Figueiredo v. Peru: A Step Backward for Arbitration Enforcement

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A recent decision by the United States Court of Appeals for the Second Circuit represents a dramatic step backward for the enforcement in the United States of international arbitration awards. In Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, the Second Circuit held that enforcement of international arbitration awards pursuant to a multilateral treaty is subject to the U.S. common law doctrine of forum non conveniens (FNC). 1 Given that FNC relates to the convenience of holding a trial on the underlying merits, rather than the “convenience” of locating and executing upon assets post-judgment, FNC should have little if any relevance to enforcement actions. The Second Circuit’s reasoning is particularly weak because it did not proceed on commonly understood convenience factors at all. Instead, the Second Circuit expressed concern that enforcement in the United States would demonstrate improper respect for a Peruvian statute that would restrict payment of the arbitration award. 2 Therefore, the court deemed it inconvenient for any Peruvian entity that would be entitled to the protective armor of this statute in Peru to be subject

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2 Id. at *19–20.
to enforcement proceedings in the United States.\footnote{Id. at *21–22.}

The Second Circuit managed to mangle several doctrines at once, creating a number of problems. First, FNC should be a narrowly restricted doctrine that relates to the trial of underlying facts and not to the enforcement of a resulting award or judgment. Once an award is rendered, assets should be deemed convenient to attach wherever they are located, a point that is the essence of enforcement. Second, public policy concerns have nothing to do with FNC; rather, the public policy exception of the New York Convention is a wholly separate section of that treaty. Third, it is not the blanket “public policy” of the United States to defer automatically to the laws of other countries, especially where those laws interfere directly with the multilateral commitment made by both the United States and Peru to enforce international arbitration awards. By cloaking its public policy holding in FNC garb, the Second Circuit misapplied one doctrine, misstated another, and left enforcement of future international arbitration awards—at least in the critical commercial center that is New York—potentially in considerable disarray.

I. THE TREATY

As the dissent in \textit{Figueiredo} noted, we live in a period of an explosion in the incidence of international arbitration. “Between 1993 and 2003, the number of international arbitrations overseen by the leading arbitral institutions nearly doubled, and as of 2005 it was estimated that nearly ninety percent of transnational commercial contracts contained an arbitration provision.”\footnote{Id. at *30 (Lynch, J., dissenting) (citing Christopher R. Drahozal, \textit{New Experiences of International Arbitration in the United States}, 54 AM. J. COMP. L. 233, 233 & n.1 (2006)).}

One of the primary reasons for international arbitration’s growth and popularity is the relative ease with which a winner can collect on its award. It would be antithetical to arbitration, which has as its essence the parties’ election to \textit{avoid} the local court systems of their own countries (or any other), for the winning party to have to litigate a second time on the merits, this time in enforcement proceedings on the losing party’s home turf. Instead, under a treaty entitled the United Nations Convention on the Recognition and Enforcement of International Arbitration Awards, more commonly known as the New York Convention, an arbitration award rendered in the territory of one signatory is enforceable in the territory of another.\footnote{Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].} While there are a number of specified and limited exceptions, a re-litigation of the merits is not one of them. Under Article V(1) of the New York Convention, awards may be denied enforcement only where
there is a failure of due process or a failure by the arbitrators to act in accordance with their mandate (by, for example, proceeding in a manner, or deciding an issue, other than as prescribed by the contract’s arbitration clause). Under Article V(2) of the Convention, awards may also be denied enforcement where they are contrary to the public policy of the enforcing country.

The New York Convention enjoys broad international consensus, with 146 signatory countries. Its popularity makes it effective, and its effectiveness makes it popular. “Beyond cavil, the New York Convention is one of the most successful commercial treaties in history.” The effect has been to create a single, unified international enforcement regime. Broadly speaking, the New York Convention has led to jurisprudence in national courts that is pro-arbitration and pro-enforcement. “Most developed international arbitration regimes impose a presumptive obligation to recognize international arbitral awards. . . . Most developed national arbitration statutes also treat foreign arbitral awards as presumptively valid.”

