Territorialized and Internationalized Arbitration Tribunals

The relevance of the place of arbitration and the tendency to deregulation are not necessarily contradictory. From a theoretical point of view, one might argue that deregulation of international commercial arbitration is to a large extent based upon the law of the place of arbitration which provides for deregulation and sets forth its conditions and limits.\(^1\)

1. Introduction

In order to determine the applicable law in any given arbitral proceeding, one must first establish the tribunals’ source of authority to render awards. This issue, which is intrinsically linked to the nature of the tribunals, has given rise to different theories, the most prominent of which are the seat theory and the delocalization theory. Following an assessment of these theories in light of state practice in the form of national arbitration laws, treaties, and jurisprudence, together with arbitration rules, awards, and scholarship, we will conclude that the tribunals may be divided into two categories. Based on the international principle of territorial sovereignty, coupled with considerations of due process, finality, and consistency, the tribunals’ mandate may generally be said to stem from the state in which the tribunal is seated. Most types of investment tribunals may therefore be classified as ‘territorialized’.\(^2\) However, and by way of exception, states may relinquish their sovereign right to regulate activities taking place on their territory; and in the area of investment arbitration, this is the case with respect to tribunals established pursuant to the (ICSID) Convention on the Settlement of Disputes between States and Nationals of Other States,\(^3\) and the Iran–United States Claims Tribunal, set up on the basis of the Algiers Accords.\(^4\) These latter tribunals,

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2. In terms of numbers of arbitrations, however, these territorialized tribunals are probably in the minority. It is difficult, if not impossible, to give an exact percentage, as arbitrations conducted outside the ICSID framework are not always registered. Yet, there are some estimates. See S. Wittich, ‘The Limits of Party Autonomy in Investment Arbitration’ in Investment and Commercial Arbitration: Similarities and Divergences (C. Knahr, ed., Utrecht, Eleven International Publishing, 2010), 47, 48 (‘With 63.5 per cent of the known investment disputes, ICSID clearly holds the leading position in investment, especially treaty-based arbitration’ [references omitted]). Another difficulty is that references to ICSID often include the ICSID Additional Facility Rules. See UNCTAD, ‘Latest Developments in Investor–State Dispute Settlement’ IIA Monitor No. 1 (April 2012), at 1.  
whose mandate is founded in the international legal order, will be referred to as ‘internationalized’.

As to the structure of our analysis, we will first observe some special features of the arbitral process (Section 2). In Section 3, we will proceed to examine the delocalization theory and the seat theory, respectively. In brief, adherents of the delocalization theory advocate the view that the arbitral process is—or at least should be—self-contained, with little or no interaction with a particular national legal order. Contrariwise, according to the seat theory, arbitral proceedings are subject to the law of the state in which the award is rendered—also referred to as the tribunals’ juridical seat. While emphasizing the considerable influence that the delocalization theory has had on state practice, it will be concluded that the same state practice supports the seat theory, at least as concerns territorialized tribunals. In Section 4, we will discuss separately the internationalized nature of tribunals operating pursuant to a treaty regime—the Iran–United States Claims Tribunal and ICSID tribunals—before reaching general conclusions in Section 5.

2. Features of the Arbitral Process

An inherent feature of and requirement in arbitration is consent. In other words, it is up to both parties to the dispute to agree to settle it through arbitration. The arbitral process thus differs from national litigation in that the jurisdiction of domestic courts does not depend on the consent of the respondent. The process is rather more akin to that before international courts and tribunals, as the latter do require the consent of both states parties in order to render a judgment or an award.

In investment arbitration, the parties’ consent is provided for in their arbitration agreement, which may refer to an existing dispute (compromis); or, more commonly, it may be contained in an arbitration clause concerning future disputes (clause compromissoire). The latter may be found in an investment contract entered into by the disputing parties; or it may be included in the national legislation of the host state, or in a bi- or multilateral investment treaty to which the host state and the investor’s home state are parties. Since the mid-1980s, numerous awards have been rendered on the basis of host state consent provided in investment laws; or especially in recent years, investment treaties, adopted or entered into by the host state with regard to disputes arising out of investments made in its territory. The term ‘arbitration without privity’ has been used to describe this mode of arbitrating, whereby the host state makes its

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5 See generally C. Schreuer, ‘Consent to Arbitration’ in Oxford Handbook of International Investment Law (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 830. But see A.M. Steingruber, Consent in International Arbitration (Oxford, Oxford University Press, 2012), 1 (‘[T]he certainty that “arbitration is consensual by nature” or that “arbitration is a creature of contract” has begun to be questioned’).
7 See Status of Eastern Carelia Case (Fin. v USSR), 1923 PCIJ (Ser. B) No. 5, at 27 (Advisory Opinion of 23 July).
10 See A.R. Parra, ‘Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment’ (1997) 12(2) ICSID Rev-FILJ 287. See also Chapter 1, Sections 2–3 (on motivations for the study and the scope of and terminology used in the study); Chapter 4, Section 3.2 (on arbitration without privity).
offer to arbitrate disputes with foreign investors, and it is up to the investor to accept
the offer by instituting proceedings against the host state.\textsuperscript{11} As stated in \textit{El Paso Energy
International Company v Argentine Republic} (2006):

[An ICSID tribunal] can only have jurisdiction if there is mutual consent. It is now established
beyond doubt that a general reference to ICSID arbitration in a BIT can be considered as being
the written consent of the State [. . .], and that the filing of a request by the investor is considered
to be the latter’s consent.\textsuperscript{12}

The instruments that provide for consent will to a greater or lesser extent set out the
framework for the arbitration. The parties may formulate their own rules in this
respect,\textsuperscript{13} but most often they refer to a standard set of arbitration rules. These rules
may provide for either non-institutionalized (ad hoc) or institutionalized arbitration.
The former is illustrated by the UNCITRAL Arbitration Rules\textsuperscript{14} and the latter by
the rules promulgated by (private) institutions across the world, such as the Inter-
national Chamber of Commerce (ICC),\textsuperscript{15} the London Court of International Arbi-
tration (LCIA),\textsuperscript{16} the Stockholm Chamber of Commerce (SCC),\textsuperscript{17} the American
Arbitration Association (AAA),\textsuperscript{18} the Cairo Regional Centre for International Com-
mercial Arbitration (CRCICA),\textsuperscript{19} the China Council for the Promotion of Inter-
national Trade/China Chamber of International Commerce (CIETAC),\textsuperscript{20} the
Netherlands Arbitration Institute (NAI),\textsuperscript{21} the Dubai International Arbitration
Centre,\textsuperscript{22} and the World Bank.\textsuperscript{23}

\textsuperscript{11} J. Paulsson, ‘Arbitration Without Privity’ (1995) 10(2) \textit{ICSID Rev.-FILJ} 232. See also V.
\textit{Suffolk Transnat L. Rev.} 367, 373 (in such a legal construction, the agreement to arbitrate is not
part and parcel of an arm’s length transaction. It is expressed in two independent consents—or an
‘offer’ and an “acceptance”—that remain separated by the invisible sovereign veil of the state, which is
never pierced by the handshake of the parties. But this strange transnational transaction is not only
separated in terms of jurisdicitional space. It is also separated in terms of time, since at the time when
the foreign investor accepts the state’s offer to arbitrate, the dispute between the parties has already
arisen.).

\textsuperscript{12} \textit{El Paso Energy International Company v Argentine Republic}, ICSID Case No. ARB/03/15,
Decision on Jurisdiction, 27 April 2006 (L. Callsisch, B. Stern, P. Bernardini, arbs), para. 25.
\textsuperscript{13} See UNCITRAL, \textit{Notes on Organizing Arbitral Proceedings}, XXVII UNCITRAL Y.B. (1996), at
para. 16.
\textsuperscript{14} UNCITRAL Arbitration Rules (as revised in 2010). See also J.D. Franchini, ‘International
Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement’
(1994) 62 \textit{Fordham L. Rev.} 2223, 2226–7 (the UNCITRAL Arbitration Rules may also be used by
tribunals set up under institutions such as the ICC, in which case the parties stipulate that the
UNCITRAL Rules will substitute for the institution’s rules).
\textsuperscript{15} Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January
\textsuperscript{16} Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (as in force as from
1 January 2010) (hereinafter SCC Rules).
\textsuperscript{17} American Arbitration Association, International Center for Dispute Resolution (ICDR) Inter-
national Dispute Resolution Procedures (Arbitration Rules amended and effective 1 June 2009).
\textsuperscript{18} Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arbitration Rules
(in force as from 1 March 2011) (hereinafter CRCICA Rules).
\textsuperscript{19} China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules
(effective 1 May 2012).
\textsuperscript{20} Netherlands Arbitration Institute (NAI) Arbitration Rules (effective 1 January 2010) (hereinafter
NAI Rules).
\textsuperscript{21} Dubai International Arbitration Centre (DIAC) Arbitration Rules (effective 7 May 2007).
\textsuperscript{22} See ICSID Convention; ICSID Additional Facility Rules (as amended and in effect from
10 April 2006).
Whereas ad hoc arbitration gives the parties the utmost control over the procedure, institutionalized arbitration adds the comfort element of knowing that the institution has experience in the way it handles arbitral proceedings; and often, their secretariat comprises counsel to whom the parties and arbitrators may turn for advice.\textsuperscript{24} Also, the institutions may fulfill a more stringent supervisory role than each tribunal in isolation. The work of ICC arbitral tribunals, for instance, is monitored by the ICC International Court of Arbitration, which oversees the arbitration process from the initial request to the final award.\textsuperscript{25}

Apart from neutrality,\textsuperscript{26} one reason for resorting to arbitration is the comparative flexibility it provides to parties and arbitrators as opposed to court litigation. Arbitration rules allow the disputing parties much freedom in tailoring the proceedings to suit their special wishes; and they provide default provisions that apply in case the parties have not agreed otherwise. Such procedural freedom is illustrated by the UNCITRAL Arbitration Rules, which state that disputes shall be settled in accordance with these Rules ‘subject to such modification as the parties may agree’.\textsuperscript{27} Further, it is often explicitly mentioned that the parties may agree on such matters as the identity of the arbitrator(s) or an appointing authority;\textsuperscript{28} the place of arbitration;\textsuperscript{29} and, as will be amply demonstrated in the subsequent chapters, the law applicable to the merits of the dispute.\textsuperscript{30} Some rules, however, are mandatory in nature, such as the requirement that the parties must be treated with equality and be given a reasonable opportunity of presenting their case.\textsuperscript{31}

Other noteworthy features of the arbitral process include first, the doctrine of Kompetenz/Kompetenz, by virtue of which tribunals may rule on their own jurisdiction.\textsuperscript{32} Secondly, arbitrators may render an award despite the fact that a party does not appear or otherwise frustrates the proceedings.\textsuperscript{33} A last characteristic is the final and binding nature of the award. The SCC Rules, for instance, provide that ‘[a]n award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay.’\textsuperscript{34}


\textsuperscript{25} See ICC Rules (2012), arts 1, 33. See also J.P. Gaffney, The Liberty of Decision of the Arbitral Tribunal, TDM (6 June 2008).

\textsuperscript{26} Cf. I. Alvik, Contracting with Sovereignty (Oxford, Hart, 2011), 44 (‘[T]he foreign investors are sceptical towards litigation in national courts. This is not necessarily only because it is believed that the courts will be corrupt or unreliable or openly partisan as such. Even the most impartial national court may show greater understanding for the concerns of its home government than a neutral and detached international judge’).

\textsuperscript{27} UNCITRAL Arbitration Rules (2010), art. 1(1). See also ICSID Convention (1965), art. 44.

\textsuperscript{28} See UNCITRAL Arbitration Rules (2010), arts 6–7; ICSID Convention (1965), art. 37(2).

