arbitraje, vol. IX, nº 3, 2016, pp. 765–788

ICSID Awards before US and German Courts: A Comparative Approach

José CABRERA RODRÍGUEZ [*]

Summary: I. Introduction. II. Comparative methodology and scope of comparison. III. The ICSID Convention. IV. ICSID awards under U.S. law. V. ICSID awards under German law. VI. Comparative assessment.

Abstract: ICSID Awards before US and German Courts: A Comparative Approac

This paper is purported to offer a comparative approach to the procedural mechanisms by which the enforcement provisions of the ICSID Convention have been implemented under the legal systems of the United States and Germany. The comparative analysis will take into account the procedural provisions by the enforcement of ICSID awards is governed in both countries, as well as relevant case law and legal scholarship.

Keywords: INVESTMENT ARBITRATION – ICSID – AWARD ENFORCEMENT-- UNITED STATES – GERMANY.

Resumen: Los laudos CIADI ante los tribunales alemanes. Una aproximación compararativa

El presente trabajo pretende ofrecer un tratamiento comparativo de los mecanismos procesales a través de los que se han implementado las normas de ejecución de la Convención del CIADI en los ordenamientos jurídicos de los Estados Unidos y Alemania. El análisis comparativo toma en consideración tanto las normas procesales por las que se rige la ejecución de los laudos del CIADI en ambos países, como la jurisprudencia relevante en esta materia y la doctrina jurídica.

Palabras clave: ARBITRAJE DE INVERSIONS – CIADI – EJECUCIÓN DE LAUDOS ARBITRALES – ESTADOS UNIDOS – ALEMANIA.

[*] Universidad Autónoma de Madrid.

ISSN 1888–5373
DOI:10.19194/arbitrajeraci.9.2.05

I. Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') has established the sole purely international arbitration system for protecting the rights granted to foreign investors by international treaties. Its foremost feature is claimed to be the enforcement mechanism by which the State parties are required to enforce the awards rendered within the framework of the ICSID Convention 'as if it were a final judgment of a court in that State'. By strictly precluding any scope for domestic judicial review, the ICSID Convention has purportedly intended to bypass the typically divergent standards of deference accorded to foreign awards in different domestic legal systems in order to perform an uniquely efficient and worldwide homogeneous enforcement mechanism.

The present article is purported to provide evidence on to what extent the ICSID Convention may be considered to have reached this purpose by comparatively assessing how the latter has been implemented in some influential domestic legal systems. It will be further ascertain whether the awards rendered within its framework are accorded by their domestic courts the extreme deference required by the ICSID Convention at the enforcement stage.

The comparative analysis proceeds in three stages. Part II explains why the comparative analysis seems to be appropriate for the research and why the choice of the US and German legal systems is convenient. Part III sketches a general overview of the enforcement mechanism designed by the ICSID Convention. Parts IV and V then examine how the latter has been implemented in the US and Germany. Part VI finally proceeds to compare and contrast the approaches adopted in both legal systems and draws some conclusions.

II. Comparative methodology and scope of comparison

Several reasons plead for a comparative approach to the present field of study. Comparative legal methodology has indeed a long–standing tradition in the field of international law as a valuable tool for assessing how heterogeneously treaties are implemented and interpreted in different domestic legal systems[1]. The comparative methodology has recently been further extended to national judicial practice for acknowledging domestic courts to

[1] *Vid.* A. Roberts, P. Stephan, P.–H. Verdier y M. Versteeg (eds), *Comparative International Law*, Oxford, OUP, 2015; D. Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford, OUP, 2011; D.B. Hollis, "A Comparative Approach to Treaty Law and Practice", in D.B. Hollis, M.R. Blakeslee y B. Ederington (eds), *National Treaty Law and Practice*, Leiden, Martinus Nijhoff, 2005, pp. 32–45; W.E. Butler, *International Law in Comparative Perspective*, Alphen aan den Rijn, Sijthoff & Noordhoof, 1980.

play an increasingly relevant role in how treaties ultimately operate in national legal systems[2].

Moreover, comparative methodology in the field of international law is called upon to perform functions that reach far beyond its heuristic potential as analytical tool for merely academic purposes. When applied to domestic judicial decisions interpreting and enforcing treaties, the comparative methodology may indeed provide evidence of State practice by assessing how homogeneously or heterogeneously State parties understand their common treaty obligations. Were a certain consensus to be identified by means of comparison, domestic judicial practice should be accorded normative relevance for treaty interpretation and may be regarded as evidence of existing custom under articles 38(1)(a) and (b) of the Statute of the International Court of Justice[3].

The scope of the comparative analysis is limited here to the procedural mechanisms by which the enforcement provisions of the ICSID Convention have been implemented under the legal systems of two of its State parties, namely the United States (US) and Germany. These legal systems have been chosen for several reasons. First, these countries share the common feature of having being forced to adopt an ambivalent and balanced position with regard to investment arbitration, since both are simultaneously capital exporting and importing countries[4]. Second, the US and Germany are unmistakably acknowledged to be among the most significant actors in the international investment system and both have accordingly developed long standing policies promoting international investment agreements[5]. Third, the US and

---

[2] *Vid.* D. Sloss, "Treaty Enforcement in Domestic Courts: A Comparative Approach", in D. Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study,*Cambridge, CUP, 2009; M. Andenas y D. Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: OUP, 2011); Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De)Fragmentation of International,* Oxford, Hart, 2012.

[3] *Vid.* A. Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", *Int'l Comp. L. Q.*, vol. 60. 2011, pp. 57–92, at 62–63 (arguing that "[n]ational court decisions, as evidence of State practice, are relevant to the interpretation of treaties and the existence of custom under articles 38(1)(a) and (b) of the ICJ Statute. Court decisions by treaty parties amount to subsequent practice that provides evidence of how those States understand their treaty obligations, which shall be taken into account in treaty interpretation when it evidences general agreement about interpretation. Although opinion is divided over exactly which acts and statements count for State practice and *opinio juris* in the formation of custom, there is general agreement that national court decisions are evidence of one or other element or both elements. Custom may also be relevant to treaty interpretation").

[4] As for the case of the US, *Vid.* Th. W. Walsh, "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?", *Berkeley J. Int'l L.*, 24, 2006, pp. 444–462, 445–446 (emphasizing that "[t]he advent of the United States as a defendant in NAFTA Chapter 11 investor–State disputes has caused the United States to become the first capital–exporting State to break with investors' interests. The United States now evaluates foreign investment law in both an offensive and defensive light"). Germany is facing a similar experience after the controversial Vattenfall case. *Vid. Der Spiegel*, 2nd November 2011: "*Vattenfall vs. Germany: Nuclear Phase–Out Faces Billion–Euro Lawsuit*".

[5] The relevance of this feature for the comparison of both national legal systems in the field of international investment arbitration has also been emphasized by W.W. Burke–White and A. von

Germany provide respectively representative models of common law and civil law systems, as well as typical examples of decentralized and unified judicial systems[6]. Both dichotomies can be arguably expected to prompt significant divergences in the way in which the ICSID Convention is implemented[7]. Four, the US and Germany can arguably be considered to have adopted a relatively similar mechanism to incorporate international law into their domestic legal orders[8], which has been evocatively labeled as 'hybrid monism' or 'mitigated dualism'[9]. This approach is featured by the distinction between self–executing and non self–executing treaties, the latter requiring to be implemented via domestic law in order to be directly applied by courts. In both Germany and the US implemented treaties are accorded the status of domestic federal law and rank lower than the Constitution. And both legal systems operate interpretative rules by which courts are required to construe domestic law in accordance with treaties. This convergence can be considered to make the US and Germany suitable for being compared by providing a relatively homogeneous framework under which treaties, as the ICSID Convention, may be expected to operate in both domestic legal orders[10].

Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations", *Yale J. Int'l L.*, vol. 35, 2010, pp. 283–346, at 314.

[6] For a comparative approach to both judiciary structures, *Vid.* J. Zätzsch, *Richterliche Unabhangigkeit und Richterauswahl in den USA und Deutschland*, Baden–Baden, Nomos, 2000, pp. 23–33.

[7] The ICSID Convention drafters were well aware that "[b]ecause of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non–unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system". *Vid.* "Report of the Executive Directors on the Convention on the Settlem.ent of Investment Disputes between States and National of Other States" (para 42), in R. Rayfuse (ed), *ICSID Reports* – Vol. 1 (Cambridge: Grotius, 1993) pp. 23–34, at 32.

[8] For the case of Germany, *Vid.* H.–P. Folz, "Germany", in D. Shelton (ed.), *International Law and Domestic Legal Systems*, Oxford. OUP 2011. pp. 240–248; A.L. Paulus, "Germany", in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge. CUP, 2009, 209–242. For the case of the US, *Vid.* J. Telman, "A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law", in M. Milanović (ed.), *Basic Concepts of Public International Law. Monism and Dualism*, Belgrade, University of Belgrade 2013, pp. 571–590.