From a U.S. standpoint, the existence of a multinational dispute resolution enforcement regime is particularly unique, because there is no similar treaty that exists to enforce U.S. court judgments. Despite several attempts over the last several decades, the United States is not party to any treaty by which other nations agree to enforce U.S. court judgments and the United States agrees to enforce foreign judgments. There are regional treaties that provide for enforcement of so-called “business-to-business” agreements where the underlying merits decision was rendered in the country (forum) selected by the parties in a commercial contract, id. arts. I, V, VIII. The Convention has not, however, been ratified by a sufficient number of countries to be presently operative. Only the United States and the European Union are signatories, and only Mexico has acceded to the Convention. Status Table: 37: Convention of 30 June 2005 on Choice of Court Agreements, HAGUE CONFERENCE ON PRIVATE INT’L LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited Jan. 17, 2011). On the subject of the Choice of Court convention generally, see, e.g., Woodward, supra note 11.
civil monetary enforcement of judgment conventions, including in Europe and in Latin America, but none of these treaties include the United States as a member.\textsuperscript{13} For the United States, arbitration enforceability stands apart.

The New York Convention did not, however, eliminate the need for any enforcement proceedings. The winning party still must domesticate the arbitration award by reducing it to a formal court judgment, and must then execute the judgment upon the assets of the losing party.\textsuperscript{14} In the United States, the process of domesticking the arbitration award is called “confirmation,” and is done pursuant to the Federal Arbitration Act (FAA).\textsuperscript{15} A party has three years to confirm an arbitration award.\textsuperscript{16} Chapter 2 of the FAA incorporates the New York Convention—and so, under U.S. law, the only prescribed statutory bases for not confirming an arbitration award are those found in Article V of the New York Convention. Such, at least, was where U.S. law stood before \textit{Figueiredo}.

\textbf{II. FORUM NON CONVENIENS}

FNC is a common law doctrine permitting courts to decline jurisdiction in cases connected to more than one legal system.\textsuperscript{17} In the United States, the Supreme Court originally adopted FNC in the context of domestic litigation to prevent plaintiffs from filing suit in states that had little connection to the underlying dispute when an alternative forum was available.\textsuperscript{18} Since the adoption of the federal venue transfer statute,\textsuperscript{19} however, “the federal doctrine of \textit{ forum non conveniens has continuing application only in cases where the alternative forum is abroad.”}\textsuperscript{20} Under that doctrine:

\begin{quote}
[W]hen an alternative forum has jurisdiction to hear the case, and \textit{when trial in the chosen forum} would “establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,” or when the “chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems,” the court may, in the exercise of its sound discretion,
\end{quote}

\begin{footnotes}
\item[14] New York Convention, supra note 5, art. IV.
\item[16] 9 U.S.C. § 207.
\end{footnotes}
dismiss the case.\textsuperscript{21}

Thus, in modern application, federal courts deciding whether to apply FNC must first determine whether an adequate alternative foreign forum exists for the plaintiff’s claims.\textsuperscript{22} If an alternative forum exists, the court must assess whether the litigants’ private interest and the public interest favor adjudication in the United States.\textsuperscript{23} In evaluating these interests, the court must also consider the appropriate deference due to plaintiff’s choice of forum.\textsuperscript{24}

The court’s assessment of whether the private interest and public interest favor the plaintiff’s choice of forum is essentially an evaluation of whether it is convenient to adjudicate the plaintiffs’ claims in the United States. The traditional private interest factors include ease of access to relevant evidence, the identity and location of witnesses, whether such witnesses can be compelled to attend hearings, and the relative expense to the parties.\textsuperscript{25} The traditional public interest factors assess the court’s administrative capability to adjudicate the case.\textsuperscript{26} Thus, the relevant public and private interest factors assess the litigants’ ability to fairly and reasonably present their claims and defenses, and the court’s ability to evaluate those claims and defenses. Importantly, these factors measure whether it is convenient to \textit{hold a trial on the underlying merits} of the parties’ claims in the United States.

III. THE PREQUEL: MONDE RE

Figueiredo’s damage to the international arbitration fabric was virtually inevitable once the Second Circuit rendered its 2002 decision in \textit{Monégasque de Reassurances S.A.M. v. NAKNafto-Gaz of Ukraine (Monde Re)}.\textsuperscript{27} In \textit{Monde Re}, the petitioner had won an arbitration award of \$88


\textsuperscript{22} \textit{Brand}, supra note 17, at 481.

