

## STATE JURISDICTION AND IMMUNITIES

*Second Circuit Rejects Argentina's Immunity Claim in Action to Confirm ICSID Award*

In 2005, an International Centre for Settlement of Investment Disputes (ICSID) arbitration tribunal constituted pursuant to the bilateral investment treaty between Argentina and the United States<sup>1</sup> issued an award of \$133.2 million plus interest in favor of CMS Gas Transmission Company (CMS).<sup>2</sup> Blue Ridge Investments LLC (Blue Ridge) subsequently purchased CMS's interest in the award. In 2010, Blue Ridge filed a petition in the U.S. District Court for the Southern District of New York to confirm the award pursuant to Article 54 of the ICSID Convention.<sup>3</sup> Argentina moved to dismiss, arguing, *inter alia*, that it was immune from suit under the U.S. Foreign Sovereign Immunities Act (FSIA).<sup>4</sup> The district court denied the motion,<sup>5</sup> holding that Argentina was not entitled to sovereign immunity under both the FSIA's implied waiver provision<sup>6</sup> and its arbitral award exception.<sup>7</sup>

Argentina appealed the order denying its motion to dismiss to the U.S. Court of Appeals for the Second Circuit. Such an order is not a final decision and generally cannot be appealed.<sup>8</sup> However, the court of appeals found that it had jurisdiction under the *collateral order doctrine*,<sup>9</sup> which allows appeals of some orders determining important issues if they would be unreviewable on appeal from a final judgment.<sup>10</sup>

The appellate court agreed with the court below and rejected Argentina's claim of sovereign immunity.

[T]he FSIA "establishes a general rule of immunity from the jurisdiction of the courts in the United States, except as provided by certain statutory exceptions." . . . The exceptions to the FSIA's jurisdictional immunity from suit are described in 28 U.S.C. §1605(a). For the purposes of this appeal, only 28 U.S.C. §1605(a)(1) (describing the implied waiver exception) and 28 U.S.C. §1605(a)(6) (describing the arbitral award exception) are relevant.

## i. The Implied Waiver Exception

The implied waiver exception provides that:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver

<sup>1</sup> Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993).

<sup>2</sup> CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), *at* [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504\\_En&caseId=C4](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4).

<sup>3</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 UST 1270, 575 UNTS 159 (Mar. 18, 1965).

<sup>4</sup> Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1602–11 (2012).

<sup>5</sup> Blue Ridge Invs., LLC v. Republic of Argentina, 902 F.Supp.2d 367, 375 (S.D.N.Y. 2012).

<sup>6</sup> 28 U.S.C. §1605(a)(1).

<sup>7</sup> 28 U.S.C. §1605(a)(6).

<sup>8</sup> *See* 28 U.S.C. §1291.

<sup>9</sup> Blue Ridge Invs., LLC v. Republic of Argentina, No. 12-4139 (2d Cir. Aug. 19, 2013), 2013 U.S. App. LEXIS 17160, at \*16–22.

<sup>10</sup> *See* Will v. Hallock, 546 U.S. 345, 349 (2006).

which the foreign state may purport to effect except in accordance with the terms of the waiver . . . .

28 U.S.C. §1605(a)(1). Although this exception “must be construed narrowly,” *Cabiri v. Gov’t of Republic of Ghana*, 165 F.3d 193, 201 (2d Cir. 1999), we agree with the District Court, *Blue Ridge Invs.*, 902 F.Supp.2d at 374-74 [sic], that our decision in *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993), compels the conclusion that Argentina waived its sovereign immunity by becoming a party to the ICSID Convention.

In *Seetransport*, we held that by becoming a party to the Convention on the Recognition and Enforcement of Arbitral Awards (“CFREAA”), a foreign sovereign implicitly waived its immunity because the terms of the CFREAA provided, inter alia, that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .” 989 F.2d at 578 (quoting 9 U.S.C. §201). In other words, we held that “when a country becomes a [Contracting State] to the [CFREAA], by the very provisions of the [CFREAA], the [Contracting] State must have contemplated enforcement actions in other [Contracting] States.” *Id.*

The provisions of the ICSID Convention require us to reach the same conclusion here. As the District Court noted, “[p]ursuant to Article 54 of the Convention, [e]ach Contracting State shall recognize an award rendered pursuant to th[e] 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.” *Blue Ridge Invs.*, 902 F.Supp.2d at 374 (internal quotation marks omitted). In light of the enforcement mechanism provided by the ICSID Convention, we agree with the District Court that Argentina “must have contemplated enforcement actions in other [Contracting] [S]tates,” including the United States. *Seetransport*, 989 F.2d at 578.