[9] *Vid.* M.P. Van Alstine, "The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions", in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge, CUP, 2009, pp. 758–581 (explaining the concept of hybrid monism).

[10] *Vid.* J. Husa, *A New Introduction to Comparative Law*, Oxford, Hart, 2015 at Chapter 7 (emphasizing the methodological relevance of a "shared feature or function by means of which comparison becomes possible"). Be it noted, however, that the relevance acknowledged to the dualism–monist categories for analyzing how treaties operate in domestic legal orders have been critically nuanced by recent scholarship. *Vid.* D. Sloss, "Domestic Application of Treaties", in D. B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford, OUP, 2012, pp. 367–395, at 379 (suggesting that '[t]he monist–dualist dichotomy cannot explain variations among States in judicial decision—making "n cases involving vertical treaty provisions. Rather, the extent to which domestic courts apply vertical treaty provisions is best explained by examining whether courts in a particular country are more inclined to adopt a nationalist or transnationalism approach"). *Vid.* also M. Méndez, *The Legal Effects of EU Agreements*, Oxford, OUP, 2013) pp. 37 ss (considering several arguments to support, at 40, the thesis that '[t]he analytical utility of the increasingly common usage of the terminology of monism and dualism as means of classifying different domestic constitutional approaches to the relationship between

The comparative analysis will not limit itself to the statutory provisions by which its enforcement system has been procedurally incorporated into both domestic legal orders. Case law applying these provisions is also examined in order to assess how the ICSID Convention keeps being judicially implemented by domestic courts. Indirectly relevant case law will be also considered inasmuch as it might potentially exert any influence on the way in which the ICSID Convention is interpreted and applied. Finally, further attention will be focused on legal scholarship, since strong empirical evidence suggests the latter to be of particular relevance for both US[11] and German[12] judiciaries. The first step of the purported research, as noted above, requires to briefly examine the main features of the enforcement mechanism designed by the ICSID Convention.

III. The ICSID Convention

International investments have been politically promoted since the late 1950's through the conclusion of treaties, commonly known as international investment agreements[13], by which 'two or more states agree to certain legal rules to govern investments undertaken by nationals of one treaty party in the territory of another treaty party'[14]. The total number of such agreements currently in force is estimated to be about 3,276 worldwide[15]. Substantive standards for investment protection typically provided therein encompass a standard range of vaguely worded clauses by which host states commit themselves to afford foreign investors 'fair and equitable treatment', 'full protection and security' or national and non–discriminatory treatment[16]. Beyond these substantive standards, investment protection is further procedurally safeguarded through the inclusion of mechanisms for the settlement of disputes, by which injured investors are entitled to sue their host States before international arbitration tribunals in case treaty–granted substantive protection standards were purportedly breached. International arbitration tribunals are thereby given treaty–based *ad hoc* jurisdiction to hear and adjudicate investor claims against host States under the arbitration rules agreed by the treaty parties.

---

treaties and domestic law is questionable') *Vid.* also E. Mak, "Comparative Law before the Supreme Courts of the UK and the Netherlands: An Empirical and Comparative Analysis", in M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law*, Oxford: OUP, 2015, pp. 407–436, at 432 (arguing that '[t]he distinction between dualist and monist mechanisms for the implementation of international law in national legal systems is becoming less important').

[11] *Vid.* D. L. Swartz and L. Petherbridge, "The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study", *Cornell L. Rev.*, 96, 2011, pp. 1345–1374.

[12] *Vid.* H. E. S. Mattila, "Cross–references in court decisions a study in comparative legal linguistics", *Lapland L. Rev.*, 1, 2011, pp. 96–121 (collecting and analyzing empirical evidence on the relevance allocated to scholarship in German court decisions).

[13] *Vid.* K.J. Vandevelde, "A Brief History of International Investment Agreements", *Davis J. Int'l L. & Policy*, 12, 2005, pp. 157–94.

[14] J.W. Salacuse, *The Law of Investment Treaties*, Oxford, OUP, 2015, p. 14.

[15] UNCTAD World Investment Report 2015 (United Nations 2015) at 106.

[16] *Vid.* K.J. Vandevelde, *supra*, note 13, at 172.

Since entering into force in 1966 under the auspices of the World Bank Group, the ICSID Convention provides the most commonly used set of arbitration rules for adjudicating disputes arising from international investment agreements[17]. As already noted, the foremost feature distinguishing the ICSID Convention from other investment arbitration rules is enabling a self–contained international arbitral system. Awards rendered thereunder are prevented from being vacated nor even reviewed by domestic courts. Arbitral proceedings conducted within its framework are considered to be territorially delocalized and thus hermetically isolated from any domestic legal order[18].

Once rendered, awards are not subject to any appeal mechanism nor review on their merits, though Article 52 of the ICSID Convention foreseen the exceptional possibility of them being annulled by a specific *ad hoc* committee on the basis of the narrow–scope grounds exhaustively listed therein[19]. The parties having exhausted this procedure, awards are claimed to be final and binding by Article 53 of the ICSID Convention and State parties are mandated by Article 54(1) to recognize them and enforce the pecuniary obligations imposed by the awards 'as if it were a final judgment of a court in that State'. The sole limit imposed to enforcement obligations by Article 55 of the ICSID Convention is to preserve domestic immunity rules protecting sovereign property from execution.

Whereas awards rendered under other investment arbitration rules are governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), those issued under the ICSID Convention are directly governed by the latter. In contrast to the New York Convention, which has been depicted as a 'constitutional instrument' that "leaves a substantial role for national law and national courts to play in the international arbitral process"[20] by providing a set of limited grounds for resisting the recognition and enforcement of awards[21], the ICSID Convention is specifically designed to curtail the role domestic judiciaries are allowed to play by preventing them from invoking any public policy or *ordre public* grounds against their automatic recognition and enforcement[22]. This procedural feature has been laconically summarized by saying that ICSID awards

[17] To date, 151 Contracting States have so far ratified the ICSID Convention. As of end 2013, 62% of the known disputes had been arbitrated under ICSID rules. *Vid.* UNCTAD Recent Developments in Investor–State Dispute Settlement (IIA Issues Note No. 1, 2014) at 9.

[18] *Vid.* L. Reed, J. Paulsson and N. Blackaby (eds), *Guide to ICSID Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2011, p. 14 (explaining that "[t]he ICSID process is entirely self–contained and hence delocalized").

[19] Annulment grounds are limited to improper constitution of the tribunal; corruption on the part of one its members; the tribunal acting in excess of its powers; serious departure from a fundamental rule of procedure; and failure to state the reasons on which the award is based.

[20] Supreme Court of Canada, *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, [2010] 1 S.C.R. 649, quoting Gary B. Born, *International Commercial Arbitration*, Kluwer Law International, 2009, p. 101.

[21] *Vid.* Article V of the New York Convention.

[22] Ch. H. Schreuer, *The ICSID Convention: A Commentary* , 2nd ed, Cambridge, CUP 2013. pp. 1115 ss.

are 'enforceable within the Contracting States with no resistance to the enforcement possible'[23].

However, though precluded from any judicial control, ICSID awards ultimately require to be enforced before domestic courts when losing parties refuse to comply therewith. Despite the categorical wording of its provisions, the possibility for the ICSID Convention to be heterogeneously interpreted and applied by national judiciaries is inherent to the diversity of the domestic procedural rules by which its enforcement provisions have been incorporated into national legal orders[24]. Therefore, only through a comparative analysis of the procedural mechanisms by which these provisions have been implemented in different State parties it can be assessed to what extent the enforcement system designed by the ICSID Convention operates as worldwide homogeneously as it was purportedly intended to be performed.

IV. ICSID awards under U.S. law

As for the case of the US, the ICSID Convention was implemented by Congress via 22 U. S. Code § 1650. The statute reads as follows:

> - An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act ... shall not apply to enforcement of awards rendered pursuant to the convention.
>
> - The district courts of the United States ... shall have exclusive jurisdiction over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.

Being given 'full faith and credit', ICSID awards are incorporated into the US legal system via 22 U. S. Code § 1650(a) under a mechanism purportedly similar to that by which domestic state courts are required to recognize and enforce judgments of another state according to the Full Faith and Credit Clause of Article IV § 1 of the United States Constitution[25].

As interpreted by the Supreme Court in *Baker v. General Motors Corp.*, 522 U.S. 222 (1998), the Full Faith and Credit Clause implies that '[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judica-

[23] A.J. van den Berg, "Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions", *ICSID Review*, 1987, 2, pp. 439–56, 439.