\textsuperscript{29} See UNCITRAL Arbitration Rules (2010), art. 18; ICSID Convention (1965), arts 62–3.

\textsuperscript{30} See generally Chapter 3, Section 3.1 (on party agreement on the applicable law). See also Chapter 5, Section 2.1 (on party agreement on the application of national law); Chapter 6, Section 2.1 (on party agreement on the application of international law).

\textsuperscript{31} See UNCITRAL Arbitration Rules (2010), art. 17(1). Reference is also made to the impartiality and independence of the arbitrators. See SCC Rules (2010), art. 14; ICSID Convention (1965), art. 14.

\textsuperscript{32} See, e.g., LCIA Rules (1998), art. 23.1; ICSID Convention (1965), art. 41(1). See also Texaco Overseas Petroleum Co. & California Asiatic Oil Co. (TOPCO/CALASIATIC) v Gov’t of the Libyan Arab Republic, Decision on Jurisdiction, 27 November 1975 (Dupuy sole Arb.), 53 I.L.R. 389, 407 (1979).

\textsuperscript{33} See SCC Rules (2010), art. 30; ICSID Convention (1965), art. 45(2).

\textsuperscript{34} SCC Rules (2010), art. 40; ICSID Convention (1965), art. 53(1); Iran–US Claims Settlement Declaration (1981), art. IV(1).
Several sets of arbitration rules stipulate that the parties to the proceedings waive any form of recourse against the award.35

3. Territorialized Tribunals

With the aim of identifying the origin of the mandate of arbitral tribunals, we will in what follows examine the delocalization theory and the seat theory.36 It will be demonstrated that the former theory has had much impact as to the extent to which states regulate arbitration proceedings. In particular, this is illustrated by the degree of procedural freedom and flexibility that national arbitration laws grant the disputing parties and the arbitrators. Nevertheless, the same state practice confirms the seat theory in that it uniformly lays down requirements for the arbitral process. While the delocalization theory thus has had a strong normative impact on the way in which states regulate arbitration, empirically, the seat theory is better suited to explain the regulation that in fact takes place. As the mandate of the tribunals therefore must be said to stem at least partly37 from the national legal order in which they are seated, the nature of the tribunals will be characterized as ‘territorialized’. It is noted at the outset that this designation does not apply to the Iran–United States Claims Tribunal and ICSID tribunals, which by virtue of the treaties establishing them are insulated from the application of the national law of their seat. For that reason, their legal framework is separately in Section 4.

3.1. The delocalization theory

The features of the arbitral process explored in Section 2 have led certain scholars to conclude that the tribunals are, or—at the very least—should be, characterized as delocalized, a-national, or supranational.38 In short, this body of scholarship argues that the parties ought to be able to agree to have their dispute settled in accordance with their arbitration agreement and the arbitration rules to which it may refer, without or with minimal interference from any national legal order.39 According to Lew,

35 See, e.g., ICC Rules (2012), art. 34(6); LCIA Rules (1998), art. 26.9. Both instruments add the important condition that such waivers must be ‘validly made’. See also art. 29.2.

36 According to Paulsson, there are ‘four more or less competing propositions. The first is that any arbitration is perforce national, and lives or dies according to the law of the place of arbitration. This might be called the territorial thesis. The second is that arbitration may be given effect by more than one legal order, none of them inevitably essential. This is the pluralistic thesis. The third is that arbitration is the product of an autonomous legal order accepted as such by arbitrators and judges. The fourth is that arbitration may be fully effective pursuant to conventional arrangements that do not depend on national law or judges at all.’ J. Paulsson, ‘Arbitration in Three Dimensions’ (2011) 60(2) Int’l & Comp. L.Q. 291, 292 (emphasis in original). See also E. Gaillard, ‘The Representations of International Arbitration’ (2010) 1(2) J. Int'l Disp. Settlement 1, 9 (referring to the ‘monolocal’, ‘multilocal’, and ‘transnational’ approach); E. Gaillard, Legal Theory of International Arbitration (Leiden, Nijhoff, 2010).

37 That is, next to the parties’ arbitration agreement. See fn. 77 (on the hybrid theory).


39 Cf. N. Blackaby et al., Redfern and Hunter on International Arbitration (Oxford, Oxford University Press, 2009), 188. (The authors explain the delocalization theory as ‘the idea being that instead of a dual system of control, first by the lex arbitri and then by the courts of the place of enforcement of the award, there should be only one point of control—that of the place of enforcement. In this way, the whole world (or most of it) would be available for international commercial arbitrations; and international commercial arbitration itself would be “supra-national”, “a-national”, “transnational”, “delocalised”, or even “expatriate”. More poetically, such an arbitration would be a “floating arbitration”, resulting in a “floating award”’
The ideal and expectation is for international arbitration to be established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration agreements and awards should be recognised and given effect, with little or no complication or review, by national courts.40

More forcefully, Goldman concludes: ‘Unless one adopts the irrational and unjustifiable system of attaching the arbitral process to its seat [. . .] any search for a way of grounding the arbitration in some system leads one unavoidably to the need for an autonomous non-national system.’41 And in 1989, the Institute of International Law adopted a resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises,42 in which it explicitly rejects juridical and philosophical objections to a-national or denationalized arbitration.43

Various considerations of both a theoretical and practical nature have been put forward in favour of the delocalization theory. Foremost of these, its proponents emphasize the parties’ underlying arbitration agreement, which, they point out, constitutes the foundation for the establishment of the tribunals. Von Mehren, for instance, in his function as rapporteur to the aforementioned resolution of the Institute of International Law, refers to the primacy of the arbitration agreement as the arbitration’s ‘charter’.44 In addition to the fact that the state has no influence or control over the decision of the parties to agree to submit their disputes to arbitration, a further and related argument concerns the inherent differences between arbitrators and national judges. Whereas the latter derive their authority from the state, the former—it is contended—do not owe allegiance to any state; and consequently, they are not responsible for upholding their laws.45 Combined, these considerations have given rise to what has been termed the contractual theory.46

Arbitration frequently takes place in a state different from the home state of any of the parties to the proceedings.47 With this in mind, the supporters of the delocalization

[references omitted]). See also Paulsson, fn. 36, at 298 (‘So-called “delocalised awards” are not thought to be independent of any legal order. “Delocalisation” refers to the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it. “Plurilocalisation” would perhaps have been more accurate’ [emphasis in original, references omitted]).

43 IIL Resolution, Explanatory Note by A.T. von Mehren.
45 See Lalive, fn. 38, at 159, quoted in Paulsson, Arbitration Unbound, fn. 38, at 362 (the arbitrator’s mission, conferred by the parties’ consent, is one of a private nature, ‘and it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration’).
47 See P. Read, ‘Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium’ (1999) 10 Am. Rev. Int’l Arb. 177, 178. But see ADF Group Inc v United States, ICSID Case No. ARB (AF)/00/1, Procedural Order No. 2 (C.B. Lamm, A. de Mestral, F.P. Feliciano, arbs), para. 21. See also M. Blessing, Introduction to Arbitration: Swiss and International Perspectives (Basel, Helbing und Lichtenhahn, 1999), 210 (A ‘clearly noticeable trend’ is that host countries for large investment or infrastructure projects will not only impose their own national laws, but also their own
theory point to the transnational nature of the arbitration, and challenge the burden placed upon it by the law of the tribunal’s seat.\textsuperscript{48} While national courts and purely domestic arbitral tribunals have intrinsic connections with the seat, arbitral tribunals resolving disputes involving parties from different states are often chosen for reasons of convenience; and in case the parties cannot agree on the place of arbitration, the seat may be selected by the tribunal and/or the arbitral institution.\textsuperscript{49} It has therefore been argued that arbitrators should not seek guidance from the law of the tribunal’s seat, especially as this law is not drafted to tailor to the needs of international commercial arbitration.\textsuperscript{50}

It has further been pointed out that an important reason why the parties to a transnational dispute agree to submit a dispute to arbitration is that they aim to place their relationship on a non-national plane, so as to avoid all national (courts of) law(s).\textsuperscript{51} This view has been advanced in particular for investment arbitration. In this vein, the tribunal in \textit{Saudi Arabia v Arabian American Oil Company (Aramco)} (1958) held that the jurisdictional immunity of states ‘excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases’.\textsuperscript{52}

While arbitration has been described as a form of non-national, private justice system,\textsuperscript{53} some have gone beyond the sole rejection of any link to a national legal order and have sought to ground the arbitral process in the international legal order. For instance, the tribunal in \textit{Aramco} concluded that ‘the arbitration, as such, can only be governed by international law’, rather than the law of the seat, Geneva, Switzerland.\textsuperscript{54}

Also, sole Arbitrator Dupuy in \textit{Texaco Overseas Petroleum Company and California Asiatic Oil Company (Topco/Calasiatic) v Government of the Libyan Arab Republic} (1977) stated that ‘[o]ne cannot accept that the institution of arbitration should escape the reach of all legal systems and be somehow suspended in vacuo’, and that therefore, the arbitration was ‘directly governed by international law’.\textsuperscript{55} A final example here is the decision by sole Arbitrator Mahmassani, sitting in Geneva, who, in the case of \textit{Liamco v Libya}, determined that ‘in his procedure [he] shall be guided as much as possible by the general principles contained in the [Model Rules] on Arbitral Procedure of the International Law Commission’.\textsuperscript{56} In the final award, he offered the following reason for this decision: ‘It is an accepted principle of international law that the arbitral rules of procedure shall be


\textsuperscript{49} See, e.g., ICC Rules (2012), art. 12.

\textsuperscript{50} See, e.g., Paulsson, \textit{Arbitration Unbound}, fn. 38, at 369 (referring to practice freeing transnational contracts from ‘national Procrustean beds’).


\textsuperscript{52} \textit{Saudi Arabia v Arabian American Oil Co. (Aramco)}, Award, 23 August 1958 (Sauser-Hall, Badawi/M. Hassan, Habachy, arbs), 27 I.L.R. 117, 136, 154–5 (1963) (hereinafter \textit{ARAMCO}).


\textsuperscript{54} \textit{ARAMCO}, fn. 52, Award, 27 I.L.R. 117, 154–6.

\textsuperscript{55} \textit{TOPCO/CALASIATIC}, fn. 32, Award, 19 January 1977 (Dupuy, sole arb.), at para. 16.

