B. THE INTERNATIONAL LAW OF TREATIES

The international law of treaties may also create grounds for refusing to enforce an ICSID award. Professor Schreuer, as noted above, has remarked that the “finality of [ICSID] awards would also exclude any examination of their compliance with international public policy or international law in general.” Here too, commentators may have too quickly dismissed the prospect that national courts will not review an ICSID award on the basis of international public policy, as illustrated by the reference to international ordre public found in SOABI v Senegal. Moreover, international law respecting Treaty obligations applies to both the interpretation of obligations of Contracting States under the ICSID Convention and to the circumstances in which those obligations may be suspended. Therefore, the international law of treaties may also come into play. Let us turn first to the interpretation of a Contracting State’s obligation under Article 54(1) to recognize and enforce an ICSID award.

The core instrument for interpreting treaties is the Vienna Convention on the Law of Treaties, to which virtually all countries are adherents. Article 31(3)(c) of the Vienna Convention tells us that treaties should be interpreted in light of “any relevant rules of international law applicable in the relations between the parties.” Sympathetic domestic courts might employ, among other arguments, the international law doctrines of “abuse of right,” “denial of justice,” “unfair and inequitable treatment” or “good faith” as bases to interpret the recognition and enforcement obligations established by ICSID Article 54(1). As the reader is aware, the scope of these doctrines, and indeed in some cases their very existence, can be controversial. For purposes of this article, we offer no opinion regarding those issues.

The doctrine of “abuse of right” arguably obligates parties to exercise a right reasonably and in good faith. An abuse of right may arise, for example, where a party “adopts a position contrary to one it has previously taken [and] the other party has relied on the initial position to its detriment.” This international precept is codified in the domestic law of many countries as well. Article 2 of the Swiss Civil Code states that “[e]very person limits to enforcement of icsid awards shall exercise his rights and perform his obligations in accordance with the rules of good faith. A manifest abuse of right is not protected by law.” Article 281 of the Greek Civil Code states that “[t]here is an abuse of a right under this article, if the party exercising that right goes well beyond the limits of accepted principles of good faith and morality. The exercise of a right becomes ‘abusive,’ if a reasonable person would say its exercise exceeded its financial or social objective.” Although admittedly in a different context, the concept of “abuse of right” was
employed by the arbitrators in recent ad hoc investor-state arbitrations involving geothermal power projects in Indonesia to limit the damages awarded against the Indonesian side.  

Mr Nolan and Mr Baldwin are, respectively, partner and associate at Milbank, Tweed, Hadley & McCloy LLP, specializing in international arbitration. Mr Kantor is a retired partner of Milbank Tweed, currently teaching at Georgetown University Law Center and serving as an arbitrator in international disputes. An earlier version of portions of this article was published in the December 2004 issue of the International Financial Law Review.

Schreuer, supra note 9, at 1129.

See A. F. M. Maniruzzaman, State Contracts with Aliens: the Question of Unilateral Change by the State in Contemporary International Law, 9 J. Int’l Arb 141 (No. 4, 1992).

Riahi v Iran, Award in Case No. 485 (600-485-1), Iran-United States Claims Tribunal, February, 27, 2003.


Referring Principles:

I.1.4 - Abuse of rights