[24] *Vid.* A. Nollkaemper, *supra*, note 2, at 219 (emphasizing that 'precisely because of the different context, a norm that is transplanted into a different legal system is not the same norm. That argument is prima facie applicable to transplanting an international norm to the domestic level. Domesticated obligations start a new life as domestic norms, governed by separate secondary norms'.

[25] Article IV § 1 of the United States Constitution states that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof'.

ta) purposes, in other words, the judgment of the rendering State gains nationwide force'. The obligation to recognize and enforce state court judgments was extended to federal courts by Congress via 28 U.S. Code § 1738[26].

First, ICSID awards are thus accorded the same status granted to domestic state court judgments[27]. This privilege rule deviates from the general one by which foreign and international awards, as those governed by the New York Convention, are required to be confirmed by US courts prior to be enforced[28]. Though it must be noted that even the Full Faith and Credit Clause has not been unequivocally interpreted as strictly precluding judicial review[29]. Under exceptional circumstances, state court judgments may be denied recognition and enforcement by other state and federal courts on a limited set of grounds[30].

Second, federal district courts are vested by 22 U. S. Code § 1650(b) with exclusive jurisdiction over recognition and enforcement of ICSID awards. Yet no specific procedure is explicitly foreseen[31], nor is any summary process provided for federal enforcement of state judgments, to which ICSID awards are equated, which could be applied by analogy[32]. It remains thus unclear under which procedure ICSID awards are to be enforced by federal district courts.

---

[26] 28 U.S. Code § 1738 provides that "[t]he Acts of the legislature of any State, Territory, or Possession of the United States", as well as "[t]he records and judicial proceedings of any court of any such State, Territory or Possession … shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken'.

[27] *Vid.* R.P. Alford, "Federal Courts, International Tribunals, and the Continuum of Deference", *Virginia J. Int'l L.*, 43, 2003, pp. 675–796, 687 (pointing out that 'national courts *must* accord international tribunal decisions co–equal status with a state court judgment').

[28] *Vid.* D.J. Levy (ed), *International Litigation*, New York, ABA, 2003, p. 364 (noting that '[a]lthough as a rule foreign arbitral awards are not self–executing and must first be reduced to a court judgment in order to be enforced, awards arising from the [ICSID Convention] … represent the exception to this rule').

[29] *Vid.* E.P. Redpath, "Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records", *Emory L.J.*, 62, 2013, pp. 639–680.

[30] For a general overview on this limited set of grounds, *vid.* W.L. Reynolds, "The Iron Law of Full Faith and Credit", *Maryland L. Rev.*, 53, 1194, pp. 412–449. *Vid.* also P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, 2nd ed., Tubinga, Mohr, 1989, p. 78 (criticizing the decision to apply the full faith and credit model to ICSID awards for suggesting that ICSID awards may be opposed the same exceptions to enforcement as the state court judgments).

[31] *Vid.* E.G. Kehoe, "The Enforcement of Arbitral Awards Against Foreign Sovereigns – the United States", in R. Doak Bisho (ed.), *Enforcement of Arbitral Awards Against Sovereigns*, New York: JurisNet, 2009, pp. 241–271, at 250 (pointing out that "22 U.S.C. §1650a does not specify the procedural mechanism, whether it be in the form of registration, a motion, complaint or otherwise, by which a party converts an ICSID award into an enforceable U.S. federal court judgment").

[32] *Vid.* Editorial Note, "New Approach to United States Enforcement of International Arbitration Awards", *Duke Law Journal* , 1968, pp. 258–281, at 274 (early criticizing the decision to procedurally equate ICSID awards and state court judgments by arguing that "[i]t is well settled that federal courts must give full faith and credit to state court judgments. However, in contrast to federal court enforcement of a judgment of another federal court, there is no summary enforcement procedure applicable to state court judgments sought to be enforced in federal courts. A party *Vid.*king implementation of a state court judgment, and therefore also a Convention award, must institute an original action on the award and obtain a new judgment in the federal court").

Aside from the implementing statute, the recognition and enforcement of ICSID awards, when rendered against States other than the US, are also governed by the Foreign Sovereign Immunities Act (FSIA). Specific procedural rules are therein provided for bringing legal actions against foreign States in US courts.

Finally, since the US is mandated by Article 54 (1) of the ICSID Convention to enforce pecuniary obligations imposed by an award 'as if it were a final judgment of a court in that State', a last mention must be made of the possibility for a final domestic judgment to be challenged in US law. Rule 60(b) of the Federal Rules of Civil Procedure (FRCP) enumerates five circumstances under which such a final judgment may be reviewed[33]. Were ICSID awards to be treated exactly as the latter, the hypothesis cannot be *a priori* dismissed that Rule 60(b) of the FRCP may be eventually applied to them by analogy[34].

Four issues can be thus pointed out. First, the question whether there remains any scope whatsoever for judicial review of ICSID awards, at least under the same exceptional conditions as state court judgments. Second, and indirectly linked to the latter, the question of which procedure is the appropriate one to domesticate ICSID awards. Third, the question of how to interpret and construe the relationship between the incorporation provisions in 22 U. S. Code § 1650 and the FSIAS. Four, the question whether ICSID awards may be indirectly challenged under Rule 60(b) of the FRCP as final domestic judgements. Except for the latter, all of these issues have already been explored in US case law.

Before further proceeding, it should be noted that the first two issues, as already noted, are indirectly linked to each other. A decision on the appropriate procedure to enforce ICSID awards should be consistent with the scope for judicial review allocated to the enforcing courts. Since the FSIA provides specific procedural rules for bringing legal actions against foreign States, this third issue also appears to be ultimately intertwined with the two former ones.

As for the question whether any room remains for judicial review, US courts have declined to extent to ICSID awards the limitations for giving full

[33] Rule 60(b) of the FRCP states: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief".

[34] *Vid.* A. Broches, "Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution", *ICSID Review*, 1987, 2, pp. 287–334, at 322–323; E. Baldwin, M. Kantor and M. Nolan, "Limits to Enforcement of ICSID Awards", *J. Int'l Arb.*, vol. 23, nº 1, 2006, pp. 1–24, at 9.

faith and credit to domestic state court judgments[35]. Several arguments have been considered in order to reach this conclusion. First, it is supported by the incorporation statute being construed in accordance with the categorical wording of the enforcement provisions contained in the ICSID Convention[36]. Even more so when the latter are interpreted against the background of the New York Convention[37]. Second, the conclusion is further supported by the decision to exclude ICSID awards from domestic arbitration rules, under which awards are exposed to judicial review when sought to be confirmed[38].

As for the appropriate procedure to be employed, the incorporation statute have been considered to have a gap. In order to fill it, federal courts have borrowed expedited procedures from the law of the forum state for domesti-

[35] *Vid. Mobil Cerro Negro Ltd.* v. *Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) (stating that "[t]here is no charter for a federal court to examine an ICSID award as it would a state–court judgment for infirmities, because under § 1650a, such awards are entitled to full faith and credit and are subject to substantive review by ICSID alone … There are only limited exceptions to the Constitution"s requirement of full faith and credit. None apply in the context of an ICSID award"). *Vid.* also *Micula v Government of Romania*, No. 15 MISC. 107, 2015 WL 4643180, at *1 (S.D.N.Y. Aug. 5, 2015) (emphasizing that "[r]ecognition is a matter in which a court has no discretion once it determines that an [ICSID] award is authentic"). This view was formerly endorsed by the intellectual founding father of the ICSID Convention. *Vid.* A. Broches, *supra*, note 34, at 322–323. Yet the opposite view was explicitly suggested by authoritative scholarship. *Vid.* International Law Association – Committee on International Commercial, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London, ILA, 2000, p. 9, note 31 (suggesting that "[a]rguably, the US has reserved the right – through its reference to "full faith and credit" in the law implementing the Convention (222 USC paras. 1650–1650a) – to verify at least that the tribunal had jurisdiction and that due process was respected"); *vid.* also E. Baldwin, M. Kantor and M. Nolan, *supra*, note 34, at 11–12.

[36] *Vid. Mobil Cerro Negro Ltd. v Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) (explaining that "Article 54 is directed to *contracting states*. As noted, it requires them to recognize an ICSID award "as binding" and to enforce the award's pecuniary obligations "as if it were a final judgment of a court in that State." ICSID Convention art. 54(1). There are no exceptions to the contracting state"s duty to recognize the award. Article 54 also directs that "[a] party *Vid.*king recognition or enforcement in the territories of a Contracting State shall furnish" to a competent court a certified copy of the award. *Id.* art. 54(2). Such a court therefore is to review only the award's authenticity; recognition thereafter is mechanistic and effectively "automatic"“). *Vid.* also *Micula v Government of Romania*, No. 15 MISC. 107, 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015) (emphasizing that "[r]ecognition is a matter in which a court has no discretion once it determines that an award is authentic … As Article 53 of the ICISD Convention unambiguously states, awards "*shall not* be subject to *any appeal* or to *any other remedy* except those provided for in this Convention. Each party *shall* abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention"“)

[37] *Vid. Mobil Cerro Negro Ltd.* v. *Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) ("Articles 53 through 55 of the ICSID Convention thus represented a considered decision to depart fundamentally from the New York Convention, in denying courts any power to review the parties" agreement to arbitrate, to decline to hear particular types of cases, and, most salient here, to refuse to recognize ICSID awards").