\textsuperscript{56} \textit{Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic}, Award, 12 April 1977 (S. Mahmassani, sole arb.), 20 I.L.M. 1 (1981).
determined by the agreement of the parties, or in default of such agreement, by decision of the Arbitral Tribunal, independently of the [...] law of the seat.\textsuperscript{57}

Speaking of international commercial arbitration in general, Lalive suggests:

While he is clearly not an organ of the State, the international arbitrator is not acting in a legal vacuum and is not called upon to decide, so to speak, as if he did not belong to this world! The question may be raised here, in passing [...] whether the arbitrator is not, perhaps, the organ of the international community, be it the community of States or the ‘international community of businessmen’ (in which more and more States and State organs appear to be active) or both international communities.\textsuperscript{58}

This suggestion was taken up by the Institute of International Law in its 1989 Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises.\textsuperscript{59} In the Explanatory Note to this Resolution, Rapporteur von Mehren states that the tribunal’s authority originates in an international order resting ‘on a broad consensus to the effect that those engaged in international commercial and economic intercourse are entitled to establish a dispute-resolution process—and to stipulate for its use a body of substantive rules and principles—that exists and operates independently of national legal orders’.\textsuperscript{60} In a similar sense, Gaillard describes a ‘transnational’ ‘representation of international arbitration’ according to which ‘the legally binding nature of arbitration is rooted in a distinct, trans-national legal order, that could be labelled as the “arbitral legal order”’.\textsuperscript{61} In this ‘representation’, he states, the arbitrator is analogized with an international judge; and the award is seen as a ‘decision of international justice, just as would be a decision rendered by a permanent international court established by the international community. It is neither national nor Stateless; it is international.’\textsuperscript{62}

Indicative of the view that arbitral tribunals have an international lex arbitri is also the statement by the UNCITRAL Tribunal in Methanex v United States (2005), according to which the tribunal finds itself bound by ‘international constitutional law’:

\[T\]he Tribunal agrees with the implication of Methanex’s submission with respect to the obligations of an international tribunal—that as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or jus cogens and not to give effect to parties’ choices of law that are inconsistent with such principles.\textsuperscript{63}

As will be demonstrated later, the delocalization theory has had much influence on state practice in that states have adopted flexible arbitration laws tailored to the needs of the

\textsuperscript{57} LIAMCO, 20 I.L.M. 1, 42 (1981).
\textsuperscript{58} P. Lalive, \textit{Transnational (or Truly International) Public Policy and International Arbitration}, ICCA Congress Series No. 5 (1986), para. 44. See also Fragistas, fn. 51, at 14–15 (‘[I]l’arbitrage supra-national doit donc être un arbitrage international, c’est-à-dire un arbitrage qui échappe à l’emprise de tout droit national pour être soumis directement au droit international’).
\textsuperscript{59} IIIL Resolution, fn. 42.
\textsuperscript{60} IIIL Resolution, Explanatory Note by von Mehren. See also J.D.M. Lew, \textit{Applicable Law in International Commercial Arbitration} (Dobbs Ferry, NY, Oceana Publications, 1978), 540 (Lew refers to arbitrators as ‘the guardians of the international commercial order’). The resolution does not cover arbitration conducted pursuant to treaties, such as the ICSID Convention; and consequently it does not apply to the Iran–United States Claims Tribunal and ICSID tribunals. Resolution, at Preamble (the ‘Resolution is without prejudice to applicable provisions of international treaties’).
\textsuperscript{61} Gaillard, \textit{The Representations of International Arbitration}, fn. 36, at 9.
\textsuperscript{62} Gaillard, \textit{The Representations of International Arbitration}, at 9.
\textsuperscript{63} \textit{Methanex v United States}, Final Award, 3 August 2005 (J.W.F. Rowley, W.M. Reisman, V.V. Veeder, arbs), at Part IV, Chapter C, p. 11, para. 24.
business community. While at first glance it might seem reasonable to construe such practice so as to indicate a belief—or opinio juris—that the arbitration process is indeed grounded in the international legal order, it is our view that this theory of internationalization falls short of explaining the practice that has given rise to the seat theory, and that will be examined in what follows.

3.2. The seat theory

As highlighted earlier in the section devoted to the arbitral process, there are important differences between national courts and arbitral tribunals. Contrary to litigation, arbitration is voluntary as it depends upon the existence of an arbitration agreement. Further, and in line with this agreement, it is generally the parties—not the state in which the arbitration is held—that appoint the arbitrators. Accordingly, arbitral tribunals do not fit the mould of state organs.

This conclusion does not, however, carry with it the inference that the tribunals are not subject to the law of the state in which they are seated. States have the inherent right to regulate all persons and things on their territory, as long as such regulation is not inconsistent with international law. While admittedly, the links between the arbitral process and the designated seat are often tenuous, states have—in what constitutes important state practice—positively exercised this right of regulation by enacting laws that impose requirements and possible sanctions on proceedings conducted and awards rendered on their territory. Such practice, which receives direct or indirect support in arbitration rules, arbitration awards, and the (New York) Convention on the Recognition and Enforcement on Foreign Arbitral Awards, may explain the observation that ‘[i]n the absence of an international treaty that sanctions [delocalization], such a system has not become a reality, thus far existing only in “academic dreamland”’.

It also explains why von Mehren, in his Explanatory Note to the Resolution by the Institute of International Law, includes the important caveat that the resolution ‘does not address

64 See Section 2 (on features of the arbitral process).
69 See Section 3.2.3 (on the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards).
the kind or degree of control exercised by national legal systems over arbitrations’. In fact, a prominent member of the Institute criticized the resolution, partly on the basis of the ‘undue extent to which it minimizes the importance of the law of the seat of arbitration’. As will be shown, the role of the tribunal’s juridical seat does not only reflect state practice; a rooting of the arbitral process in a legal system may safeguard due process. Moreover, it is desirable from a practical point of view. In this vein, and while otherwise advocating ‘full procedural autonomy’ for the arbitral process, Blessing observes:

The foregoing considerations form the basis for the seat theory, which deems arbitral tribunals to be subject to the national legal order in which they are juridically seated, and that consequently considers the tribunals’ mandate to stem at least partly from national law.

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71 IIL Resolution, fn. 42, Explanatory Note by von Mehren.
72 I.F.I. Shihata, ‘The Institute of International Law’s Resolution on Arbitration between States and Foreign Enterprises—A Comment’ (1990) 5(1) ICSID Rev.-FILJ 65, 66, at fn. 3. See also at 65 (‘While the Resolution as a whole was adopted by a large majority […] some of its provisions were opposed by many members and associates of the Institute, including this writer’).
73 See Section 3.2.4 (on considerations of due process, finality, and consistency).
74 See Section 3.2.4. See also Petrochilos, fn. 67, at 26 (for Petrochilos, not territoriality as such, but rather considerations of effectiveness and speak in favour of the territorial thesis).
75 Blessing, fn. 47, at 159 (emphasis in original). See also Blackaby et al., fn. 39, at 438 (‘Arbitration is dependent on the underlying support of the courts which alone have the power to rescue the system when one party seeks to sabotage it’).
77 A theoretical underpinning that has been offered in favour of the seat theory is the hybrid theory, which acknowledges the fact that the mandate of the tribunals concurrently stems from the arbitration agreement and the state that gives effect to that agreement, the arbitral proceedings, and the binding award, i.e., the tribunal’s seat. See G. Sausser-Hall, ‘Report to the Institut de Droit International’ (1957) 47-II Annuaire de l’Institut de Droit International 394, 399 (the contractual and jurisdictional elements of arbitration are ‘indissolubly intertwined’). Cf. W.W. Park, ‘Judicial Controls in the Arbitral Process’ (1989) 5(3) Arb. Int’l 230, 237 (‘The authority of an arbitrator […] derives not only from the consent of the parties, but also from the several legal systems that support the arbitral process: the law that enforces the agreement to arbitrate, the forum called on to recognize and enforce the award, and the law of the place of the proceedings’).
Of course, it is open to states to sign away their sovereign right to regulate arbitration taking place on their territory; and this is the case for the States Claims Tribunal and ICSID tribunals. They truly operate in the international legal order; and for that reason, they will be examined separately in Section 4.

### 3.2.1. National arbitration laws

As concerns state practice, we note in particular the 1985 UNCITRAL Model Law on International Commercial Arbitration, which establishes a national procedural framework for arbitration in those states that adopt it as part of their national law.\(^79\)

As indicated by its title, the Model Law concerns ‘international commercial arbitration’, as opposed to purely domestic arbitration;\(^80\) and it applies to arbitration whether or not administered by a permanent arbitration institution.\(^81\) In the words of the UNCITRAL Secretariat, the Model Law ‘reflects a worldwide consensus on the principles and important issues of international arbitration practice’.\(^82\) With its objective of harmonizing the treatment of international commercial arbitration in the various states,\(^83\) it has so far been quite successful as it is increasingly being adopted by developed and developing states alike.\(^84\) For that reason, it is appropriate to use the Model Law to illustrate state practice in the area of national arbitration laws.

#### 3.2.1.1. The territorial criterion and the nationality of awards

An important feature of the UNCITRAL Model Law is that it applies a strict territorial criterion. That is, with a few exceptions, it applies to arbitration conducted on the territory of the given state, the tribunal’s juridical seat: ‘The provisions of this Law, except articles [. . .], apply only if the place of arbitration is in the territory of this state.’\(^85\) Under the UNCITRAL Model Law, the parties are free to incorporate into their arbitration agreement procedural provisions of a ‘foreign’ law, provided there is no conflict with the few mandatory provisions of the Model Law.\(^86\) Still, by virtue of the territorial criterion, awards rendered in a Model Law state will have that state’s

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\(^79\) UNCITRAL Model Law 2006.

\(^80\) UNCITRAL Model Law, art. 1. See also Chapter 1, Section 2 (on the scope of and terminology used in the study).

\(^81\) UNCITRAL Model Law (2006), art. 2(a). Since the term ‘commercial’ is given a broad definition, the Model Law also applies to mixed arbitration proceedings between a foreign investor and a host State. See art. I, fn. **.

\(^82\) UNCITRAL, Explanatory Note, fn. 8, at para. 2.


\(^85\) UNCITRAL Model Law (2006), art. 1(2). The exceptions relate to recognition of arbitration agreements (art. 8), interim measures of protection (art. 9), and recognition and enforcement of interim measures and arbitral awards (arts 17, 35–66), all of which are given a global scope.

\(^86\) See UNCITRAL, Explanatory Note, fn. 8, at para. 14.
'nationality', \(^{87}\) and consequently be subject to the requirements of the Model Law as incorporated by that state. \(^{88}\)

The law of the seat does not only apply to proceedings between two private parties; contrary to the holding of the *Aramco* tribunal, \(^{89}\) it also applies in disputes involving a state party. As Luzzatto states:

In principle, there can be little doubt, if any, that international arbitration arising from a dispute between States and foreign subjects, under a contractual relationship between the parties, should be put on the same level as arbitrations between two private parties, and not as arbitrations between States, which are governed as such by public international law [. . .]. The practice of courts and arbitral tribunals confirms this assumption. \(^{90}\)

Thus, in *Sapphire International Petroleum Ltd v National Iranian Oil Co.* (1963), sole Arbitrator Cavin held that the arbitral decision ‘should be subject to the supervision of a State authority, such as the judicial sovereignty of a State’, and that ‘[t]herefore, as far as procedure is concerned, it is subject to the binding rules of the Code of Civil Procedure of Vaud [. . .]’, the place where the tribunal was seated. \(^{91}\) And the UNCITRAL Tribunal in *Wintershall A.G. et al v Government of Qatar* (1989), seated in the Netherlands, noted that the UNCITRAL Arbitration Rules were subject to any mandatory provisions of the Netherlands Arbitration Law, which would prevail in the event of any conflict. \(^{92}\) The applicability of the law of the tribunal’s juridical seat in investor–state arbitration has been confirmed more recently by the SCC Tribunal in *Petrobart Limited v Kyrgyz Republic* (2005), the latter holding that ‘procedural questions which have not been determined by the Treaty will be decided both in accordance with the institutional Rules of the SCC Institute and in accordance with the law of the seat of arbitration, namely Swedish arbitration law’. \(^{93}\) The applicability of the Swedish Arbitration Act to arbitration proceedings between a private party and a state when the tribunal is seated in Sweden was confirmed by the Swedish Supreme Court in *Rosinvest Co v Russian Federation* (2010):

Pursuant to Section 46, the Act applies to arbitral proceedings which take place in Sweden even where the dispute has an international connection. Also in such proceedings, Swedish courts may be called upon to appoint arbitrators, hear witnesses under oath, rule on arbitrators’ fees and hear challenge and invalidation claims in respect of arbitral awards. \(^{94}\)


\(^{88}\) Cf. Indian Arbitration and Conciliation Act (No. 26 of 1996), section 2(2) (hereinafter Indian Arbitration Act) (‘This Part shall apply where the place of arbitration is in India’); G. Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (2003) 36 V. and J. Transnat L. 1313, 1315.

\(^{89}\) See Section 3.1 (on the delocalization theory).