## ii. The Arbitral Award Exception

In addition to the implied waiver exception, the District Court also correctly concluded that Argentina waived its sovereign immunity pursuant to the arbitral award exception. The arbitral award exception provides, in relevant part, that

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

28 U.S.C. §1605(a)(6).

To our knowledge, every court to consider whether awards issued pursuant to the ICSID Convention fall within the arbitral award exception to the FSIA has concluded that they do. *See, e.g., Cont’l Cas. Co. v. Argentine Republic*, 893 F.Supp.2d 747, 751 (E.D. Va. 2012) (“Nor, as several courts have noted, is there any doubt that ICSID arbitral awards fall within th[e] [arbitral award] immunity exception.”); *Funnekotter v. Republic of Zimbabwe*, No. 09 Civ. 8168(CM), 2011 WL 666227 at \*2 (S.D.N.Y. Feb. 10, 2011) (similar); *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009) (entering a judgment recognizing an ICSID Convention award against Egypt). We agree. Indeed, inasmuch as (1) the Award was issued pursuant to the ICSID Convention, which is “a treaty or other international agreement in force for the United States calling for the recognition

and enforcement of arbitral awards,” 28 U.S.C. §1605(a)(6)(B), and (2) the United States and Argentina are both parties to the ICSID Convention . . . , Argentina’s agreement to submit its dispute to arbitration under the ICSID Convention constituted a waiver of immunity from suit pursuant to 28 U.S.C. §1605(a)(6)(B).<sup>11</sup>

#### INTERNATIONAL ORGANIZATIONS

##### *New York Supreme Court Addresses Immunity of Heads of International Organizations*

In May 2011, Dominique Strauss-Kahn, the former head of the International Monetary Fund (IMF), was involved in a sexual encounter with a hotel employee in Manhattan.<sup>1</sup> The nature of the encounter is disputed. Criminal charges against Strauss-Kahn were dropped, but the hotel employee brought a civil action (later settled) in the New York Supreme Court in the Bronx.<sup>2</sup> (The New York Supreme Court is the trial-level court for civil cases in New York State.)

In the civil action, Strauss-Kahn argued that he was entitled to absolute immunity as head of the IMF, pursuant to customary international law as evidenced by Section 21 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.<sup>3</sup> This claim was rejected in a substantial opinion by Justice Douglas E. McKeon examining the official acts immunity of international organization officials under U.S. law. Because the case was settled following McKeon’s ruling, his opinion is the only assessment of Strauss-Kahn’s immunity claim. An excerpt follows:

In July, 1944, optimistic that the conclusion of World War II was near, delegates from 44 nations met at Bretton Woods, New Hampshire, to promulgate plans for a post-World War II international monetary system. From that gathering came the idea for the IMF. Soon, Articles of Agreement (“Articles”) for the proposed agency were drafted, which were ratified by the United States in 1945 by enactment of the Bretton Woods Agreement Act (22 U.S.C. §286 *et seq.*). By 1946, the Articles were ratified by sufficient nations to make the IMF a legally empowered specialized agency.

....

Turning to the issue of immunity, pursuant to IMF Articles §8(i), *all employees of the IMF are “immune from legal process with respect to acts performed by them in their official capacity”* except when the Fund waives [the] immunity. . . .” (emphasis supplied). This provision is expressly incorporated into the Bretton Woods Agreement (22 U.S.C. §286h), which gives the immunity provisions of the Articles “full force and effect in the United States . . . .” Hence, the document creating the IMF and the American statute approving it provide for “functional” or “official acts” immunity for IMF employees.

In 1945, the International Organizations Immunity Act of 1945 (IOIA) (22 U.S.C. §288d[b]), became law in the United States. This statute provides that:

<sup>11</sup> *Blue Ridge Invs.*, 2013 U.S. App. LEXIS 17160, at \*30–35 (footnotes omitted).

<sup>1</sup> Al Baker & Steven Erlanger, *I.M.F. Chief, Apprehended at Airport, Is Accused of Sexual Attack*, N.Y. TIMES, May 14, 2011, at [http://www.nytimes.com/2011/05/15/nyregion/imf-head-is-arrested-and-accused-of-sexual-attack.html?\\_r=0](http://www.nytimes.com/2011/05/15/nyregion/imf-head-is-arrested-and-accused-of-sexual-attack.html?_r=0).

<sup>2</sup> *Settlement Reached in Strauss-Kahn, NYC Hotel Maid Case*, CBS NEWS, Dec. 10, 2012, at [http://www.cbsnews.com/8301-201\\_162-57558280/settlement-reached-in-strauss-kahn-nyc-hotel-maid-case](http://www.cbsnews.com/8301-201_162-57558280/settlement-reached-in-strauss-kahn-nyc-hotel-maid-case).

<sup>3</sup> Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 UNTS 261, *available* at <http://www.uia.org/archive/legal-status-5-1>.