[38] *Vid. Mobil Cerro Negro Ltd.* v. *Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) (arguing that "the ICSID enabling statute provides: "The Federal Arbitration Act (9 U.S.C. § 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention." 28 U.S.C. § 1650a. Chapter 2 of the FAA, as noted, implemented the New York Convention. Section 1650a thereby reflected Congress"s intention that the New York Convention, which provided for limited substantive review of—and the right of the award debtor to challenge— arbitral awards would not apply to the enforcement of ICSID awards").

cating ICSID awards[39]. This decision was mainly supported by considering unnecessary to bring a plenary legal action. Defendants are thereby denied no right to oppose recognition of the award since the latter is precluded from judicial review[40].

Such conclusion was not deemed to be affected by the specific procedural requirements established in the FSIA. Leaving aside the exceptions provided therein for legal actions governed by international treaties, such as the ICSID Convention[41], federal courts have interestingly argued that its specific procedural rules are reserved for proper litigation over contested issues, suggesting that Congress had not considered that the FSIA would apply in proceedings where, as in the case of domesticating ICSID awards, no substantive issues are to be decided[42]. Furthermore, even if a plenary legal action were hypothetically required by the FSIA for recognizing and enforcing the award, no procedural right could be virtually exercised by the defendant foreign State to challenge the award or oppose its enforcement[43].

---

[39] *Vid. Liberian Eastern Timber Corp. v Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986); *Vid.* Grenada v. Grynberg, No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011); *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M–82 (S.D.N.Y. Nov. 20, 2007); Sempra Energy Int'l v. Argentine Republic, No. M–82 (S.D.N.Y. Nov. 14, 2007); *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015); *Micula v Government of Romania*, No. 15 MISC. 107, 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015). Only one case has been reported where a plenary legal action was explicitly required for recognizing an ICSID award. *Vid. Micula v Government of Romania*, No. 1:14–cv–00600 (APM) (D.D.C. May 18, 2015).

[40] *Vid. Mobil Cerro Negro Ltd. v Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) (stating that "[p]ermitting an ICSID award to be converted, ex parte, into a federal judgment does not deprive the award debtor of a right (such as a debtor has under the New York Convention) to challenge the award. It would merely provide an avenue for delay"). *Vid.* also *Micula v Government of Romania*, No. 15 MISC. 107, 2015 WL 4643180, at *1 (S.D.N.Y. Aug. 5, 2015) (noting that "[e]ven if Petitioners were directed to commence a plenary action for recognition … nothing would change substantively").

[41] *Vid. Mobil Cerro Negro Ltd.* v. *Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) (concluding that "the FSIA evinces an intention to leave existing practice under international treaties undisturbed"). *Vid.* also *Blue Ridge Invs., L.L.C. v Republic of. Argentina*, 735 F.3d 72 (2d Cir. 2013).

[42] *Vid. Mobil Cerro Negro Ltd.* v. *Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) (arguing that "the FSIA repeatedly uses terms that presuppose litigation over a contested issue, e.g., a conventional lawsuit in which liability, damages, and/or the availability of attachment are at issue. This terminology uneasily fits the non–substantive, mechanistic context of ICSID award recognition, in which, upon authentication of the award, its conversion into a judgment is automatic. It suggests that, in enacting the FSIA, Congress had in mind a conventional lawsuit against a sovereign to resolve issues of liability and/or damages … and not the rara avis that is a proceeding to convert a ICSID award into a federal court judgment".

[43] *Vid. Mobil Cerro Negro Ltd. v Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015) (stating that "[the defendant] has not identified any legal basis on which, were it to be granted the right to be sued and to participate in the award recognition process, it could, or would, challenge ICSID's award to [the petitioner]. But requiring the creditor to comply with the FSIA"s procedures for such a lawsuit when the award debtor is a sovereign … could lead to substantial delays. And construing the FSIA to permit ICSID creditors to continue to be able to use (via borrowing) state recognition procedures as permitted by the ICSID enabling statute would leave foreign sovereigns fully able to vindicate the rights they do have. A sovereign is at liberty to challenge the award within ICSID, to *Vid.*k its annulment, or, as [the defendant] has done, to *Vid.*k its modification").

In closing this section, a brief reference must be made to the last of the above mentioned issues. Absent any case law on point, the question whether Rule 60(b) of the FRCP may be hypothetically applied to federal judgments by which ICSID awards have been incorporated into US law remains unclear. Though the wording of Article 54 (1) of the ICSID Convention may suggest this possibility, such a literal reading would be arguably held inconsistent with the spirit of the Convention by the US courts[44]. The rationale would be the same employed by these courts to reject a literal interpretation of the wording 'full faith and credit' in 22 U. S. Code § 1650(a) which could have potentially subjected ICSID awards to the same enforcement exceptions as state court judgments.

V. ICSID awards under German law

Before proceeding to address the status accorded to ICSID awards under German law, two caveats must be broached. First, unlike as in the case of the US, the German case law on this issue is significantly scarce. To date, only one case has been so far reported in which the enforcement of ICSID awards under German law was properly addressed[45]. Second, given Germany's membership of the European Union (EU), the issue at hand cannot be confined to a purely dual relationship between the ICSID Convention and the German domestic legal order. Since EU law claims to be part of the latter[46], the enforcement of ICSID awards before German courts may potentially fall within the scope of application of EU law[47]. Were that the case, the risk of conflict cannot be dismissed[48]. Whether such a situation should be analytically conceived as either a conflict between international and domestic law or

[44] Be it noted, however, that Rule 60(b) of the FRCP has been admitted to apply to judgments confirming ordinary arbitration awards which, unlike those rendered under the ICSID Convention, have to be confirmed under the Federal Arbitration Act. *Vid. AIG Baker Sterling Heights, LLC v Am. Multi–Cinema Inc.*, 579 F.3d 1268 (11th Cir. 2009).

[45] *Vid.* Frankfurt Court of Appeals (OLG Frankfurt am Main), Decision of 20 November 2012 (Az. 18 W 59/12).

[46] *Vid.* European Court of Justice, Case 6/64, Costa v ENEL [1964] ECR 585.

[47] *Vid.* P. Ortolani, "Intra–EU Arbitral Awards vis–à–vis Article 107 TFEU: State Aid Law as a Limit to Compliance", *J.Int'l Disp. Set*t., 2015, 6, pp. 118–135.

[48] *Vid.* European Court of Justice, Case C–205/06, *Commission v Austria* [2009] ECR I–1301; Case–249/06, *Commission v Sweden* [2009] ECR I–1335; and Case C–118/07, *Commission v Finland* [2009] I–10889. In these decisions, commonly known as the "BIT cases", free capital transfer clauses contained in bilateral investment treaties ("BITs") concluded with non–EU countries by Austria, Sweden and Finland prior to their accession to the EU were deemed incompatible with the powers conferred upon the EU Council to restrict free movement of capital to and from non–EU countries. Although former Art 307(1) of the European Community Treaty [now Art 351(1) of the Treaty on Functioning of the European Union, "TFEU"] confirmed pre–accession treaties concluded with non–EU countries by Member States to remain in force, Austria, Sweden and Finland were hold not to have taken appropriate steps required by former Article 307(2) [now Article 351(2) TFEU] to remove the referred incompatibilities.

a conflict between international treaties remains unclear[49] and will not be further discussed here[50]. With these two caveats in mind, we can now proceed to examine the mechanism by which ICSID awards are incorporated into German law.

The ICSID Convention was implemented in Germany via statutory provisions enacted by the *Gesetz zu dem Übereinkommen vom 18. März 1965 zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehörigen anderer Staaten* ('ICSID Act'). Its Article 2 states that the enforcement of ICSID awards shall be governed by the procedural rules provided for enforcing foreign awards, namely § 1061 of the *Zivilprozessordnung* (German Code of Civil Procedure, 'ZPO'). It further provides that the petition for enforcement can only be denied if the award has been nullified according to the ICSID Convention.

The enforcement of ICSID awards is thus governed by § 1061(1) ZPO, which reads as follows:

> "The recognition and enforcement of foreign arbitration awards is governed by the Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards [New York Convention]. The stipulations of other treaties concerning the recognition and enforcement of arbitration awards shall remain unaffected hereby".