\textsuperscript{23} Id.

\textsuperscript{24} Id. In the Second Circuit, evaluation of the deference due to plaintiff’s choice of forum is the first step in the FNC analysis. \textit{Norex Petroleum, Ltd. v. Access Indus., Inc.}, 416 F.3d 146, 153 (2d Cir. 2005) (describing the three-step analysis as the determination of (1) the appropriate deference due to plaintiff’s choice of forum; (2) whether an alternative forum exists; and (3) the public and private interests implicated by the choice of forum).

\textsuperscript{25} Id., supra note 17, at 476.

\textsuperscript{26} Id. at 477 (explaining that since the Supreme Court’s decision in \textit{Gilbert}, the public interest factors have included the congestion of the docket, the burden of jury duty on a community that has no relation to the underlying dispute, and conflict of laws problems).

\textsuperscript{27} 311 F.3d 488 (2d Cir. 2002).
million against a Ukrainian company called Ukragazprom. Petitioner then sought enforcement in New York against not only Ukragazprom, but the Government of the Ukraine. Ukraine moved for dismissal of the enforcement petition on the basis of FNC. The district court granted the motion to dismiss and the Second Circuit affirmed.

The Second Circuit acknowledged the argument “that the doctrine of forum non conveniens cannot be applied to a proceeding to confirm an arbitral award pursuant to the provisions of the Convention,” but rejected this argument on the basis that “the proceedings for enforcement of foreign arbitral awards are subject to the rules of procedure that are applied in the courts where enforcement is sought.” In basing its FNC decision on “rules of procedure,” the Second Circuit looked to Article III of the New York Convention, which provides 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, under the conditions laid down in the following articles.”

The enforcing forum’s “rules of procedure” therefore became an independent basis for denying enforcement—even though the plain language of the Convention provides that “[r]ecognition and enforcement of the award may be refused . . . only if” the party opposing enforcement establishes one of the Article V factors. Following Monde Re, courts in New York began consistently applying an FNC test in cases of enforcement of international arbitration awards.

IV. CRITICISM OF THE PREQUEL

Monde Re was not a popular decision. The use of Article III of the New York Convention to elevate FNC as a means to deny enforcement was viewed as doubly flawed: first, because conformity to procedural laws is not a listed Article V exception, and second, even if there was some basis for using procedure to deny enforcement, FNC can not be one of those

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28 Id. at 491.
29 Id. at 492.
30 Id.
31 Id. at 491.
32 Id. at 495.
33 Id. (emphasis added).
34 New York Convention, supra note 5, art. III (emphasis added); Monde Re, 311 F.3d at 496.
35 New York Convention, supra note 5, art. V (emphasis added); Monde Re, 311 F.3d at 496.
procedures:

[T]he debate on Article III confirms that the reference to “rules of procedure” relates simply to formalities for an application to confirm or enforce, including fees and the pro forma structure of the request. There is no evidence that the language was intended to incorporate doctrines that permit or require courts to prune their dockets in normal commercial litigation.\(^{37}\)

This was especially the case since “the doctrine of *forum non conveniens* generally is unknown in legal systems following the continental civil law model.”\(^{38}\) Civil law countries, which make up the majority of the signatory states under the Convention, could hardly have meant to import—indirectly at that—a doctrine to which they do not subscribe in the first place: “We... cannot assume that the drafters [of the New York Convention] would have understood the doctrine of *forum non conveniens* to be a ‘question of procedure.’”\(^{39}\)

One commentator expressed both hope and fear: the hope was that “the unique circumstances of the case... may limit potential abuse of the *forum non conveniens* doctrine in international arbitration,”\(^{40}\) but the fear was that instead “no guarantee remains that parties to arbitration will not use the *forum non conveniens* doctrine to establish lack of jurisdiction so an award may be set aside.”\(^{41}\) The same commentator predicted that:

Unless judges realize the need to preserve the narrow grounds for refusal to enforce arbitral awards outlined in Article V of the New York Convention and conclude that the doctrine should not be considered a “procedural” exception within the meaning and spirit of the treaty, the demise of its basic guarantees—reliability and efficiency in international arbitration—is practically certain.\(^{42}\)

Another commentator simply threw up his hands:

Because the US and most other signatories have ratified the Convention on a reciprocal basis it would be reasonable to expect US courts not to find procedural exceptions to its application not expressed in the Convention or considered applicable to their

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\(^{37}\) Park & Yanos, *supra* note 9, at 262.