\(^{94}\) *Rosinvest Co v Russian Federation*, Supreme Court of Sweden, Case No. Ö 2301–09, Decision, 12 November 2010, para. 3.
According to the Court, the parties’ agreement to hold the proceedings in Sweden was determinative; if this is the case, ‘it is irrelevant if the parties or the arbitrators have decided to hold hearings in other countries, if the arbitrators are not from Sweden, if their duties have been carried out in another country or if the dispute concerns a contract which otherwise has no connection to Sweden […]’. To the same effect, the English Court of Appeals in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta* (2006) held: ‘The arbitration leading to the first award took place in Denmark in accordance with the parties’ agreement and we think there can be little doubt that the curial law of the proceedings was Danish law.’

A final example is the award in *Jan Oostergetel and Theodora Laurentius v Slovak Republic* (2012), in which the UNCITRAL Tribunal confirmed the applicability of the law of its seat, Switzerland: ‘[T]hese proceedings are governed by the arbitration law of the seat, i.e., by Chapter 12 [Swiss Private International Law Act 1987] PILA and, as provided in Article 8(5) of the BIT, by the UNCITRAL Arbitration Rules (1976).’

### 3.2.1.2. Annulment as an exercise of control

Perhaps the strongest indication that arbitral proceedings are subject to the law of the tribunal’s seat is the fact that the national courts of the seat may sanction ‘flawed’ awards with annulment. According to the UNCITRAL Model Law, annulment may occur in the following situations: first, when a party was under some incapacity, or unable to present its case; secondly, when the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the tribunal’s seat; thirdly, the award deals with a dispute, or contains decisions on matters not falling within the arbitration agreement; fourthly, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the Model Law as adopted by the seat; fifthly, the subject-matter of the dispute is not capable of

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95 *Rosinvest v Russian Federation*, at para. 4. See also at paras 2, 6.


99 UNCITRAL Model Law (2006), art. 34(2)(a)(i) and (ii).

100 UNCITRAL Model Law, art. 34(2)(a)(i).

101 UNCITRAL Model Law, art. 34(2)(a)(iii) (adding that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the latter will be set aside).

102 UNCITRAL Model Law, art. 34(a)(iv) (unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate).

103 UNCITRAL Model Law, art. 34(a)(iv).
settlement by arbitration according to the law of the seat; or sixthly, the award is in conflict with the public policy of the seat.\footnote{104}{UNCITRAL Model Law, art. 34(2)(b)(i). On the topic of arbitrability, see generally L.A. Mistelis and S.L. Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Alphen aan den Rijn, Kluwer Law International, 2009).}\footnote{105}{UNCITRAL Model Law, art. 34(2)(b)(ii). It should be noted that state practice differs as to the grounds for annulment. See Chapaev and Bradautanu, fn. 98, at 441.}

In view of our focus on the applicable law, it should be pointed out that the references to the parties’ agreement and to public policy may entail a check to the substantive law applied by the arbitral tribunals.\footnote{106}{On the limits of this check, see Section 3.3 (on the influence on the delocalization theory on state practice); Chapter 3, Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).}\footnote{107}{Czech Republic v CME Czech Republic B.V. (2003), Svea Court of Appeal, 15 May 2003, 42 I.L.M. 919, 963 (2003).}

The possibility to annul awards on this basis is explicitly stipulated in the Egyptian Law Concerning Arbitration in Civil and Commercial Matters: ‘An action to procure the nullity of the arbitral award is admissible only in the following cases: [. . .] (d) If the arbitral award fails to apply the law agreed to by the parties to the subject matter of the dispute [. . .].’\footnote{108}{Egyptian Law No. 27/1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters (as last amended by Law No. 8/2000), art. 53(1) (hereinafter Egyptian Arbitration Law). See also Arbitration Law of Jordan, Law No. 31/2001, 14 June 2001, art. 49(a)(4).}

We also note here that in the absence of an agreement by the parties to the contrary, the English Arbitration Act allows for an appeal to the court on a point of law.\footnote{109}{See English Arbitration Act (1996), sections 45, 69. See also New Zealand Arbitration Act (1996), Second Schedule, section 5 (appeals on questions of law). Cf. Park, fn. 41, at 14, 18–20.}\footnote{110}{Sinclair v Woods of Winchester Ltd (No. 2) [2006] EWHC 3003 (TCC), para. 13.}

The right of national courts to review and annul awards rendered on their territory is confirmed by judicial practice and in scholarship.\footnote{111}{See, e.g., C. McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Kluwer, 2009), 95, 140; Park, fn. 77, at 232. See also Section 3.2.4 (on considerations of due process, finality, and consistency).}\footnote{112}{See, e.g., C. McLachlan, ‘Territorialized and Internationalized Arbitration Tribunals’ in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Kluwer, 2009), 95, 140; Park, fn. 77, at 232. See also Section 3.2.4 (on considerations of due process, finality, and consistency).}

authorities to contrary effect.

law as the relevant procedural law

incongruity in a conclusion that the consensual arbitration intended under the Treaty

considered by a tribunal whose procedure is subject to Municipal law. 

Occidental and Ecuador have agreed that rights with their origin in international law will be

entities in a tribunal that is subject to control under Municipal laws. [ . . . ] In this case,

their origin in international law, they are rights that are intended to be exercised by Municipal law

which exist on the plane of international law, are rights that are given to a class of entities which exist on the plane of

Municipal law, i.e. ‘investors’. In particular, the right to arbitrate ‘investment disputes’ as defined in Article VI.1 [of the BIT] is given to Municipal law entities. That right can be exercised in an

arbitral tribunal (set up under UNCITRAL arbitration rules) that will be subject to procedural

laws (UNCITRAL arbitration rules and, if the seat is in England, the 1996 [Arbitration] Act),

which exist on the ‘Municipal’ or ‘private’ or ‘domestic’ law plane. So, although the rights have

their origin in international law, they are rights that are intended to be exercised by Municipal law

entities in a tribunal that is subject to control under Municipal laws. [ . . . ] In this case,

Occidental and Ecuador have agreed that rights with their origin in international law will be

considered by a tribunal whose procedure is subject to Municipal law.124

This position was upheld by the English Court of Appeal in the same case: ‘we see no incongruity in a conclusion that the consensual arbitration intended under the Treaty carries with it the usual procedural and supervisory remedies provided under English law as the relevant procedural law’.125 The Court stated that it had not been shown any authorities to contrary effect.126 A similar observation has been made by Crawford with

118 See, e.g., La République du Liban v France Télécom Mobiles International S.A., et FTML S.A.L.,


121 See K. Hobér and N. Eliasson, ‘Review of Investment Treaty Awards by Municipal Courts’ in
Arbitration under International Investment Agreements: A Guide to the Key Issues (K. Yannaca-Small, ed.,
Oxford, Oxford University Press, 2010), 635, 668.


123 Cf. Occidental Exploration and Production Company v Republic of Ecuador, LCIA Case No.
UN3467, Final Award, 1 July 2004.

124 Republic of Ecuador v Occidental Exploration and Production Company, High Court of Justice,
Queen’s Bench Division, Commercial Court, 29 April 2005 [2005] EWHC 774 (Comm) (per Mr Justice Aikens), para. 73. See also at para. 64.

125 Republic of Ecuador, Judgment of the Court of Appeal regarding non-justiciability of challenge

126 Republic of Ecuador. See also Czech Republic v European Media Ventures SA, Decision on
Annulment [2007] EWHC 2851 (Comm). But see G. Sacerdoti, Case T 8735-01-77, The Czech Republic v CME Czech Republic B.V., Svea Court of Appeal (expert legal opinion for CME), TDM 2(5) (2005), at 31–2 (‘The courts of the place of arbitration are especially constrained by BITs in their
examination of a challenge against an international award based on such a treaty. [ . . . ] The limits
imposed on the Swedish courts in this respect would stem from the general principle of respect of
foreign States sovereignty: “par in parem non habet jurisdictionem”').
respect to tribunals set up pursuant to NAFTA Chapter Eleven: while they are not part of the judicial systems of the contracting states, ‘this does not mean that they are legal Alsatias, beyond any form of jurisdictional control’. 127 Indeed, he points out, it is open to respondent governments to challenge any adverse decision in the same way as any other international arbitral award can be challenged by a party to it, i.e., by proceedings before the courts of the place of arbitration. 128 To the same effect, the NAFTA Tribunal in Waste Management Inc. v Mexico (2001) stated:

Unlike arbitration under the ICSID Convention, arbitration under the Arbitration (Additional Facility) Rules is not quarantined from legal supervision under the law of the place of arbitration. The possible requirements of that law are specifically referred to in the Arbitration (Additional Facility) Rules (see Articles 1, 53 (3), (4)). Thus the determination of the place of an Additional Facility arbitration can have important consequences in terms of the applicability of the arbitration law of that place. 129

By way of conclusion on this point, we refer to the recent award in Saipem S.p.A. v The People’s Republic of Bangladesh (2009). 130 At issue was the legality of the decision by Bangladesh courts to annul an ICC award rendered in Dhaka against Bangladesh Oil Gas and Mineral Corporation (Petrobangla) in the favour of Saipem, for breach of contract. 131 Specifically, Saipem argued that by declaring the ICC award non-existent, Bangladesh had deprived it of the compensation for the expropriation of its investment, in contravention of Bangladesh’s obligations pursuant to the BIT entered into with Italy, Saipem’s home state. 132 While upholding the claim, the tribunal emphasized Bangladesh’s right of supervisory jurisdiction over the arbitration process: ‘There is no question that, under most legal systems including the Bangladeshi one, by choosing the seat of the arbitration the parties submit to the jurisdiction of the courts at the seat, which jurisdiction can be exercised in aid and in control of the arbitration process.’ 133 This is also the case, stated the tribunal, when the parties have agreed to arbitrate the dispute pursuant to the ICC Arbitration Rules:

[While binding on the parties, the ICC Rules are not binding upon national courts. Hence, the Tribunal fails to see how the assertion of jurisdiction by the courts of Bangladesh can be deemed illegal on this ground. Indeed, it is generally accepted that national arbitration law can provide for a solution which is different from the ICC Rules. For instance, as mentioned by both parties, Dutch arbitration law provides that the local courts have mandatory jurisdiction over a challenge and revocation of the authority of arbitrators and no one would think of claiming that the courts of the Netherlands breach international law by asserting jurisdiction over a request to challenge or revoke an ICC arbitrator. 134] The claimant still prevailed on the basis that Bangladeshi courts had abused their right of supervisory jurisdiction over the arbitration process, in a way that constituted illegal

129 Waste Management Inc. v United Mexican States, ICSID Case No. ARB(AF)00/3, Decision on Venue of the Arbitration, 26 September 2001 (J. Crawford, G. Aguilar Alvarez, B.R. Civiletti, arbs), para. 5.
131 Saipem v Bangladesh, at para. 84.
132 Saipem v Bangladesh, at para. 84.
133 Saipem v Bangladesh, at para. 187. See also at paras 101, 115.
134 Saipem v Bangladesh, at para. 138.
expropriation: ‘[T]he Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights.’

In so holding, it quoted from Poudret and Besson: ‘We believe that the lex arbitri constitutes the primary legal basis for the effectiveness of the arbitration agreement and the arbitrators do not have a discretionary power to disregard injunctions issued by the courts at the seat of the arbitration. To the contrary, they should obey such decision, unless they are manifestly abusive.’

In sum, in emphasizing the potentially important role played by the national law of the tribunal’s juridical seat, the foregoing remarks also demonstrate the desirability of the arbitrators, as well as counsel of the disputing parties, familiarizing themselves with and heeding national requirements imposed on the arbitral process by the tribunal’s juridical seat.

3.2.2. Arbitration rules

Next to national arbitration laws, arbitration rules promulgated by (private) institutions also support the seat theory, at least indirectly. The UNCITRAL Arbitration Rules, for instance, provide in article 18(1) that the awards ‘shall be deemed to have been made at the place of arbitration’, and in article 1(3) that in case any of its provisions ‘is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail’.

