(e) The law applicable to the tribunal's procedure

Just as there is no single law that governs all the substantive issues arising out of disputes submitted to ICSID arbitration within the investor/State regime, there is no single law universally applicable to the procedural issues arising out of these disputes either. The search for a tidy pigeon hole in this respect is futile and one is reminded of the vast literature on the law governing arbitrations under the aegis of the Iran-US Claims Tribunal, which even in the twilight years of that institution has yet to produce a sustained consensus.[96] Rather than seeking to identify a single applicable law to ICSID procedure, it is appropriate to distinguish between various elements of the procedure which attract different applicable laws.

The ICSID Convention, in conjunction with the ICSID Arbitration Rules, seeks as far as possible to provide a comprehensive set of rules to govern the procedure of ICSID arbitrations. Among the procedural issues addressed by the Convention and Arbitration Rules are included matters relating to the constitution of the tribunal (articles 37–40, 56–58; Rules 1–12); matters relating to the conduct of the written and oral phases of the procedure (Rules 13–27, 29–32, 38) and the place of the proceedings (articles 62-3; Rule 13); the power to decide jurisdictional questions (article 41; Rule 41); evidentiary matters (article 43; Rules 33–37); the failure of a party to appear or present its case (article 45; Rule 42); the power to decide incidental claims or counterclaims (article 46; Rule 40); provisional measures (article 47; Rule 39); the procedure for rendering an award and for its interpretation, revision and annulment (articles 48–52; Rules 46–53); and costs (articles 59–61; Rule 28). Article 44 also confers upon the Tribunal the important power to decide procedural matters with respect to which the Convention and the Arbitration Rules are silent. Contrary, however, to a widespread conception of the ICSID regime, it is neither completely 'self-contained', nor 'autonomous'. The following examples demonstrate this point.

First, the parties to an ICSID arbitration can apply to municipal courts and other authorities for provisional measures for the preservation of their rights and interests either before the institution of ICSID proceedings or thereafter. It is a matter of debate as to whether the parties must consent to such in the arbitration agreement, given the uncertainty as to whether the amendment to Rule 39 of the ICSID Arbitration Rules by the ICSID Administrative Council (by the insertion of a new paragraph 5 making resort to municipal courts for this purpose conditional upon the consent of the parties) was a 'clarification' of article 26 (providing for the exclusivity of ICSID arbitration *vis-à-vis* other remedies) or an attempt to modify its application, which would be *ultra vires* the Administrative Council. If consent *is* required, then it is likely to be found to be implicit in many of the investment treaty arbitrations submitted to ICSID insofar as investment treaties often contain a provision to the effect that the submission of an investment dispute is without prejudice to the parties' rights to apply for injunctive relief before municipal courts. For instance, article 26(3) of the 2004 Model BIT for the United States of America provides that the investor:

> may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

[96] Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *BYIL* 151, 160–162.

Any such application for injunctive relief will naturally be governed by the *lex fori*.

There may be formidable reasons for a party to ICSID proceedings to petition municipal courts for injunctive relief in support of those proceedings and it cannot be assumed that adherence to an expansive interpretation of article 26 so as to rule out this possibility is likely to promote the effectiveness of the ICSID system. Interim measures to prevent assets from being dissipated or evidence from being destroyed, or to compel the production of documents or the attendance of witnesses, or to restrain a party from pursuing parallel proceedings in a municipal court, might play a decisive role in achieving justice in the reference to ICSID arbitration. Moreover, ICSID tribunals themselves are virtually impotent in this respect, having merely the power to 'recommend' (rather than to 'prescribe') provisional measures.[97] Such non-binding 'recommendations' have a poor track record of compliance[98] and are not generally enforceable in municipal courts.

Second, the municipal rules for the enforcement and execution of final judgments apply to the enforcement and execution of ICSID awards in the territories of Contracting States.[99] For example, in *AIG Capital Partners v Republic of Kazakhstan*,[100] AIG and the joint venture company formed for its investment in Kazakhstan petitioned the English High Court to enforce an ICSID award rendered in their favour against assets in London held by third party custodians on behalf of the National Bank of Kazakhstan. The Claimants had registered the award as a judgment under section 1 of the Arbitration (International Investment Disputes) Act 1966 and sought a Third Party Debt and Charging Order under Part 72.2 of the English Civil Procedure Rules and the Charging Orders Act 1979 to enable the Claimants to recover their award debt directly from the custodians of the assets. The orders sought by the Claimants were denied because, *inter alia*, the assets of the National Bank of Kazakhstan were protected by sovereign immunity from execution pursuant to section 14(4) of the State Immunity Act 1978.

Third, the law on sovereign immunity from execution (whether found in international custom, treaty or municipal law) applies to the execution of ICSID awards in the territories of both Contracting States (article 55) and non-Contracting States. Again, in *AIG Capital Partners v Republic of Kazakhstan*,[101] the execution of an ICSID award was refused by an English court due to a blanket immunity attaching to the 'property of a State's central bank' pursuant to section 14(4) of the State Immunity Act 1978.