\(^{38}\) Brand, *supra* note 17, at 468.

\(^{39}\) Hosaka v. United Airlines, Inc., 305 F.3d 989, 999 n.13 (9th Cir. 2002).


\(^{41}\) Id. at 911.

\(^{42}\) Id.
recognition obligations by other signatory nations. That, however, is
the present position in the prominent Second Circuit Court of
Appeals. . . .

Outside the Second Circuit, courts rejected the Monde Re
approach to FNC as a basis for denying enforcement of international treaties. Two
decisions stand out. In Hosaka v. United Airlines, Inc., the United States
Court of Appeals for the Ninth Circuit considered a case under the Warsaw
Convention (which relates to claims against airline carriers). The district
court had dismissed the underlying claim on the basis of FNC, and referred
it instead to the courts of Japan. The Ninth Circuit reversed, finding that
“[t]he text of the Warsaw Convention is silent on the availability of the
doctrine of forum non conveniens.” The court noted that the Warsaw
Convention (like the New York Convention) is a treaty and thus exceptions
to its enforcement should be narrowly construed: “‘Our home-centered
preemption analysis . . . should not be applied, mechanically, in construing
our international obligations.’ . . . Application of the doctrine of forum non
conveniens would undermine the goal of uniformity.” The Ninth Circuit’s
refusal to allow FNC to trump a treaty’s express language is especially
notable given that it was considering the more fundamental question of
where the case should be heard on the merits—not, as in Figueiredo, where
the post-merits, enforcement case should be heard. If FNC were to have
any application it would instead more properly be at the merits stage.

In TMR Energy Ltd. v. State Property Fund of Ukraine, the United
States Court of Appeals for the District of Columbia Circuit rejected an
FNC challenge to enforcement of a Swedish arbitration award. The court’s
holding, however, did not reject the application of FNC in its entirety (a
perhaps notable sign because future-Chief Justice Roberts was one of the
judges on the panel). Instead, the D.C. Circuit held that since the Ukrainian
government’s property could only be attached in the United States, and thus
“there is no other forum in which TMR could reach the [State Property
Fund’s] property,” FNC did not apply. Left unanswered by this decision
was whether FNC would apply if there was another available asset stream
to attach. There would seem to be no good reason to rule any differently in
such a situation:

Jeremy Harwood, The Role of Forum Non Conveniens in Declining to Recognise New
/news/features/article/28658/.

Hosaka, 305 F.3d 989.

Id. at 993.

Id. at 994.

Id. at 994 n.4, 997 (quoting El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 175
(1999)).


Id. at 304.
When an award debtor has assets and business in the United States, it is difficult to take seriously the concerns expressed about distance to the forum. If keeping property and doing business in the United States is not too much of a burden for the award debtor, why should the court be solicitous of the burden of defending the enforcement action?  

V. THE FIGUEIREDO DECISION

Having crawled out onto a limb in Monde Re, the Second Circuit proceeded to saw it off in Figueiredo. Its decision fulfilled all of the commentators’ worst fears about where Monde Re might lead. Indeed, it went beyond these fears by using FNC to confuse the public policy doctrine in the New York Convention.