Böckstiegel notes that the latter provision is of general validity:

Article 1(2) [now article 1(3)] in no way newly creates that principle, but is only declaratory of a limit to arbitration agreements and arbitration proceedings existing independently of this recognition in the UNCITRAL Rules. On the contrary, even if the UNCITRAL Rules did not contain such an article, mandatory provisions of national law, if they were applicable, would still have to be respected. This is exactly what makes them mandatory.

Commenting on the recent modifications of the UNCITRAL Arbitration Rules, Daly and Smith find it significant that this language was kept intact in the 2010 version, especially because investment arbitration was in the minds of the UNCITRAL Working Group: ‘Specifically, there [was] no discussion of changing Art. 1(2), which appears to indicate that mandatory rules of the lex arbitri prevail over the UNCITRAL Rules.’

135 Saipem v Bangladesh, at para. 161.
136 Saipem v Bangladesh, at para. 160 (referring to Poudret and Besson, fn. 65, at 117 [emphasis in original]). Cf. Petrochilos, fn. 36, at 247–8 (Petrochilos comments on Himpurna California Energy Ltd v Indonesia, Interim Award, 26 September 1999 (J. Paulsson, A.A. de Fina, H.P. Abduraysid, arbs) 2000 XXV Y.B. Comm’l Arb. 11). See also fn. 66 (states have the inherent right to regulate all persons and things on their territory, as long as such regulation is not inconsistent with international law).
137 Cf. Rubins, fn. 122, at section 4; Lauterpacht, fn. 66, at 649.
139 UNCITRAL Arbitration Rules (2010), art. 1(3).
140 Böckstiegel, fn. 66, at 229 (referring to the same provision in the 1976 UNCITRAL Arbitration Rules). See also at 224.
Also the LCIA Arbitration Rules give explicit endorsement to the importance of the law of the tribunal’s seat: ‘The law applicable to the arbitration (if any) shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat.’\textsuperscript{142}

The ICC Arbitration Rules have changed during the years with respect to the importance placed on the law of the tribunal’s juridical seat. The 1955 ICC Rules provided that where the Rules were silent and the parties had not chosen a law of procedure, the arbitrator was to look to ‘the law of the country in which the arbitrator holds the proceedings’\textsuperscript{143}. In what has been described as a ‘revolutionary innovation’,\textsuperscript{144} the Rules were revised in 1975 in order to separate the arbitration, to the extent possible, from local procedural law.\textsuperscript{145} Accordingly, the arbitrators were authorized to decide procedural issues without reference to any national law.\textsuperscript{146} This detachment from the law of the seat continues to characterize the present 2012 Rules. According to article 15(1), the proceedings before the ICC tribunals ‘shall be governed by these Rules, and, where these Rules are silent by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration’.\textsuperscript{147}

Although this provision admittedly gives strong support to the delocalization theory, it would be incorrect to characterize tribunals operating pursuant to the ICC Rules as "national. Indeed, according to the Secretariat of the ICC International Court of Arbitration, a failure by the parties and the arbitral tribunal to respect mandatory rules of procedure at the place of arbitration may lead to the award being set aside.\textsuperscript{148} We further note that the Internal Rules of the International Court of Arbitration of the ICC direct the Court, when scrutinizing an award, to consider, ‘to the extent practicable, the requirements of mandatory law at the place of arbitration’.\textsuperscript{149}

3.2.3. The (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The enforcement of awards is facilitated in particular by the 1958 United Nations (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{150} This Convention corroborates the territorial criterion of the seat theory, as

\begin{itemize}
  \item \textsuperscript{142} LCIA Rules (1998), art. 16.3. See also art. 26.2.
  \item \textsuperscript{145} Derains and Schwartz, fn. 143, at 223.
  \item \textsuperscript{146} Derains and Schwartz (referring to article 11 of the 1975 ICC Arbitration Rules).
  \item \textsuperscript{147} See ICC Rules (2012), art. 15(1) (emphasis added).
  \item \textsuperscript{148} J. Fry et al., The Secretariat’s Guide to ICC Arbitration (Paris, International Chamber of Commerce, 2012), para. 3–721. See also Derains and Schwartz, fn. 143, at 228.
  \item \textsuperscript{149} ICC Rules (2012), Appendix II, Internal Rules of the International Court of Arbitration, art. 6.
it makes several references to the state in which the award was ‘made’, or rendered. As Söderlund states:

In this world of global expansion of arbitration it has been quite natural to speculate about the advent of the truly international award. Such award would not be attached to any national legal system. It would, as it were, unfold in a realm of its own. Many times such awards have been called ‘transnational,’ ‘a-national,’ or ‘floating awards’ when discussed in legal writings. Irrespective of whether such a truly international award will materialise in the future, one thing is certain and that is that it does not exist today. Today an arbitral award—despite its international character—is of a particular nationality. In fact, the entire world order, when it comes to arbitral agreements and awards, evolves around the fact that the 1958 New York Convention attaches decisive importance to the fact that arbitral awards are rendered in a particular jurisdiction.\textsuperscript{151}

More specifically, the Convention applies to ‘arbitral awards made in the territory of a State’ other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal\textsuperscript{151},\textsuperscript{152} including states.\textsuperscript{153} Whereas it also applies to awards ‘not considered domestic awards in the State where their recognition and enforcement are sought’,\textsuperscript{154} a contracting state may declare that it will, on the basis of reciprocity, exclude awards not ‘made in the territory of another Contracting State’.\textsuperscript{155} Only a handful of states have refrained from making such a declaration,\textsuperscript{156} a practice that could be seen to lend implicit support to the seat theory.

References to the tribunal’s juridical seat are also included in several of the permissible\textsuperscript{157} grounds listed in the Convention for refusal of recognition and enforcement of awards: the award ‘has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made’;\textsuperscript{158} the parties ‘were, under the law applicable to them, under some incapacity, or the said agreement...
is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made,"\textsuperscript{159} and the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.\textsuperscript{160}

These grounds for non-enforcement demonstrate the control a tribunal’s juridical seat may exert over the award, also at the enforcement stage. Illustrative in this respect is \textit{Termo Rio S.A. E.S.P. \\& Leaseco Group, LLC v Electranta S.P.} (2007), in which a US court of appeal denied enforcement of an award rendered by an ICC tribunal in Columbia on the basis that it had been set aside by Columbian courts.\textsuperscript{161} The Court held:

“The [New York] Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. [...] This means that a primary State necessarily may set aside an award on grounds that are not consistent with the laws and policies of a secondary Contracting State. The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to ‘competent authority’ to ‘set aside’ an arbitration award made in its country.\textsuperscript{162} In accordance with the arbitration agreement, arbitrators arguably have a duty to attempt to render enforceable awards.\textsuperscript{163} While there are some notable examples of awards being enforced despite annulment at the tribunal’s juridical seat,\textsuperscript{164} arbitrators ought therefore to be conscious of the fact that a failure to abide by the law of the seat of arbitration may have the price of non-enforcement of awards.\textsuperscript{165} In fact, according to

\textsuperscript{159} New York Convention (1958), art. V(1)(a) (emphasis added).
\textsuperscript{160} New York Convention (1958), art. V(1)(d) (emphasis added). Other reasons for refusing recognition and enforcement of awards include those listed in article V(2) (The subject matter of the difference is not capable of settlement by arbitration under the law of [the country where recognition and enforcement is sought]); or [...] [t]he recognition or enforcement of the award would be contrary to the public policy of that country). Cf. UNCITRAL Model Law (2006), art. 36.\textsuperscript{159}
Sanders, one of the ‘founding fathers’ of the New York Convention, if an award is set aside at the seat of the arbitration, the ‘Courts [. . .] will refuse the enforcement as there no longer exists an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement’.  

Such concerns about enforceability were explicitly heeded in *British Petroleum Exploration Co. (Libya) Limited* v *Government of the Libyan Arab Republic* (1973).  

Sole Arbitrator Lagergren observed that ‘the attachment to a developed legal system is both convenient and constructive’. As the seat was fixed at Copenhagen, and ‘having particular regard to the wide scope of freedom and independence enjoyed by arbitration tribunals under Danish law’, he concluded that the procedural law of the arbitration was Danish law and that the award would be Danish. Importantly, and keeping in mind that states in which enforcement is sought may require that the award is legally rendered in particular state, he based his conclusion partly on the fact that the parties must have intended an effective remedy: ‘effectiveness of an arbitral award that lacks nationality—which it may if the law of the arbitration is international law—generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality.’

### 3.2.4. Considerations of due process, finality, and consistency

Next to national arbitration laws, arbitration rules, and the New York Convention, the attachment of arbitral proceedings to one national legal order is supported by considerations of due process, finality, and consistency. Most arbitration rules oblige the arbitrators to render awards in accordance with the arbitration agreement, to be impartial, and to respect the parties’ right to due process. It is conceivable, however, that arbitrators exceed, or in other ways act contrary to, their mandate, for instance, by applying a different law to the merits than that upon which the parties agreed, or by accepting bribes that influence the outcome of the dispute. In such a case, the possibility of annulment of the award is not only an inherent right of tribunal’s juridical seat, but also necessary in terms of due process and desirable for the arbitration process in general.

Importantly, arbitration affects not only winners and losers, but often society at large as well; and national review serves as an imperative control mechanism on the legal accuracy of the arbitration. Blackaby et al. state: ‘it would be unusual for a State to support arbitral tribunals operating within its jurisdiction without claiming some degree of control over the conduct of those arbitral tribunals—if only to ensure that certain minimum standards of justice are met, particularly in procedural

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168 *BP v Libya*, at 309.

169 *BP v Libya*, at 309. See also Second Award, 1 August 1974, 5 Y.B. Com. Arb., 147, 158–61 (1980) (Basing himself on Danish law, Lagergren denied the application for a reopening of the award).

170 *BP v Libya*, Award, at 309. Cf. J.G. Wetter, *If The International Arbitral Process: Public and Private* (Dobbs Ferry, NY, Oceana Publications, 1979), 409 (‘The desirability to localise an award, for the purpose of making it enforceable is the main reason for, and consequence of, preferring the BP doctrine’).

171 See Section 2 (on features of the arbitral process).
matters.\textsuperscript{172} Such a ‘safety net’ has additional value in case of disputes involving a state, whose general population may be affected by a biased or unsound award. As noted by the English Court of Appeal in \textit{Occidental Exploration & Production Company v Ecuador} (2005): ‘recourse to a court, when and if permissible, would (one hopes) be likely to correct any error in interpretation, rather than to perpetuate or introduce one.’\textsuperscript{173} In addition, it has been observed that the mere existence of the possibility of review may in and of itself increase the quality of awards.\textsuperscript{174}

Finally, and while also the New York Convention may operate as a safeguard against incompetence and bias at the enforcement stage,\textsuperscript{175} the possibility to seek annulment at the tribunal’s jurisdictional seat has the advantage of allowing the unsuccessful party to litigate such issues in one state rather than in all the states in which it may have assets and enforcement is sought. The US Court of Appeals stated in \textit{Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd} (1999):

If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary ‘with enforcement actions from country to country until a court is found, if any, which grants the enforcement.’\textsuperscript{176}

As such, the delocalization theory, in advocating ‘floating awards’,\textsuperscript{177} may also be criticized on the basis that it may produce conflicting judgments. As Goode puts it:

The territorial approach, in insisting that the validity of an arbitral award is governed by the \textit{lex loci arbitri}, has the great merit of subjecting the question of validity to a single decision at the court of origin. By contrast, denial of the function of a \textit{lex loci arbitri} may involve litigation in every country in which the respondent has assets, and even within a single country may entail the case being taken up through a two-tier or even three-tier hierarchical chain and then, where the highest court acts as a court of cassation, being sent back again to a new lower court for a fresh determination. [...] As more than one commentator has pointed out, this is not delocalization, it is multilocalization.\textsuperscript{178}

\textsuperscript{172} Blackaby et al., fn. 39, at 68. See also at 109 (‘It seems that the movement in favour of total delocalisation, in the sense of freeing an international arbitration from control by the \textit{lex arbitri}, has run into the ground. As the Belgian experiment showed, delocalisation is only possible to the extent that it is permitted by the \textit{lex arbitri}; and parties to an arbitration may well prefer an arbitral tribunal which is subject to some legal control, rather than risk a runaway tribunal’). Cf. F.A. Mann, ‘Private Arbitration and Public Policy’ (1985) 4 \textit{Civ. Just. Q.} 257, 267; W.W. Park, ‘Why Courts Review Arbitral Awards’ in \textit{Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel} (R. Briner et al., eds, Köln, Berlin, Munich, Carl Heymanns Verlag KG, 2001), 595.