Fourth, in the territories of non-Contracting States, ICSID awards are likely to be enforced in accordance with the rules for the enforcement of foreign arbitral awards (such as, where applicable, those contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or in municipal enactments giving effect to this Convention).

Fifth, where a party has instituted parallel proceedings in a municipal court in breach of article 26, municipal rules for the granting of a stay of court proceedings apply. In *Attorney-General v Mobil Oil NZ Ltd*, the New Zealand High Court stayed proceedings brought by the New Zealand Government because there was a 'relevant relationship or nexus' between the issues raised in these court proceedings and the pending ICSID

[97] See ICSID Convention, art 47 and ICSID Rules, r 39. There is now some doubtful authority that 'recommend' actually means 'prescribe': see CH Schreuer, L Malintoppi, A Reinisch, & A Sinclair, *The ICSID Convention* (2nd edn, Cambridge, CUP, 2009), 764–765.

[98] See eg *CSOB v Slovakia* (ICSID Case No ARB/97/4), Award, 24 May 1999, 5 *ICSID Reports* 330.

[99] Arts 54(1), 54.3.

[100] [2005] EWHC 2239 (Comm); 11 *ICSID Reports* 118.

[101] Ibid.

arbitration that had been commenced by Mobil.[102] The Court exercised its power to stay in accordance with its discretion under a domestic statute (s 8 of the Arbitration (International Investment Disputes) Act 1979).[103] In *MINE v Guinea*, the US Court of Appeals left upon the possibility that US courts could compel an ICSID arbitration upon a petition by one of the parties under the Federal Arbitration Act. The Court ruled that MINE was estopped from raising this argument because in earlier court proceedings it had represented that the *particular* arbitration clause referring to ICSID arbitration was incapable of specific performance and thus American Arbitration Association (AAA) arbitration should instead be compelled.[104]

Sixth, some Contracting States have, by their implementing legislation passed in accordance with article 69, reserved the possibility of subjecting an ICSID arbitration to certain procedural rules contained in their municipal laws.[105] To the extent that such municipal procedural rules supplement rather than modify the ICSID Arbitration Rules, it is doubtful that the Contracting State could be in violation of the ICSID Convention.

Further reading

P Muchlinski, F Ortino, & C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford, OUP, 2008)

RD Bishop, J Crawford, & WM Reisman, *Foreign Investment Disputes* (The Hague, Kluwer Law International, 2005)

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Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *BYIL* 151

C McLachlan, L Shore, & M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, OUP, 2007)

CH Schreuer, L Malintoppi, A Reinisch, & A Sinclair, *The ICSID Convention* (2nd edn, Cambridge, CUP, 2009)

[102] *Attorney-General v Mobil Oil NZ Ltd* (1987) 118 *ILR* 620, 630.

[103] See also, in England: s 3(2) of the Arbitration (International Investment Disputes) Act 1966, by which s 9 of the Arbitration Act 1996 applies to applications to stay in favour of ICSID arbitrations.

[104] *MINE v Guinea*, 693 F.2d 1094, 1103–4 (12 November 1982).

[105] See eg in England: s 3(1) of the Arbitration (International Investment Disputes) Act 1966, by which the Lord Chancellor can direct that ss 36, 38–44 of the Arbitration Act 1996 apply to ICSID arbitrations.

Chapter 54.2

OTHER SPECIFIC REGIMES OF RESPONSIBILITY: THE IRAN-US CLAIMS TRIBUNAL

DANIEL MÜLLER

The Iran-US Claims Tribunal was created after the revolutionary events in Iran which deeply disturbed the relationship between Iran and the United States at the end of the 1970s. The Algiers Declarations of 19 January 1981, which consisted of the General Declaration,[1] the Claims Settlement Declaration,[2] and several technical agreements, represent the settlement of all disputes between these two States, in addition to the settlement of the *Tehran Hostages* case.[3] The Tribunal has jurisdiction to decide cases between the two States concerning the interpretation and execution of the Algiers Declarations, to decide commercial inter-State claims and, in particular, to deal with claims arising from allegations made by a national of one State relating to damage caused by the other.

The Iran US-Claims Tribunal is unique. For one thing, it was created and worked in an environment that was politically difficult and unfavourable. Furthermore, it was given a broad and mixed jurisdiction, covering both public international law and private law claims, involving States and private actors. Finally, the great number of claims submitted and decisions given transformed this Tribunal into an exceptional arbitral mechanism.[4]

As such, the Tribunal has become one of the most significant arbitral mechanisms and its case law constitutes a rich and important source of public international and commercial law. The Tribunal has substantially contributed to the development and consolidation of the law on international responsibility. Its jurisdiction over and treatment of claims of private individuals nevertheless remains exceptional.

[1] 1 *Iran-US CTR* 3. [2] Ibid, 9.

[3] *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3.

[4] P Daillier, 'Tribunal irano-américain de reclamations' (1999) 45 *AFDI* 541.