Like Monde Re, Figueiredo concerned an attempt to enforce in New York an underlying arbitration award rendered in another country. 51 Also as in Monde Re, the enforcement action was directed against a governmental entity, although that presence was less controversial because the district court held that the contract signatory was an instrumentality of the government of Peru. 52 Petitioner thus sought to seize $21 million on account in New York City as a result of the government of Peru’s sale of bonds. 53

That the enforcement efforts were directed against a sovereign state brought into play a Peruvian statute that the Second Circuit ultimately found dispositive. 54 Peru passed a law that limited the annual amount that any state agency could pay on a judgment to three percent of that agency’s annual budget. 55 As a consequence, by the time the case was heard by the Second Circuit, the agency had paid only $1.4 million of the $21 million award. 56

The Peruvian agency disclosed the existence of the three percent statute in the Southern District of New York, and argued that the case should be dismissed on FNC grounds. 57 The district court denied the

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50 Park & Yanos, supra note 9, at 281.
52 Id. at *8. The Second Circuit did not dispute this aspect of the district court’s holding. See id. at *20 (noting that the signatory entity “appears to be an instrumentality of the Peruvian government”).
53 Id. at *1–2.
54 Id. at *8, *18–20.
55 Id. at *4–5.
56 Id. at *7.
motion. The Second Circuit, once seized of the appeal, invited the United States to submit a brief as amicus curiae. Interestingly, the United States did not urge reversal based on either FNC or, more broadly than that, the “comity” to which the United States displays to the laws of other countries. The United States instead asked only that the case be remanded on the particular, sovereign immunity aspect of the attachment of Peru’s property.

The Second Circuit reversed:

[W]e think the District Court erred. It is no doubt true that only a United States court may attach a defendant’s particular assets located here, but that circumstance cannot render a foreign forum inadequate. If it could, every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of FNC.

Inherent in the Second Circuit’s FNC holding was the importance of the three percent cap: “We agree with the Appellants that the cap statute is a highly significant public factor warranting FNC dismissal.” So important was the cap that the Second Circuit found that it trumped the general public policy in favor of arbitration and arbitration enforcement: “Although enforcement of such awards is normally a favored policy of the United States and is specifically contemplated by the Panama Convention, that general policy must give way to the significant public factor of Peru’s cap statute.”

Judge Lynch dissented, in an opinion twice as long as the majority ruling. He argued both that (i) the application of FNC violated the United States’ obligations under the New York Convention (and related Panama Convention); and (ii) in any event, FNC did not apply on the facts of Figueiredo. In Part I of the dissent, Judge Lynch explained that the mere application of FNC read into the Conventions an exception to enforcement

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58 Id. at 378.
60 Id. at *10.
61 Id.
62 Id. at *13 (emphasis added).
63 Id. at *19.
64 Id. at *21.
65 Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448, 1438 U.N.T.S. 248 [hereinafter Panama Convention]. The Panama Convention applies to the enforcement of international arbitration awards between citizens of members of the Organization States that have ratified the treaty. 9 U.S.C. § 305 (2006). The Panama Convention was modeled after the New York Convention, and the limited grounds for denying enforcement of an arbitral award are the same as the New York Convention. See Panama Convention, supra, art. V; New York Convention, supra note 5, art. V.
that does not exist. In particular, he noted that these treaties were specifically drafted to restrict the grounds for denying enforcement to those enumerated in Article V, and that this purpose was undermined by the application of the “vague and discretionary” FNC doctrine. In Part II, the dissent argued that even if FNC was available to the court, the motivations underlying the conventions should cause it to be construed narrowly and ultimately rendered inapplicable in this case. Here, Judge Lynch took special aim at what he found to be FNC’s unsuitability as a means to oppose enforcement of international arbitration awards:

[W]e should be especially wary of applying FNC expansively or in novel ways that suggest that enforcement plaintiffs should be referred back to the very courts they sought to avoid in resorting to arbitration . . . . Again, the essentially summary nature of enforcement proceedings matters. Forum non conveniens is intended to minimize practical problems so as to “make trial of a case easy, expeditious and inexpensive.” But in a summary proceeding to confirm an arbitration award, “the proof and logistics factors attendant to trial are non-existent.”

Thus, Judge Lynch recognized, as described above, that the FNC doctrine was developed as a means to limit plaintiffs from seeking adjudication of the merits of their claims in remote courts with no connection to the underlying dispute. Here, however, a decision on the merits had already been rendered, and the majority’s decision did not identify any logistical reason that the parties and/or the court could not adjudicate the petition to confirm. Indeed, as the dissent explained, the only substantive issue raised before the court by Figueiredo’s petition to confirm was whether the nominal signatory to the contract was an organ of the Peruvian state. “The district court did not find that a particularly difficult issue or one that was more expensive or difficult to litigate in the United States than in Peru . . . .” Moreover, “[a]s a sovereign state with substantial resources and with significant commercial interests in the United States, Peru . . . was amply able to litigate those questions here.”