\textsuperscript{174} See J. J. Coe Jr, ‘Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA?’ (2002) 19(3) \textit{J. Int Arb.} 185, section II(C). Cf. Park, fn. 77, at 233 (‘The dark side of delocalised arbitration is that arbitrators will find it easier to exceed their powers in jurisdictions that provide no control over the arbitration’s procedural fairness’).

\textsuperscript{175} Cf. Park, fn. 41, at 144; Chan, fn. 70, at 145–6.


\textsuperscript{177} Cf. Smit, fn. 157, at 629 (describing a-national arbitration as a ‘floating and stateless arbitration and arbitral awards’ that ‘does not owe its existence, validity, or effectiveness to a particular national law’).

3.3. The influence of the delocalization theory on state practice

Although the premise behind the delocalization theory and the seat theory is fundamentally different, it is essential to note that the practical differences between them have become limited as states grant increasing degrees of procedural autonomy to the arbitration process, and especially arbitration of a transnational nature. This stems from the recognition by states, long highlighted by adherents to the delocalization theory, that their national procedural rules are not well-suited for arbitration between parties from different states. A related explanation offered for this development is that arbitration has become a ‘business’, and states compete for a greater share of the fees paid to arbitrators and attorneys by reforming their arbitration laws in line with the business community’s demand for greater flexibility. In this way, states also indirectly promote economic activity.

In line with this pro-arbitration trend, national arbitration laws limit court involvement in the arbitral process. As noted by the US Supreme Court, ‘we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.’ Further, national arbitration laws give the disputing parties and arbitrators much freedom in tailoring the proceedings to suit their particular needs and wishes. To this end, the UNCITRAL Model Law provides that ‘subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings’. Another significant factor is that the parties may generally agree to let the arbitration be conducted in accordance with arbitration rules, such as the UNCITRAL Arbitration Rules. As explicitly provided in the German Arbitration Law: ‘subject to the mandatory provisions of this Book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.’

The number of such mandatory rules is limited.

The scope and extent of judicial review is also restricted. The US District Court held in Thunderbird Gaming Corporation v Mexico (2007): ‘Courts have long recognized that judicial review of an arbitration award is extremely limited. [ . . . ] Thunderbird bears the heavy burden of establishing that vacatur of the arbitration award is appropriate. [ . . . ] In the absence of a legal basis to vacate, this court has no discretion but to

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180 See Derains and Schwartz, fn. 143, at 226–7.
181 De Ly, fn. 1, at 48–9. See also Caron, fn. 165, at 119, at fn. 64.
182 See Danilowicz, fn. 76, at 237 (‘The sovereign also has an interest in the development of international arbitration as a means of promoting trade and commerce’).
186 German Arbitration Act (1998), section 1042(3). See also UNCITRAL Model Law (2006), art. 2(e).
confirm the award.\textsuperscript{188} In fact, in certain jurisdictions, such as France, Belgium, Switzerland, and Sweden, the parties to the proceedings may by agreement exclude the possibility of seeking annulment.\textsuperscript{189} According to the Supreme Court of Switzerland, this possibility is in conformity with article 6 of the European Convention on Human Rights and Fundamental Freedoms:

La controverse porte, en l’espèce, sur la question de savoir s’il est possible de renoncer à recourir contre une sentence arbitrale à venir sans violer l’art. 6 par. 1 CEDH. Cette question doit être tranchée par l’affirmative [ . . . ] Il n’y a, dès lors, pas de raison de priver les parties aptes à assumer les conséquences d’une renonciation au recours de la possibilité que leur offre cette disposition – incarnation procédurale du principe d’autonomie de la volonté – d’échapper à toute intervention étatique susceptible de porter atteinte à la confidentialité de l’arbitrage ou de disposer rapidement d’une décision exécutoire mettant fin au différend [The controversy in this case is whether it is possible to waive recourse against an arbitral award in the future without violating article 6(1) of the ECHR. This question must be answered in the affirmative [ . . . ] There is therefore no reason to deprive the parties able to bear the consequences of a waiver of the possibility offered by this provision—the procedural embodiment of the principle of party autonomy—to escape any state intervention which could undermine the confidentiality of the arbitration or to quickly have a binding decision ending the dispute] . . . .\textsuperscript{190}

Importantly, and as will be demonstrated in the next chapter, this ‘hands off’ approach encompasses the law applicable to the merits in that national arbitration laws grant the parties and the tribunals considerable freedom with respect to the substantive applicable law. Of further significance is the fact that the limited possibility to seek annulment extends to the tribunal’s decision as to the applicable law: the courts of the juridical seat will as a rule not allow judicial review of the choice-of-law methodology applied by the arbitrators.\textsuperscript{191} This is so even in situations where the parties have stipulated the applicable law. According to the Swedish Court of Appeal, ‘an excess of mandate may be involved only where the arbitrators’ interpretation of the choice of law clause proves to be baseless such that their assessment may be equated with the


\textsuperscript{191} See G.A. Born, \textit{International Commercial Arbitration} (Ardsley, NY, Transnational Publisher; The Hague, Kluwer Law International, 2001). But see G.C. Moss, ‘Is the Arbitral Tribunal Bound by the Parties’ Factual and Legal Pleadings’ (2006)3 \textit{Stockholm Int’l Arb. Rev.}, 1, 10 (Moss suggests a more stringent standard of review for treaty arbitration: ‘This is because the error in question would be made in connection not with the decision on the merits (which is beyond the scope of control that a court may exercise on an award), but with the establishment of the tribunal’s jurisdiction or of its duties in the conduct of the proceedings, as determined by the applicable arbitration law or investment treaty (which is within the scope of the judicial control)’).
arbitrators almost having ignored a provision regarding applicable law.'\textsuperscript{192} Thus, it held, ‘[t]here is no excess of mandate where the arbitrators have applied the designated law incorrectly. Nor can there hardly be any excess of mandate where the arbitrators have been required to interpret the parties’ designation of applicable law, and in so doing, have interpreted the designation incorrectly.’\textsuperscript{193}

The aforementioned practice leads us to conclude that at least one of the concerns presented by the delocalization theory, namely that of ‘peculiar and unexpected local norms’,\textsuperscript{194} is to a large degree resolved.\textsuperscript{195} As noted by Kaufmann-Kohler: ‘One of the main purposes of de-localization, as it was then discussed, was to eliminate the unintended effects of certain arbitration-hostile features of the law of the place where the arbitration was held. The choice of an arbitration-friendly fictional seat fully services that purpose.’\textsuperscript{196} Consequently, she states, ‘the issue of de-localization becomes moot.’\textsuperscript{197}

### 3.4. Interim conclusions

We saw that the existence of any links between arbitral tribunals and national legal orders is discouraged and/or toned down by scholars who argue that the arbitral process is—or at least should be—removed from control by any state and should therefore be viewed as delocalized, supranational, a-national, or international. We also noted the influence such awards and scholarship have had on state practice, in that national arbitration laws grant the parties and arbitrators procedural freedom and limit court involvement to a minimum.

Still, such state practice does not invalidate the soundness of the seat theory.\textsuperscript{198} Symptomatic of the strength of this theory, the vast majority of states continue to subject arbitration proceedings taking place on their territory to various mandatory, albeit limited, requirements, which again are heeded by third states at the enforcement stage. Such exercise of control, including the sanction of annulment, not only stems from the principle of territorial sovereignty, it is conducive to finality, and it constitutes a healthy ‘check’ on the system of arbitration as a whole. We may thus conclude that a tribunal’s mandate to render awards does not solely stem from the parties, but

\textsuperscript{192} Czech Republic v CME Czech Republic B.V., fn. 107, 42 I.L.M. 919, 964 (2003).

\textsuperscript{193} See Caron, fn. 165, at 119. But see Petrochilos, fn. 67, at 10 (‘However, national particularities are still to be found in the arbitration laws of a number of states […] For the time being it seems that an arbitrator has to find his way through the web of potentially relevant laws and jurisdictions by carefully juggling them’).

\textsuperscript{194} Paulsson, Arbitration Unbound, fn. 38, at 385.

\textsuperscript{195} See Caron, fn. 165, at 119. But see Petrochilos, fn. 67, at 10 (‘However, national particularities are still to be found in the arbitration laws of a number of states […] For the time being it seems that an arbitrator has to find his way through the web of potentially relevant laws and jurisdictions by carefully juggling them’).

\textsuperscript{196} Kaufmann-Kohler, fn. 88, at 1319–20 (references omitted).

\textsuperscript{197} Kaufmann-Kohler, at 1320. See also J. Paulsson, ‘The Extent of Independence of International Arbitration from the Law of the Situs’ in Contemporary Problems in International Arbitration (J.D. M. Lew, ed., London, Centre for Commercial Law Studies, 1986), 141 (while Paulsson believes that ‘there is still any life in the once-hot debate over the concept of arbitral awards detached from the legal system of the country where they were rendered […] I am quite willing to allow that the delocalisation of the international arbitral process is not the wave of the future. The need to delocalise is felt in few cases, and, happily, it may reasonably be predicted that those instances will become even rarer in the future’); Terez, fn. 68, at 380 (Caron believed that ‘delocalized arbitrations were and would become increasingly an intellectually interesting but rare oddity’).

\textsuperscript{198} Cf. F.A. Mann, ‘English Procedural Law and Foreign Arbitrations’ (1970) 19(4) Int’l & Comp. L. Q. 693, 695 (‘Is it open to the parties to choose as their lex arbitri a law other than that prevailing at the arbitration tribunal’s seat? […] It is submitted that the parties’ freedom of choice is by no means unlimited, but exists only if and to such extent as it is granted by the law of the arbitration tribunal’s seat’); Alvik, fn. 26, at 29.
also—and more importantly—from a national legal order: the tribunal’s juridical seat. Accordingly, arbitral proceedings between an investor and a host state are neither a-national, nor international, but rather subject to a national legal order.

For our purposes, we will characterize arbitral tribunals subject to the national law of their juridical seat as ‘territorialized’, a term that seeks to differentiate them from domestic arbitration tribunals, as well as the ‘internationalized’ tribunals that will be analysed in the following section.