The Frankfurt Court of Appeals has rendered the only court decision providing so far guidance on how this statute is to be construed as for ICSID awards[51]. By interpreting § 1061 ZPO in accordance with Article 54 of the ICSID Convention, the Court held that ICSID awards are equated to final domestic judgments. Therefore, though their enforcement has been referred by the ICSID Act to the same statute governing the recognition and enforcement of foreign awards (§ 1061 ZPO), the ICSID awards cannot be submitted to the same procedure as the latter in order to be enforced. As the Court explained, the general procedure for foreign awards is required to be shaped as to allow the parties litigate on the grounds upon which recognition and enforcement of the award may be denied under the New York Convention. Compared to the latter, the enforcement of ICSID awards is conducted through a strongly simplified procedure ("*stark vereinfachtes Verfahren*"). Whereas foreign awards have to be submitted to a previous procedure in order to be confirmed as enforceable before being properly executed (*Vollstreckbarkeitserklärung*), ICSID awards can be directly submitted to a proper enforcement procedure (*Zwangsvollstreckung*).

Thus, it can be reasonably inferred from the opinion of the Frankfurt Court of Appeals that no room is left for domestic judicial review, nor is any

---

[49] *Vid.* J. Klabbers and S. Trommer, "Peaceful Coexistence: Normative Pluralism in International Law", in J. Klabbers and T. Piiparinen (eds.), *Normative Pluralism and International Law. Exploring Global Governance*, Cambridge, CUP, 2013, pp. 67–93, at 70.

[50] For a detailed discussion on the issue, *vid.* J. Klabbers, *Treaty Conflict and the European Union*, Cambridge, CUP, 2009.

[51] Frankfurt Court of Appeal (OLG Frankfurt am Main), Decision of 20 November 2012 (Az. 18 W 59/12).

procedural right conferred on the parties to challenge the ICSID award or oppose its enforcement at the domestic level. German legal scholarship, in its turn, has also explicitly endorsed the view that there is no remaining scope for judicial review[52], arguing that the role of the domestic court is strictly limited to ascertain the authenticity of the ICSID award at hand[53]. ICSID awards have been described as sui generis since they need no recognition[54]. And the categorical wording of the provisions contained in the ICSID Convention with regard to enforcement has even been suggested to displace domestic law[55].

However, some authoritative scholarship has refused the idea that the ICSID Convention could be construed as strictly preventing domestic courts from applying the *ordre public* exception[56]. Their view ultimately relies on conceiving the consistency with the German *ordre public* as an unwritten prerequisite ('*ungeschriebenes Erfordernis*') for enforcement to be granted[57]. This opinion seems to remotely echo the view unsuccessfully put for-

[52] *Vid.* A. Nelle, *Anspruch, Titel und Vollstreckung im internationalen Rechtsverkehr*, Tübingen, Mohr, 2000, pp. at 569–570 and 586 (suggesting that no objection can be raised against enforcement); A. Szodruch, *Staateninsolvenz und private Gläubiger,* Berlin, BWV, 2008, pp. 411–412 (stating that the enforcement State is not entitled to review the content of the award, even if otherwise provided by domestic procedural rules); S. Schilf, *Allgemeine Vertragsgrundregeln als Vertragsstatut*, Tübingen, Mohr, 2005, p. 150 (pointing out the unique character of the ICSID awards for precluding any judicial review on the basis of the domestic *ordre public*); S. Lüke, *Punitive Damages in der Schiedsgerichtsbarkeit*, Tübingen, Mohr, 2003, p. 262 (stating that domestic authorities are not permitted to review the award); P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, 2nd ed, Tübingen, Mohr, 1989, p. 78 (suggesting that domestic courts are conceived in the framework of the ICSID Convention as mere enforcement organs); J. Kreutzfeld, *Investitionsschutz für einen deutschen Investor in der Republik Südafrika*, Hamburg, Lit, 2000, p. 87 (concluding that the role of the domestic courts is limited to the mere enforcement of the award).

[53] *Vid.* H. Bubrowski, *Internationale Investitionsschiedsverfahren und nationale Gerichte*, Tübingen, Mohr, 2013, p. 287; R. Schwartmann, *Private im Wirtschaftsvölkerrecht*, Tübingen: Mohr, 2005, p. 95; A. Escher, "Investitionsschiedsverfahren: Grundstrukturen und aktuelle Herausforderungen", in Ch. Tietje (ed.), *International Investment Protection and Arbitration*, Berlin, BWV, 2008, pp. 35–50, at 45; Ch. Tietje, "Die Beilegung internationaler Investitionsstreitigkeiten", in Th. Marauhn (ed.), *Streitbeilegung in den internationalen Wirtschaftsbeziehungen*, Tübingen, Mohr, 2005, pp. 47–62, at 55.

[54] R. Gömmel, *Investing into North African Solar Power: A Legal Framework for Risk Management and Prospects for Arbitration*, Heidelberg, Springer, 2015, p. 90, note 315; F.–J. Semler, "Schiedsverfahren im Rahmen von Investitionsschutzabkommen der Bundesrepublik Deutchsland", *Schiedsverfahrenszeitschrift*, 2003, pp- 97–102, at 99.

[55] H. Bubrowski, *supra*, note 53, p. 285.

[56] *Vid.* R. A. Schütze, *Das Internationale Zivilprozessrecht in der ZPO*, 2 ed, Berlin/New York, De Gruyter, 2011, p. 292; R. A. Schütze, § 1061 ZPO", in B. Wieczorek and R. A. Schütze (eds.), *Zivilprozessordnung und Nebengesetze: Großkommentar. Band 11*, 4 ed., Berlin/New York, De Gruyter 2014, p. 789; R.A. Schütze, D. Tscherning and W. Wais, *Handbuch des Schiedsverfahrens. Praxis der deutschen und internationalen Schiedsgerichtsbarkeit*, 2 ed, Berlin/New York: De Gruyter 1990, p. 343.

[57] *Vid.* R. A. Schütze, *supra*, note 56, at 292; *id.*, "§ 1061 ZPO", in B. Wieczorek and R. A. Schütze (eds), *supra*, note 56, at 789 (stating that, on constitutional grounds, the power to review the award on the basis of the domestic *ordre public* cannot be waived, since the German State cannot be required to enforce an award deemed to be inconsistent with the fundamental principles of its own legal order).

ward by the German delegation during the negotiation of the ICSID Convention by emphatically insisting on the idea that domestic courts should retain some discretionary power on the basis of the *ordre public* of the forum State[58].

However, this view should be contrasted with the wording of Article 24 (1) of the German Constitution, which provides that '[t]he Federation may by a law transfer sovereign powers to international organizations'. This provision has indeed been interpreted by some scholars as permitting the German State to transfer to arbitration tribunals by means of a treaty its sovereign right (*Hoheitsbefugnis*) to review investment awards on the basis of its domestic *ordre public*[59]. Be that as it may, a cautious approach should be taken in assessing these arguments, since the German Constitutional Court has held this constitutional provision to be subject to inherent limitations and has suggested that it cannot be taken literally ("*nicht wörtlich genommen werden* [darf]")[60].

To ensure a proper understanding of the relevance allocated to the *ordre public* exception in German law, the issue should be framed in the broader context in which this exception has been construed by the German Constitutional Court. In its landmark decision on the EU Lisbon Treaty, the Court stated that '[t]here is … no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements … provided this is the only way in which a violation of fundamental principles of the Constitution can be averted', adding that such idea is 'familiar in international legal relations as reference to the *ordre public* as the boundary of commitment under a treaty'[61]. The view expressed by the Court seems to implicitly rely on the hypothetical existence of a general *ordre public* clause, which could be invoked by States as exception to their treaty commitments, whether or not such a clause have been explicitly included in the treaty at hand[62].

---

[58] *Vid.* ICSID, *ICSID History of the Convention – Volume II–2*, Washington, ICSID, 2006, pp. 989, 991–2 and 1018.

[59] *Vid.* S. Kilgus, *Zur Anerkennung und Vollstreckbarerklärung englischer Schiedssprüche in Deutschland*, Berlin, Dunker & Humblot, 1995) p. 47 ("Die Übertragung der Hoheitsbefugnis, Schiedsprüche insb. auf ihre ordre public–Verträglichkeit hin zu überprüfen, an die Schiedsgerichte unter dem Übereinkommen wird man in Deutschland wegen Art. 24 Abs. 1 GG für zulässig erachten müssen").