Finally, the dissent also addressed directly the public policy implications of the decision, separating these out from FNC:

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67 Id. at *36–37.
68 Id. at *51 (citations omitted).
69 Supra Part II.
71 Id.
72 Id.
I recognize that there is something appealing about the argument that Figueiredo should not be able to levy on Peruvian assets in the United States to enforce a large judgment, and thereby escape Peruvian judgment-enforcement limitations designed to protect the budget of a developing country. But that concern is not one that sounds in the interests assessed by a forum non conveniens ruling. 73

Coming full circle, Judge Lynch stated his concern that “this decision will distort the law of forum non conveniens in this Circuit and undercut the transnational effort (in which the United States is an active participant) to promote commercial arbitration.” 74

VI. COMMENT

There are at least three significant flaws in the Second Circuit’s opinion.

First, the exceptions to enforcement in the New York Convention are stated expressly. 75 These exceptions do not include FNC. As the Supreme Court has stated, FNC is a judicially-made doctrine that permits a trial court to decline jurisdiction when it “thinks that jurisdiction ought to be declined.” 76 By adopting the New York Convention, however, the United States has already agreed that its courts will exercise jurisdiction to enforce international commercial arbitration awards that are subject to that treaty. Thus, the Second Circuit has now created a new treaty exception, in derogation of the United States’ obligations under international law and, given the incorporation of the New York Convention into the Federal Arbitration Act, in direct violation of that statute.

The Second Circuit’s willingness to carve out an additional exception to enforcement in the field of international arbitration is particularly startling given the United States Supreme Court’s recent holding in Hall Street Associates v. Mattel, Inc., in which the Court found that the only exceptions to enforcing a domestic arbitration award are those listed expressly in sections 10 and 11 of the FAA. 77 The Court rejected a “manifest disregard” challenge to confirmation on the ground that manifest disregard is not a basis under the FAA for denying confirmation: “We hold that the statutory grounds are exclusive.” 78 In the wake of Hall Street, it can hardly be U.S. law that our courts can find extra exceptions to international enforcement when none are allowed in domestic enforcement.

73 Id. at *68.
74 Id. at *71.
75 New York Convention, supra note 5, art. V.
78 Id. at 578.
“International law is part of our law . . .”79 U.S. courts cannot, therefore, wander through a treaty’s text to find exceptions to enforcement: “[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.”80

Second, the Second Circuit’s opinion had nothing to do, ultimately, with convenience. Again, in the FNC context, whether or not it is convenient to try the plaintiff’s claims depends on the parties’ ability to present their claims and defenses, and the court’s ability to evaluate those claims and defenses. Here, however, the Second Circuit used convenience as a fig leaf for the discomfort that it had with the fact that it could either allow enforcement, or defer to Peru’s statute. Uncomfortable with either bald choice, it chose instead to shroud its decision in U.S. procedural law instead of Peruvian substantive law. The disingenuousness of this approach does little to clarify either FNC or public policy jurisprudence.

Third, having wandered into the public policy area, the Second Circuit proceeded to get it entirely wrong. There is no question that enforcement of arbitration awards may be denied on grounds that the award is contrary to the public policy of the enforcing jurisdiction. This, unlike FNC, is an express exception under the New York Convention.81 Where the Second Circuit slipped is to conflate the public policy of the United States with the public policy of another country. Nothing in U.S. public policy would favor the three percent cap. The Second Circuit, however, applied an algebraic substitution principle: if the public policy of the United States is to show comity to the laws of other nations; and, if other nations pass laws that impact arbitration enforcement; then, by substitution, it must be the law of the United States to enforce laws that impact arbitration enforcement. Merely to state that principle demonstrates its illogic, but no other interpretation can be given the Second Circuit’s holding that “general policy must give way to the significant public factor of Peru’s cap statute.”82

The result is a new playbook for those seeking to avoid arbitration enforcement. Litigants who lost on the merits, and who park their assets in any New York bank, will consistently argue that it would be “inconvenient” for them to come to New York and protect these assets. They can point to any number of other places—perhaps, conveniently, their own country—where the arbitration winner can, indeed must, travel instead. If they are a governmental or quasi-governmental entity and can pass a statute or regulation that limits their “ability” to honor an arbitration award, so much

79 Paquete Habana, 175 U.S. 677, 700 (1900).
81 New York Convention, supra note 5, art. V(2).
the better, as their “inconvenience” thus increases exponentially under *Figueiredo*.