4. Internationalized Tribunals

Scholars have offered various factors for the purpose of characterizing a court or tribunal as ‘international’.\(^\text{199}\) Several of these factors are over- or under-inclusive; and there does not appear to be one ‘litmus test’.\(^\text{200}\) For instance, it has been stated that the application of international law is an intrinsic characteristic of international courts and tribunals.\(^\text{201}\) While it is true that international law constitutes the main applicable source of law for international courts and tribunals,\(^\text{202}\) national courts too apply international law;\(^\text{203}\) and as will be demonstrated in the following chapters, the application of national law is not reserved to territorialized tribunals. To the contrary, national law is frequently applied by both ICSID tribunals and the Iran–United States Claims Tribunal. We agree, thus, with Amerasinghe when he discards the application of international law as a criterion for internationalization:

In principle that a tribunal adjudicates on disputes which are based on violations of national laws does not make it any less an international tribunal, if it falls into that category, because it satisfies the requirements. Thus ICSID [...] tribunals and the Iran–US Claims Tribunal are international, although in a given case they may deal with what are purely alleged violations of national laws. In this respect international tribunals may sometimes deal with disputes that are not ‘international’ in the true sense.\(^\text{204}\)

In the same context, it is difficult to assess whether certain of the criteria offered for characterization purposes are inherent in the international nature of the tribunals; or


\(^{200}\) Cf. Alford, fn. 199, at 679 (Alford refers to ‘the absence of any canonical definition of what constitutes an international tribunal. Depending on the criteria one employs, the universe of international tribunals is extremely broad or narrow. [...]’).


\(^{202}\) See Chapter 1, Section 1 (on motivations for the study).

\(^{203}\) See Biehler, fn. 6, at 37 (‘[T]here are national courts which determine, apply and enforce international law which even from the international law perspective may be accepted at least as state practice and opinioiuris of the forum state’); P.A. Nollkaemper, ‘Internationalisering van nationale rechtspraak’ in Preadviegzen. Mededelingen van de Nederlandse Vereniging voor Internationaal Rechts (P.A. Nollkaemper, J.W.A. Fleuren, J. Wouters, and D. van Eekhoutte, eds, The Hague, T.M.C. Asser) 1–67.

whether they follow as a result of such nature. In brief, there is the classical problem of ‘the chicken and the egg’. Thus, while to some, internationalization is indicated by insulation from the law of the tribunal’s seat and the internationally binding nature of the decisions rendered,\textsuperscript{205} according to Mohebi, these features follow rather from the tribunal’s international nature, once established:

Once it is decided that a tribunal possesses true international character it follows, inevitably, that as such it pertains to \textit{sic} international order, rather than any municipal law system either that of its creating States or of its eventual or actual seat. Among practical consequences of this conviction is that the arbitral process before such international tribunal is detached from any \textit{lex fori}, and its arbitral award will have international quality the enforcement of which is subject to international rules and principles; and more importantly the non-compliance with the terms of such international award will cause international responsibility for the refusing party.\textsuperscript{206}

For the purposes of this study, we will characterize ‘internationalized’\textsuperscript{207} tribunals by three interrelated criteria: first, they operate pursuant to a treaty, from which stems their mandate to render awards.\textsuperscript{208} Secondly, the state in which they are seated has relinquished its right to regulate their activities, so that they are insulated from the application of the law of the seat.\textsuperscript{209} Thirdly, the state party to the dispute is treaty-bound to respect the tribunal’s decisions; and consequently, recognition and enforcement of the award do not depend on instruments such as the New York Convention.\textsuperscript{210} In combination, these features make the arbitration proceedings operate in the international legal order, with the result that the tribunals’ \textit{lex arbitri} is international law.

Before proceeding to examine the Iran–United States Claims Tribunal and ICSID tribunals on the basis of these criteria,\textsuperscript{211} a clarification should be made as concerns investment treaty arbitration. As noted previously, arbitration proceedings are commonly set up pursuant to an investment treaty entered into between the host state and the investor’s home state.\textsuperscript{212} Despite the fact that the arbitration agreement entered into between the investor and the host state in such cases originates in an offer set out in a treaty, this does not, in and of itself, make the arbitration tribunal international in nature. The conclusion remains that investment treaty tribunals applying, as they often do, the UNCITRAL Arbitration Rules, the ICSID Additional Facility Rules, or the Arbitration Rules of the Stockholm Chamber of Commerce are subject to control by the state in which they are seated.\textsuperscript{213} Neither does internationalization of the arbitral proceedings follow from the fact that the host state, by virtue

\textsuperscript{205} See, e.g., F.A. Mann, ‘State Contracts and International Arbitration’ (1967) 42 Brit. Y.B. Int’l L. 1, 13; Lauterpacht, fn. 66, at 651.

\textsuperscript{206} Mohebi, fn. 199, at 31.

\textsuperscript{207} For the use of the term ‘internationalized’ versus ‘international,’ see Chapter 1, Section 2 (on the scope of and terminology used in the study).

\textsuperscript{208} Cf. Amerasinghe, fn. 204, at 10–11; F. Rigaux, ‘Les situations juridiques individuelles dans un système de relativité générale’ (1989, 1) 213 Recueil des Cours, para. 83.

\textsuperscript{209} Cf. Petrochilos, fn. 67, at 298.

\textsuperscript{210} Cf. Petrochilos, at 247–8.

\textsuperscript{211} Reference should also be had to the Unified Agreement for the Investment of Arab Capital in the Arab States, setting up the Arab Investment Court. Based on the criteria listed in this Part, arbitration conducted under this Court’s auspices may also be characterized as internationalized. See generally Unified Agreement for the Investment of Arab Capital in the Arab States, TDM 1(4) (2004); W. Ben Hamida, ‘The First Arab Investment Court Decision’ (2006) 7(5) Journal of World Investment and Trade 699.

\textsuperscript{212} See Section 2 (on features of the arbitral process).

\textsuperscript{213} See Section 3.2.1.2 (on annulment as an exercise of control).
of the treaty, is internationally bound to respect awards rendered against it. This obligation flows from the investment treaty in question, rather than arbitral process as such. The difference in bindingness is illustrated by the fact that article 26 of the Energy Charger Treaty includes the stipulation that any arbitration arising under the investor-to-state dispute provisions shall, at the request of any party to the dispute, be held in a state that is a party to the New York Convention. Petrochilos confirms the non-existence of a link between treaty arbitration and internationalization of proceedings:

[T]he important point here is that arbitration provided for by treaty is not necessarily arbitration proceeding under international law. The practical purpose of the dispute resolution provisions in BITs has little to do with submitting to international law the arbitration proceedings there provided for. A primary objective is to give the option of a neutral forum to the foreign investor. Thus, to ensure that the signatory states will give effect to the agreed arbitration mechanism, provisions may be contained to: (a) create ipso facto consent to arbitration without need for subsequent agreement between the investor and the host state; [and] (b) formally render such consent equivalent to an agreement in writing for the purposes, notably, of Article II of the New York Convention [...]. In this sense, a BIT is only a vehicle for some type of arbitration, whose legal nature is not in principle affected or determined by the BIT.

4.1. The Iran–United States Claims Tribunal

The Iran–United States Claims Tribunal was established pursuant to the 1981 Algiers Accords, which include, in particular, the Claims Settlemen Declaration. Due to the political tension between the two states, the Government of Algeria functioned as an intermediary; and instead of the United States and Iran signing the proposed Accords, Algeria announced that it had received formal adherences from the two states.

The tribunal is seated in the Netherlands, and it is comprised of nine members, also referred to as arbitrators or judges. Its jurisdiction can be divided into two

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214 See Energy Charter Treaty (ECT), art. 26. See also North American Free Trade Agreement (NAFTA), art. 1130. But see Amerasinghe, fn. 204, at 11 (Tribunals ‘created under the NAFTA would qualify as international tribunals’); see at 5.

215 Petrochilos, fn. 67, at 247–9 (emphasis in original; references omitted). See also at 298. Cf. Heiskanen, fn. 11, at 399, at fn. 89 (Heiskanen characterizes investment treaty tribunals as “quasi-international” or “transnational” in the sense that the consent to arbitrate of one of the parties—the investor—is subject to the personal law (i.e. domestic law) of that party).


217 The adoption of the Algiers Accords put an end to a diplomatic stalemate between the United States of America and the Islamic Republic of Iran, which started with the seizure and detention of employees of the US Embassy in Tehran, and was intensified when the United States blocked Iranian assets. As stated in the Preamble to the General Declaration (1981), the Accords were to serve as a ‘mutually acceptable resolution of the crisis’ in the relations of the United States and Iran ‘arising out of the detention of the 52 United States Nationals in Iran’ and registered ‘the commitments which each is willing to make in order to resolve the crisis’.


220 Claims Settlement Declaration (1981), art. III (three of the members are appointed by the US; three by Iran; and three by party-appointed members acting jointly or, in absence of agreement, by an
categories: first, claims between a private party and the United States or Iran; and second, interstate claims between the two Governments.\textsuperscript{221} To the former category, which will be examined in our study, belong claims of US nationals against Iran and claims of Iranian nationals against the United States,\textsuperscript{222} as well as any counterclaim by the United States or Iran that ‘arises out of the same contract, transaction or occurrence that constitutes the subject matter of the national’s claim’.\textsuperscript{223} Further limiting the tribunal’s jurisdiction, the Claims Settlement Declaration requires such claims and counterclaims to ‘arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights’.\textsuperscript{224} As of 31 March 2009, the total number of cases finalized...
by award, decision, or order was 3,936.225 The last case involving a private party and the US or Iranian Government was decided in 2003.226

With respect to the criterion that the tribunal be set up pursuant to a treaty, we note that despite the unusual negotiations behind the Algiers Accords, their international validity is generally accepted, and consequently also the tribunal’s treaty origin.227 Indeed, on several occasions, the tribunal has interpreted the Algiers Accords in accordance with the Vienna Convention on the Law of Treaties.228 When we add the fact that the Claims Settlement Declaration explicitly denominates the tribunal as ‘international’,229 it may appear that the tribunal’s mandate is indeed grounded in the international legal order. This conclusion is supported by the tribunal itself: “This Tribunal has not been instituted by a contractual agreement between the Parties and does not derive its authority from their will. It has been instituted by an intergovernmental agreement having the status of an international treaty and it is subject to international law.”230 And the tribunal held in Iran v United States (Case A/27):

The Tribunal was established by an international agreement concluded between Iran and the United States. The States Parties empowered it to decide intergovernmental claims as well as claims by nationals of one State Party against the government of the other State Party. Under contemporary international law, the fact that an individual or a private entity is party to proceedings before a forum created by an international agreement does not deprive that forum and its proceedings of their international legal nature. The Tribunal is ‘clearly an international tribunal,’ […] and ‘it is subject to international law.’231

In the following subsections, we will first examine whether the tribunal is in fact insulated from the law of its seat, i.e., the Netherlands; and second, we will consider the nature of the states parties’ obligation to enforce awards rendered by the tribunal.

4.1.1. The tribunal’s insulation from the Law of the Seat

As concerns the first inquiry concerning the subjection or otherwise of the Iran–United States Claims Tribunal to Dutch law, there is some controversy.232 This may be explained in part by the special circumstances attendant on its creation:

228 See Iran v United States, Case No. A/18, Decision No. DEC 32-A18-FT, 6 April 1984; Marossi, fn. 225, at 497.
229 Claims Settlement Declaration (1981), art. II(1).
232 Cf. D.D. Caron et al., The UNCITRAL Arbitration Rules: A Commentary (Oxford, Oxford University Press, 2006), 38 (‘The status of the arbitral proceedings before the Iran–US Claims Tribunal, and their relation to the local (i.e., Dutch) law, is not easily characterized’).
Because the Tribunal was created by a document rapidly and secretly negotiated to end a political and diplomatic crisis, details of the Netherlands' role were not fully explored before January 20, 1981, nor could they have been in the way that normally occurs with the siting of an international organization. Instead, matters of concern to the host state had to be discussed while the organization was being created.233

A conclusion in favour of subjection to Dutch law has been drawn by reference to the fact that the parties to the Claims Settlement Declaration opted for the UNCITRAL Arbitration Rules intended for use in international commercial arbitration, rather than, for instance, the United Nations Draft Convention on Arbitral Procedure designed for use in interstate arbitration.234 As recalled from our discussion of territorialized tribunals, the UNCITRAL Arbitration Rules make explicit or implicit reference to an applicable national law, such as article 18(1), providing that the awards ‘shall be deemed to have been made at the place of arbitration’,235 and article 1(3): ‘These Rules shall govern the arbitration except that where any of the Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.’236 Partly on the basis that the United States and Iran left these provisions unmodified, Caron concludes that their presumed intent was the application of non-derogable provisions of Dutch procedural law, and the possibility of review by Dutch courts.237 He further refers to a statement by Mr Feldman, a lawyer with the US State Department during the negotiation of the Accords, that his Government acted on the assumption that proceedings would be governed by Dutch law.238

In fact, in the case Carolina Brass, Inc. v Iran (1986), the United States argued that the tribunal should find guidance in Dutch law as to the question of prescription: “The Netherlands [...] whose law the Claimant argues is applicable due to the seat of this Tribunal in The Hague, has adopted the Hague Rules and embodied the one year

233 Caron, fn. 222, at 27. See also at 31 (‘As far as this author can ascertain, neither State Party fully anticipated or appreciated the possibility of Dutch supervision at the time the Accords were drafted. For the first several years of the Tribunal’s existence, there continued to be some uncertainty as to the views of the two governments even as the Tribunal itself preserved the possibility of, and the Netherlands indicated its willingness to see, Dutch courts exercising some degree of supervision over Tribunal awards involving the claims of nationals’ [references omitted]).