[60] *Vid.* German Constitutional Court (*Bundesverfassungsgericht*), Decision of 29 May 1974 (BVerfGE 37, 271, 279), also known as "Solange I". *Vid.* also A.L. Paulus, "Germany", in D. Sloss (ed.), *supra*, note 8, at 219 (arguing that Article 24[1] of the German Constitution "was hardly meant to imply an unconditional surrender of the most basic principles of German democracy to international organizations").

[61] *Vid.* German Constitutional Court (*Bundesverfassungsgericht*), Decision of 30 June 2009 (BVerfGE 123, 267), also known as "Lisbon Decision".

[62] *Vid.* A. L. Paulus, "From Dualism to Pluralism: The Relationship between International Law, European Law and Domestic Law", in P.H.F. Bekker, R. Dozer and M. Waibel (eds.), *Making Transnational Law Work in the Global Economy. Essays in Honor of Detlev Vagts*, Cambridge, CUP, 2010, pp. 132–153, at 144 ss (questioning the concept of a "general reservation of ordre public" by critically arguing that "the Court maintains a profound ambiguity as to the source of the proposed

Under this perspective, it has been suggested that German courts are required to perform a filter function as constitutional gatekeepers[63]. Were the content of an ICSID award considered to amount to a "violation of fundamental principles of the Constitution", then German courts would be hypothetically required to deny enforcement. In fact, as a prominent German scholar and current member of the German Constitutional Court has suggested, "domestic courts may also, in rare cases, have to fulfill a gatekeeping role to safeguard constitutional values against encroachments by international institutions that may interfere with vested rights of Germany and its citizens. But this is a role of last resort"[64].

Setting aside the discussion on the *ordre public* exception, a last mention must be made to a relatively recent decision of the German Supreme Court which could be also indirectly relevant for the enforcement of ICSID awards. In the so–called *Walter Bau* case[65], the German Supreme Court held that it is the duty of the courts asked to enforce an investment award to review whether the latter exceeds the scope of the international investment agreement under which it has been rendered. Though the award at stake was not issued under the ICSID Convention, the doctrine set forth in this case could be indirectly relevant for the enforcement of ICSID awards. In particular, the Court stated that the consent granted by a foreign State to submit to the jurisdiction of the enforcing German courts by way of such agreement does not apply to matters not covered by the latter. Since treaties are not to be construed as purporting to bind the State parties beyond their consent, any awards rendered under the relevant agreement are only binding on them with regard to the particular matters submitted to arbitration therein. Had the arbitration tribunal misconstrued ("*verkennt*") the scope of the agreement, the parties cannot be considered to be bound thereby, nor is the jurisdiction consent of the foreign State to be extended beyond such scope. For this reason, the enforcement court is required to ascertain whether the dispute between the parties is covered by the agreement.

It is important to note that the duty of judicial review seems to implicitly rely on the limited scope of the international investment agreement, whereby arbitration tribunals are entitled to adjudicate the disputes arising therefrom[66], and not on the procedural rules governing the enforcement of the

reservation of the order public. The ambiguity of the Court suggests that a State could violate its international obligations with impunity, even with a sense of righteousness").

[63] *Vid.* A.L. Paulus, "Germany", in D. Sloss (ed.), *supra*, note 8, at 213 (referring to the decision of the German Constitutional Court in the so–called *Waldschlösschen* case [Decision of 29 May 2007, 2 BvR 695/07] as suggesting "that German courts are increasingly assuming a different role than they did in the past: they are playing the role of a "gatekeeper" or border guard who decides which international rules may cross the bridge into domestic law").

[64] A.L. Paulus, "Germany", in D. Sloss (ed.), *supra*, note 8, at 242.

[65] *Vid.* German Supreme Court (*Bundesgerichtshof*), Decision of 30 January 2013 (Az. III ZB 40/12).

[66] Under the so–called Kompetenz–Kompetenz principle, arbitration tribunals are entitled to rule on their own jurisdiction upon the international investment agreement from which the dispute at hand arises. Even in the case of investment awards rendered outside the ICSID Convention and thus

award, be they those of the ICSID Convention or the New York Convention. Given that ICSID awards, as any investment award whatsoever, are rendered by arbitration tribunals whose jurisdiction is limited by the relevant international investment agreement, the rationale behinds this decision could be potentially applied to them[67]. Had an ICSID arbitral tribunal issued an award beyond the scope of the international investment agreement upon which its jurisdiction is founded, then the award would not be covered by Article 54 (1) of the ICSID Convention and domestic courts would not be required by the latter to its recognition and enforcement[68].

As suggested above in the case of the *ordre public* exception, this argument can only be properly understood by reference to the broader theoretical context upon which it ultimately relies, namely that of the *ultra vires* doctrine set forth by the German Constitutional Court[69]. By conceptually construing this doctrine in the above quoted decision on the EU Lisbon Treaty with specific regard to EU institutions, the German Constitutional Court has constitutionally incorporated the like–named doctrine developed in international law[70]. It holds essentially that acts undertaken by international bodies beyond the scope of the powers conferred upon them by their constituent treaties are not binding on the State parties[71]. Nevertheless, actions taken in fulfillment of the purposes allocated to the international body must be pre-

governed by the New York Convention, the jurisdiction cannot be reviewed by the domestic courts once upheld by the arbitration tribunal. *Vid.* Ph. Landolt, "The Inconvenience of Principle: Separability and Kompetenz–Kompetenz", *J. Int'l Arb.*, vol. 30, nº 5, 2013, pp. 511–530, at 513 ss (explaining that "[i]f there is no challenge to the arbitral tribunal's Kompetenz–Kompetenz decision, it takes effect within the state of the seat and the award which follows is credited under the New York Convention in the same way as an award from an arbitral tribunal whose Kompetenz–Kompetenz was challenged before the courts of the seat but upheld. The purpose of arbitral Kompetenz–Kompetenz is to avoid a situation where the arbitral tribunal can only proceed with its work once a court has declared it to have jurisdiction to do so. Thus, Kompetenz–Kompetenz is an indispensable contributor to the efficiency of arbitral proceedings").

[67] For a critical approach to the decision of the German Supreme Court, *vid.* H. Reschke–Kessler, "Der Einfluss des Völkervertragsrechts auf Vollstreckbarerklärung und Vollstreckung aus Schiedssprüchen auf der Grundlage von Investitionsschutzabkommen", in Walther Harding, Ulrich Herrmann and Achim Krämer (eds.), *Festschrift für Wolfgang Schlick zum 65. Geburtstag*, Cologne, Carl Heymanns, 2015, pp. 57–78 (critically assessing the scope of judicial review allocated to the enforcement courts for jeopardizing the competence reserved by international investment agreements to the arbitration tribunals to rule on its own jurisdiction; *vid.* Ph. Landolt, *supra*, note 66).

[68] For a critical approach, *Vid.* P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, 2nd ed, Tübingen, Mohr 1989, p. 78 (emphatically refusing the idea that domestic courts be entitled to deny enforcement to ICSID awards by ascertaining that the arbitral tribunal have exceeded the jurisdiction conferred by the relevant international investment agreement).

[69] For a general overview, *Vid.* Editorial Comments, "Ultra vires – Has the Bundesverfassungsgericht shown its teeth?", *Common Market L. Rev.*, vol. 50, nº 4, 2013, pp. 925–929.

[70] *Vid.* F.Schorkopf, "The European Union as An Association of Sovereign States: Karlsruhe"s Ruling on the Treaty of Lisbon", *German L.J.*, vol. 10, 2009, 1219–1240, at 1231 (pointing out that "[t]he *Lisbon Case* both linguistically and dogmatically follows international law by taking up the classical notion of public power acting without competence").

[71] *Vid.* J. Klabbers, "Constitutionalism Lite", *International Organizations L. Rev.*, 2004, nº 1, pp. 31–58, at 40 ss.

sumed not to exceed the scope of their powers[72]. Though specifically construed German Constitutional Court with regard to the EU institutions in the above referred case, this constitutional rationale could be hypothetically applied to any ICSID award considered to have been rendered beyond the jurisdiction allocated to the arbitration tribunal.

Finally, a last mention must be made of the possibility for a final domestic court decision to be challenged. As in the case of US law, such possibility is explicitly provided in German law[73], though applying this procedure in order to indirectly challenge an ICSID award may be also here rejected if the relevant domestic procedural rules are to be construed in accordance with the ICSID Convention. However, it should be noted that, unlike in the case of US law, the possibility to challenge a final domestic court decision in German law may be mandated in certain cases by EU law, under the so–called Lucchini doctrine, when the court decision is considered to have been rendered in breach of EU law[74].

VI. Comparative assessment

Several conclusions may be drawn by comparing the US and German legal systems against the background of each other. To begin with, some divergences can be observed concerning the mechanisms by which the ICSID Convention has been implemented in each of these countries. While a new federal statute was specifically designed to implement the ICSID Convention in the case of the US, Germany decided not to pass new procedural legislation, but to directly refer ICSID awards to the general procedure provided by its domestic law for recognition and enforcement of foreign awards.