It may be argued that these fears are overblown since both *Monde Re* and *Figueiredo* concern the particular circumstance of government-owned parties as the subjects of enforcement, and that *Figueiredo* is further distinguishable on the grounds of the Peruvian statute at issue. Future litigants seeking enforcement, when confronted with a private rather than a governmental opponent, will certainly argue that both decisions can be distinguished on the facts. There is, however, nothing on the face of the holdings that contains those limits as a matter of law. *Monde Re* held, and *Figueiredo* followed, the principle that in enforcement cases under the New York Convention, courts in the Second Circuit needed to consider the convenience of the forum, without limitation. Neither case held that that convenience needed to be considered only in situations of state entities and/or protective statutes passed by those states. That the state was an actor, and that a statute existed, were facts that were then weighed in the test, but they were not facts that were conditions precedent for the test to be employed in the first place. *Figueiredo* had every opportunity to so confine *Monde Re*, but declined to do so. Accordingly, there remains the opportunity for mischief in all future related enforcement cases.\(^8^3\)

Moreover, if the root of the Second Circuit’s concerns in both *Monde Re* and *Figueiredo* was the governmental identity of the responding parties, there was no need to twist FNC law to protect these entities or to safeguard the comity that the United States shows foreign governments. That protection already existed in an express statute: the Foreign Sovereign Immunities Act (FSIA).\(^8^4\) The FSIA codifies the immunity of sovereign nations from suits in the United States while providing for exceptions to that immunity. One exception is where the state actor has agreed to submit to arbitration and the subsequent action in United States court is to enforce that arbitration award pursuant to U.S. treaty obligation.\(^8^5\) Further, section

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\(^8^3\) One consequence is that courts in the Second Circuit consistently are presented with, and feel compelled to consider, FNC arguments in international arbitration enforcement actions—irrespective of whether the losing arbitration party was a governmental entity. See, e.g., *Thai-Lao Lignite (Thailand) Co. v. Gov’t of the Lao People’s Democratic Republic*, No. 10 Civ. 5256, 2011 U.S. Dist. LEXIS 87844, at *23–34* (S.D.N.Y. Aug. 3, 2011); *Constellation Energy Commodities Group Inc., v. Transfield ER Cape Ltd.*, No. 10 Civ. 4434, 2011 U.S. Dist. LEXIS 83589, at *5–16* (S.D.N.Y. July 29, 2011). *Constellation* did not concern a government party, yet the court was presented with and had to consider the FNC argument anyway. *Id.* Both decisions rejected the FNC argument on the facts, but both cases were decided shortly prior to *Figueiredo*, and so it may fairly be questioned whether *Figueiredo* has breathed new life into the FNC argument. One early opportunity to gauge that question will occur this year, since the Thai-Lao case will be considered on appeal by the Second Circuit.


\(^8^5\) See 28 U.S.C. § 1605(a)(6) (providing for an exception where “the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private
1610 of the FSIA speaks directly to attachment of governmental property (i.e., the type of activity that might result from an enforcement action), and provides that government property is immune from execution unless the property was “used for a commercial activity.” By introducing FNC concepts to protect governments who lost arbitration awards and now face attachment proceedings, the Second Circuit adds an unnecessary and confusing gloss to the treatment of issues already addressed under the FSIA.

Perhaps most dangerously, Figueiredo exposes the United States to charges of hypocrisy. As arbitration expands into countries with a less traditional rule of law and less independent judiciary, the United States can be expected to take the lead in arguing that arbitration awards should be enforced. Figueiredo does not help this effort.