Before going further, it should be noted that the legal mechanism operated by the US legal system in order to implement the ICSID Convention has no functional equivalent in German law. The full faith and credit model is a bespoke procedural device specifically designed to solve a problem directly connected with the US federal structure, namely the division between federal and state judiciaries. German federalism, in turn, may be considered to have virtually no relevant influence on its domestic judiciary, since both federal (*Bundesgerichte*) and state courts (*Landgerichte*) are intertwined in a na-

[72] *Vid.* International Court of Justice, Certain Expenses of the United Nations, advisory opinion [1962] ICJ Reports 151.

[73] This possibility is commonly known in German law as "*Rechtskraftdurchbrechung*". *Vid.* B. Wieczorek, R.A. Schütze and D. Olzen, *Zivilprozessordnung und Nebengesetze: Großkommentar. Band 8*, 4 ed., Berlin/New York, De Gruyter, 2013, pp. at 283 ss.

[74] *Vid.* European Court of Justice, Case C–119/05 Lucchini v Commission [2007] E.C.R. I–6199, para 63 (stating that EU law "precludes the application of a provision of national law … which *Vid.*ks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of [EU] law"). For an updated overview on the Lucchini doctrine, *Vid.* J. Kühling and G. Schwendinger, "Rechtskraftdurchbrechung durch EU–(Beihilfen–)Recht – Die Tragweite der EuGH–Vorlage des LG Münster", *Europäische Wirtschafts– und Steuerrecht*, 2015, nº 1, pp. 1–9.

tionwide unified structure and judicial procedures are uniformly governed by federal law. Therefore, it cannot be even hypothetically ascertained how the German legal system would have resolved, compared to the US one, the issues arising from applying a mechanism similar to the full faith and credit model to ICSID awards[75].´

Be that as it may, since both countries have adopted disparate approaches, their domestic courts have accordingly being confronted with different issues. In the case of the US, as ICSID awards were equated to state court decisions by the Congress without apparently foreseeing the possibility that exceptions to enforcement might be also applied to the former by analogy, federal courts have been required to fit this congressional decision in accordance with the purposes of the ICSID Convention in order to prevent any possibility of judicial review. In this regard, it could be said that a stronger full faith and credit model has been judicially bespoken for the enforcement of ICSID awards in order to comply with the international obligations of the US under the ICSID Convention.

German courts, in turn, are confronted with the fact that ICSID awards have been ambiguously referred to the general procedure for recognition and enforcement of foreign awards. This ambiguity has been resolved by construing the domestic procedural provisions in accordance with the ICSID Convention in order to similarly prevent any remaining scope for judicial review.

One issue appears to be common to both legal systems. In neither the US nor in Germany has a specific enforcement procedure been designed for enforcement of ICSID awards. Yet this fact cannot be interpreted as showing either a similarity or difference in the approaches adopted by each of these legal systems in order to implement the ICSID Convention. It can be rather easily explained in terms of legislative economy by considering the small average number of cases in which such a procedure might be applied.

Besides, some similarities can be also observed as regards judicial practice. First, courts in both countries similarly attempt to construe the domestic statutes governing the enforcement of ICSID awards in accordance with the provisions of the ICSID Convention. Second, they also similarly resort to the latter in order to clarify ambiguities and fill lacunae found in domestic procedural law. Third, both US and German courts may be said to follow a similar trend by strictly preventing ICSID awards from further litigation at the enforcement stage. In this regard, ICSID awards are unanimously ac-

[75] The different structure of the US and German judiciaries may indeed condition any comparison of how both countries implement treaties. For a similar caveat, *vid.* C. Hoppe, "Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights", *European J. Int'l L.*, 18, 2007, pp. 317–336, at 334 (pointing out how the purported comparison of decisions rendered by the US Supreme Court and the German Constitutional Court on the same issue was conditioned by the fact that the US case "was further complicated by the difficult dynamic between the federal and state judiciaries in the United States" ando suggesting that "a fair comparison of the German and US approaches must acknowledge that the Bundesverfassungsgericht simply did not face any such challenge").

corded by both judiciaries a privilege status compared to any other foreign awards seeking enforcement.

Therefore, a certain consensus may be said to exist among US and German courts upon the point that ICSID awards are prevented from being litigated at the domestic level, since their enforcement is intended to be automatic and no procedural rights are conferred on the parties for challenging the award or opposing its enforcement before domestic courts. Indeed, courts in these two countries seem to align with a broader trend followed by judiciaries of other State parties to the ICSID Convention[76]. This appears to suggest that the enforcement mechanism designed by the latter is being ultimately operated by domestic judiciaries as homogeneously as it was purportedly intended to.

Nevertheless, a final caveat must be lodged in our conclusions as for the case of Germany. Though no evidence of domestic judicial practice opposing the automatic enforcement of ICSID awards has been found, some trends can be identified in the case law of both the Supreme and the Constitutional Court that could ultimately undermine the deference accorded to ICSID awards. In particular, the possibility has been suggested that, on constitutional grounds, domestic courts might be required to review the jurisdiction of ICSID arbitration tribunals, and ICSID awards might be denied enforcement if hypothetically considered to be inconsistent with core values of the German legal system.

It should be borne in mind that, though the US legal system has also been claimed to impose constitutional limitations on how treaties may operate at domestic level[77], the German Constitutional Court seems to place much more emphasis on zealously limiting the extent to which its own courts are bounded by decisions of international adjudicatory bodies which could be regarded as not entirely consistent with a claimed scope of core constitutional values. To this it must be added the fact that, unlike in the case of the US, German courts are simultaneously subject to the requirements of EU law. Were an ICSID award deemed inconsistent with the latter, a much more complex situation may arise.

[76] Recent decisions of Argentinian and Spanish courts on the enforcement of ICSID awards have endorsed a similar view. For the case of Argentina, *Vid.* Cámara Nacional de Apelaciones en lo Comercial, Decision of 18 August 2015 (CCI – Compañía de Concesiones de Infraestructura S.A. v Republic of Peru). For the case of Spain, *Vid.* Juzgado de Primera Instancia nº 101 de Madrid, Decision ("*Auto*") of 4 July 2013 (*Víctor Pey Casado v Republic of Chile*). For comments on the latter decision, *Vid.* J.A. Rueda García, "Primera ejecución forzosa conocida de un laudo arbitral CIADI en España (Víctor Pey Casado y Fundación Presidente Allende c. República de Chile): sin execuátur", *Cuadernos de Derecho Transnacional*, 6, 2014, pp. 414–430.

[77] *Vid.* T. Cruz, "Defending U.S. Sovereignity, Separation of Powers, and Federalism in Medellin v. Texas", *Harvard J. L & Public Policy*, vol. 33, 2010, pp. 25–35.

Bibliografía

ALFORD, R.P.: "Federal Courts, International Tribunals, and the Continuum of Deference", *Virginia J. Int'l L.*, 43, 2003, pp. 675–796.

ANDENAS, M. y Fairgrieve, D. (eds.): *Courts and Comparative Law*, Oxford: OUP, 2015.

BALDWIN, E., KANTOr, M. y NOLAN, M.: "Limits to Enforcement of ICSID Awards", *J. Int'l Aerb.*, vol. 23, nº 1, 2006, pp. 1–24.

BROCHES, A.: "Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution", *ICSID Rev.*, 1987, 2, 1987, pp. 287–334.

BUBROWSKI, H.: *Internationale Investitionsschiedsverfahren und nationale Gerichte*, Tübingen: Mohr, 2013.

BURKE–WHITE, W.W. y VON STADEN, A.: "Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations", *Yale J. It'l L.* vol. 35, 2010, pp. 283–346.

BUTLER, W.E.: *International Law in Comparative Perspective*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1980.

CRUZ, T.: "Defending U.S. Sovereignity, Separation of Powers, and Federalism in Medellin v. Texas", *Harvard J. L. and Public Policy* vol. 33, 2010, pp. 25–35.

ESCHER, A.: "Investitionsschiedsverfahren: Grundstrukturen und aktuelle Herausforderungen", in Christian Tietje (ed), *International Investment Protection and Arbitration*, Berlin, BWV, 2008, pp. 35–50.

FOLZ, H.-P.: "Germany", in Dinah Shelton (ed.), *International Law and Domestic Legal Systems*, Oxford OUP, 2011, pp. 240–248.

GÖMMEL, R.: *Investing into North African Solar Power: A Legal Framework for Risk Management and Prospects for Arbitration*, Heidelberg. Springer, 2015.

HOLLIS, D.B.: "A Comparative Approach to Treaty Law and Practice", in Duncan B. Hollis, Merritt R. Blakeslee and Benjamin Ederington (eds.), *National Treaty Law and Practice*, Martinus Nijhoff, Leiden, 2005, pp. 32–45.

HOPPE, C.: "Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights", *Eur. J. Int'l L.*, 18, 2007, pp. 317–336.

HUSA, J.: *A New Introduction to Comparative Law*, Oxford: Hart, 2015.

ICSID: *ICSID History of the Convention – Volume II–2*, Washington. ICSID, 2006.

INTERNATIONAL LAW ASSOCIATION: Committee on International Commercial, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London, ILA, 2000.

KEHOE, E.G.: "The Enforcement of Arbitral Awards Against Foreign Sovereigns – the United States", in R. Doak Bisho (ed.), *Enforcement of Arbitral Awards Against Sovereigns,* New York: JurisNet, 2009, pp.241–271.

KILGUS, S.: *Zur Anerkennung und Vollstreckbarerklärung englischer Schiedssprüche in Deutschland*, Berlin: Dunker & Humblot, 1995.

KLABBERS, J. y TROMMER, S.: "Peaceful Coexistence: Normative Pluralism in International Law", in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law. Exploring Global Governance*, Cambridge, CUP 2013. pp. 67–93.

KLABBERS, J.: "Constitutionalism Lite", *Int'l Organizations L. Rev.*, 2004, nº 1, pp. 31–58.

KLABBERS, J.: *Treaty Conflict and the European Union*, Cambridge, CUP, 2009.

KREUTZFELD, J.: *Investitionsschutz für einen deutschen Investor in der Republik Südafrika*, Hamburg, Lit, 2000.

KRISTIAN FAUCHALD. O.K. y NOLLKAEMPER, A. (eds.): *The Practice of International and National Courts and the (De)Fragmentation of International*, Oxford, Hart, 2012.

KÜHLING, J. y SCHWENDINGER, G.: "Rechtskraftdurchbrechung durch EU–(Beihilfen–)Recht – Die Tragweite der EuGH–Vorlage des LG Münster", *Europäische Wirtschafts– und Steuerrecht* 2005, nº 1, pp. 1–9.

LANDOLT, Ph.: "The Inconvenience of Principle: Separability and Kompetenz–Kompetenz", *J. Int'l Arb.*, vol. 30, nº 5, 2013, pp. 511–530.

LEVY, D.J. (ed.):, *International Litigation*, New York, ABA, 2003.

LÜKE, S.: *Punitive Damages in der Schiedsgerichtsbarkeit*, Tübingen, Mohr, 2003.

MAK, E.: "Comparative Law before the Supreme Courts of the UK and the Netherlands: An Empirical and Comparative Analysis", in Mads Andenas and Duncan Fairgrieve (eds.), *Courts and Comparative Law*, Oxford, OUP, 2015, pp. 407–436.

MATTILA, H.E.S.: "Cross–references in court decisions a study in comparative legal linguistics", *Lapland L. Rev.*, 2011, nº 1, pp. 96–121.

MENDEZ, M.: *The Legal Effects of EU Agreements*, Oxford, OUP, 2013.

NELLE, A.: *Anspruch, Titel und Vollstreckung im internationalen Rechtsverkehr*, Tübingen, Mohr, 2000.

NOLLKAEMPER, A.: *National Courts and the International Rule of Law*, Oxford, OUP, 2011.

ORTOLANI, P.: "Intra–EU Arbitral Awards vis–à–vis Article 107 TFEU: State Aid Law as a Limit to Compliance", *J. Int'l Disp. Settlement* , 2015, nº 6, pp. 118–135.

PAULUS, A.L.: "From Dualism to Pluralism: The Relationship between International Law, European Law and Domestic Law", in Pieter H. F. Bekker, Rudolf Dozer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy. Essays in Honor of Detlev Vagts*, Cambridge, CUP, 2010, pp. 132–153.

PAULUS, A.L.: "Germany", in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge. CUP, 2009, pp. 209–242.

RAYFUSE, R. (ed.): *ICSID Reports – Vol. 1* , Cambridge. Grotius, 1993.

REDPATH, E.P.: "Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records", *Emory L. J.*, vol. 62, 2013, pp.639–680.

REED, L., PAULSSON, J. y BLACKABY, N. (eds.): *Guide to ICSID Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2011.

RESCHKE–KESSLER, H.: "Der Einfluss des Völkervertragsrechts auf Vollstreckbarerklärung und Vollstreckung aus Schiedssprüchen auf der Grundlage von Investitionsschutzabkommen", in Walther Harding, Ulrich Herrmann and Achim Krämer (eds.), *Festschrift für Wolfgang Schlick zum 65. Geburtstag*, Cologne, Carl Heymanns, 2015, pp. 57–78.

REYNOLDS, W.L.: "The Iron Law of Full Faith and Credit", *Maryland L. Rev.*, vol. 53, 1994, pp. 412–449.

ROBERTS, A. STEPHAN, P., VERDIER. P-H. y VERSTEEG, M. (eds.): *Comparative International Law*, Oxford. OUP, 2015.

ROBERTS, A.: "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", Int'l Comp. L. Q., vol. 60, 2011, pp. 57–92.

SALACUSE, J.W.: *The Law of Investment Treaties*, Oxford, OUP, 2015.

SCHILF, S.: *Allgemeine Vertragsgrundregeln als Vertragsstatut*, Tübingen, Mohr, 2005.

SCHLOSSER, P.: *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*. 2nd ed., Tübingen, Mohr, 1989.

SCHORKOPF, F.: "The European Union as An Association of Sovereign States: Karlsruhe"s Ruling on the Treaty of Lisbon", *German L.J*., vol. 10, 2009, pp. 1219–1240.

SCHREUER, C.H.: *The ICSID Convention: A Commentary,* 2nd ed., Cambridge, CUP 2013.

SCHÜTZE, R.A., TSCHERNING, D. y WAIS, W.: *Handbuch des Schiedsverfahrens. Praxis der deutschen und internationalen Schiedsgerichtsbarkeit*, 2a ed., Berlin/New York, De Gruyter 1990.

SCHÜTZE, R.A.: *Das Internationale Zivilprozessrecht in der ZPO*, 2 ed., Berlin/New York, De Gruyter, 2011.

SCHWARTMANN, R.: *Private im Wirtschaftsvölkerrecht*, Tübingen, Mohr 2005.

SEMLER, F.J.: "Schiedsverfahren im Rahmen von Investitionsschutzabkommen der Bundesrepublik Deutchsland", *Schiedsverfahrenszeitschrift*, 2003, pp. 97–102.

SHELTON, D. (ed.): *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford, OUP, 2011.

SLOSS, D.: "Domestic Application of Treaties", in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford, OUP, 2012, pp. 367–395.

SLOSS, D.: "Treaty Enforcement in Domestic Courts: A Comparative Approach", in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge, CUP, 2009.

SWARTZ, D.L. y PETHERBRIDGE, L.: "The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study", *Cornell L. Rev*., vol. 96, 2011, pp. 1345–1374.

SZODRUCH, A.: *Staateninsolvenz und private Gläubiger*, Berlin, BWV, 2008.

TELMAN, J.: "A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law", in Marko Milanović (ed.), *Basic Concepts of Public International Law. Monism and Dualism*, Belgrado, University of Belgrade, 2013, pp. 571–590.

TIETJE, Ch.: "Die Beilegung internationaler Investitionsstreitigkeiten", in Thilo Marauhn (ed.), *Streitbeilegung in den internationalen Wirtschaftsbeziehungen*, Tübingen, Mohr 2005, pp. 47–62.

VAN ALSTINE, M.P.: "The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions", in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement*, Cambridge, CUP, 2009, pp. 555–614.

VAN DEN BERG, A.J.: "Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions", *ICSID Rev*., 2, 1987, pp. 439–456.

VANDEVELDE, K.J.: "A Brief History of International Investment Agreements", *U.C. Davis J. Int' L. & Policy*, 12, 2005, pp. 157–194.

WALSH, T.W.: "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?, *Berkeley J. Int"l L*., vol. 24, 2006, pp. 444–462.

WIECZOREK, B. y SCHÜTZE, R.A. (eds.): *Zivilprozessordnung und Nebengesetze: Großkommentar. Band 11*, 4 ed, Berlin/New York, De Gruyter, 2014.

WIECZOREK, B., SCHÜTZE, R.A. y OLZEN, D.: *Zivilprozessordnung und Nebengesetze: Großkommentar. Band 8*, 4 ed., Berlin/New York, De Gruyter, 2013.

ZÄTZSCH, J.: *Richterliche Unabhangigkeit und Richterauswahl in den USA und Deutschland*, Baden–Baden, Nomos, 2000.