235 UNCITRAL Arbitration Rules (2010), art. 18(1).

236 UNCITRAL Arbitration Rules (2010), art. 1(3).


238 Caron, fn. 165, at 142, at fn. 172 (referring to M. Feldman, ‘Implementation of the Iranian Claims Settlement Agreement—Status, Issues and Lessons: View from Government’s Perspective’ in Private Investors Abroad: Problems and Solutions in International Business (J. Moss, ed., 1981), 75, 97–8). But see D.D. Caron, ‘International Tribunals and the Role of the Host Country’, fn. 222, at 32, at fn. 20 (‘At a Symposium at the University of Miami Law School on April 14, 1981, Mark Feldman, a lawyer with the U.S. State Department during the negotiations of the Accords, discussed the debate internal to the State Department [...] [and] stated his personal preference for a process in which national courts would not interfere. ‘I can only speak for myself. [...] We are at a stage which raises a very complicated question concerning the law applicable to the proceedings. [...] It is a subtle and difficult thing. We are struggling with it right now. [...] One of the things we have to try and decide is how to keep the courts of the Netherlands or of England out of these cases.”’); G. Petrochilos, fn. 67, at 259 (‘The most appropriate interpretation of Article 1(2) would be, it is suggested, that the “law applicable” is in fact the constitutive instruments of the Tribunal, that is, the Algiers Declarations and, subject to those Declarations, general international law’).
time limitation in its domestic legislation.\textsuperscript{239} In that case, the tribunal refrained from answering the question as to the applicability of Dutch law:

The Tribunal need not decide whether the law of the Islamic Republic of Iran, the United States, India, or the Netherlands should apply to this particular Case in order to establish that the time limitation contained in Article 3(6) of the Hague Rules and in Paragraph 21 of the Bills of Lading is applicable in this Case, since the law in each of these countries is similar, and all are in conformity with the widespread practice reflected in the Hague Rules.\textsuperscript{240}

As additional evidence in support of his view that awards rendered by the tribunal are governed by Dutch law, Caron points to the fact that the tribunal decided on 3 May 1982 to register its awards at a Dutch court in accordance with article 639(1) of the Dutch Code of Civil Procedure, later superseded by the 1986 Netherlands Arbitration Act, included in Book 4 of the Dutch Code of Civil Procedure.\textsuperscript{241} Article 1058(1)(b) provides: "The arbitral tribunal shall ensure that without delay [...] the original of the final or partial final award is deposited with the Registry of the District Court within whose district the place of arbitration is located.'\textsuperscript{242}

It appears, however, that the awards rendered by the tribunal do not meet certain procedural requirements for valid arbitral awards under the Dutch Civil Code. In this respect, the Explanatory Note of the Dutch Ministry of Foreign Affairs, attached to the Dutch 'Bill Regarding the Applicability of Dutch law to the Awards of the Tribunal Sitting in the Hague to Hear Claims Between Iran and the United States', emphasizes the lack of an arbitration agreement between the parties in each case, in addition to the international nature of the agreement between states underlying the arbitration.\textsuperscript{243} According to the Dutch Government, absent special legislation 'it is by no means clear that the decisions and the awards of the tribunal concerning private claims would be characterized by Dutch courts as arbitral decisions or awards under the relevant provisions of the Dutch Code of Civil Procedure'.\textsuperscript{244} Consequently, it continues, it would be necessary to enact special legislation, declaring \textit{expressis verbis} that the awards are to be considered arbitral awards under Dutch law.\textsuperscript{245} The bill was never enacted.\textsuperscript{246}

Whereas Dutch courts have not ruled on their mandate to review awards rendered by the Iran–United States Claims Tribunal,\textsuperscript{247} the perceived need for and lack of special legislation make us doubt whether the awards possess Dutch nationality, and to deduce

\textsuperscript{239} Carolina Brass, Inc. v Iran, Award, 12 September 1986, Award No. 252-10035-2, 12 Iran–U.S. C.T.R. 139 (1986 III), para. 20 (a claim of less than US $250,000, presented by the US) (references omitted).

\textsuperscript{240} Carolina Brass, at para. 21.

\textsuperscript{241} Caron, fn. 165, at 143, at fn. 177 (Caron refers to the Manual of the Registry of the Iran–United States Claims Tribunal.). See also Caron et al., fn. 232, at 38 (referring to the 'practice according to which the Tribunal deposits its awards with the District Court of The Hague').

\textsuperscript{242} Netherlands Arbitration Act (1986), art. 1058(1)(b).


\textsuperscript{244} Bill on Applicability of Dutch Law; Aide Memoire and Explanatory Notes.

\textsuperscript{245} Bill on Applicability of Dutch Law; Aide Memoire and Explanatory Notes.

\textsuperscript{246} The Dutch Government ceased consideration of the legislation in 1984. See Petrochilos, fn. 67, at 245; Caron, fn. 222, at 32; Annual Report 1984/85 of the Tribunal, at p. 17; Annual Report 1986/87 of the Tribunal, at pp. 16–17.

\textsuperscript{247} See G. Lagergren, 'The Formative Years of the Iran–United States Claims Tribunal' (1997) 66 Nordic J. Intl Law 23, 31; Seifi, fn. 220, at section (b) (noting how several applications for review were withdrawn by the Applicant Iranian Government). See also Caron, fn. 165, at 144–5; and fn. 222, at 32–3.
that they rather belong to the international legal order. This conclusion finds support in the tribunal’s award in *Anaconda-Iran* (1986): ‘As concerns the Tribunal’s jurisdiction, procedure, and more generally its constitution and its functioning, the Tribunal is governed exclusively by the rules derived from the Algiers Accords and, pursuant to Article III, paragraph 2, of the [Claims Settlement Declaration], from the UNCITRAL Arbitration Rules as modified by these Accords or by the Tribunal.’ The internationalized nature of the Iran–United States Claims Tribunal was also endorsed by an English court in the case of *Dallal v Bank of Mellal* (1986), in which the plaintiff sought to relitigate in England matters which had been decided by the tribunal, or which she had omitted to raise before it. According to Justice Hobhouse, the tribunal derived its competence from international law, and based on international comity, English courts were required to recognize its decisions.

The Host State Agreement—the Exchange of Notes between the Dutch Government and the tribunal—gives substance to the international nature of the tribunal by granting the latter immunity. According to the Dutch Government, this immunity also exists as a matter of general international law. Pending the conclusion of this Host State Agreement, the Secretary-General of the Ministry of Foreign Affairs of the Netherlands wrote a letter to the tribunal concerning its immunity from the jurisdiction of Dutch courts, stating, inter alia: “The rule that the Tribunal in its capacity as a body established under public international law enjoys certain immunities and privileges in the country where it has its seat is, in general terms, derived directly from the generally accepted principles of international law.” This interpretation was sustained by the Dutch Supreme Court in a dispute between the Iran–United States Tribunal and one of its employees. Quoting verbatim the Dutch Parliamentary Report II 1982–83, the Court held that the tribunal is “entitled in the Netherlands to the usual immunity of jurisdiction of international organizations based on international public law, which is necessary for the performance of their tasks for which they have been established.” The European Commission on Human Rights reached the same


250 *Mark Dallal v Bank Mellat* (per Hobhouse J.) [1986] 1 QB 441, 2 WLR 745, 1 All ER 239. 251 *Mark Dallal*, at pp. 461H–462A. See also *Republic of Ecuador v Occidental Exploration and Production Company*, fn. 124, High Court of Justice, Queen’s Bench Division, Commercial Court, para. 42.

252 Exchange of Notes Between the Government of The Netherlands and the President of the Iran–United States Claims Tribunal Concerning the Privileges and Immunities of the Tribunal, 1990 Tractatenblad No. 150. See also A.S. Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (The Hague etc., Kluwer Law International, 1995), 49 (‘It was not until September 1990 that a host agreement was concluded with the Dutch government’).


These decisions support the tribunal’s insulation from Dutch law and its subjection to international law as its *lex arbitri*.

Hence, the registering of the tribunal’s awards at the Hague District Court may be seen more as a precautionary measure taken by the tribunal in its early days of existence to ensure the awards’ enforceability. Indeed, according to Lagergren, former President of the tribunal, the decision by the tribunal to deposit its awards at the Court has no bearing upon the yet unsolved question whether the Tribunal’s awards can be successfully challenged in Dutch courts. In his view, ‘the Tribunal possesses the character of an international tribunal, governed by public international law [. . .].’

4.1.2. The states parties’ international obligation to comply with and enforce the awards

Iran and the United States are treaty-bound, by virtue of the Claims Settlement Declaration, to give effect to the tribunal’s awards within their national legal orders. The international obligation of the states parties in this respect was confirmed in *Iran v United States* (Case A27) (1998):

By virtue of the refusal by the United States Court of Appeals for the Second Circuit to enforce the Avco award, the United States has violated its obligation under the Algiers Declarations to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the jurisdiction of the United States.

In reaching that decision, it stated the general principle that ‘[b]y definition, international arbitral awards, if final, are binding’. As concerned awards rendered by the Iran–United States Claims Tribunal in particular, the tribunal referred to article IV(1) of the Claims Settlement Declaration, which provides that ‘[a]ll decisions and awards of the Tribunal shall be final and binding’. In its view, that provision ‘rules out the possibility of readjudication of the merits of Tribunal awards by a municipal court, either under the guise of [. . .] the New York Convention or by any other means’. Whereas the tribunal recognized that no tribunal can declare itself immune from error, it added that in such a hypothetical case, only the tribunal itself could revise the award.

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256 See Pinto, fn. 216, at para. 52; Petrochilos, fn. 67, at 244.


258 G. Lagergren, ‘United States Claims Tribunal’ (1990) 13 Dalhousie Law Journal 505, 512. See also Brower and Brueschke, fn. 220, at 16; Petrochilos, fn. 36, at 243–6; Rigaux, fn. 208, at para. 86 (see, in particular, the reference to scholarship in fn. 58).

259 See Claims Settlement Declaration (1981), art. IV(3) (‘Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws’).


261 Case No. A/27, at para. 63.

262 Case No. A/27. See also *Anaconda-Iran*, fn. 230, Interlocutory Award, at para. 104 (‘[D]ue to the provisions establishing the Security Account, a settlement by this Tribunal gives successful United States’ claimants the additional benefit of a guaranteed execution of the awards’).


The fact that the awards receive their validity in the international legal order and cannot be reviewed by national courts at the enforcement stage contributes to the international character of the tribunal.

4.1.3. Interim conclusion

The Iran–United States Claims Tribunal operates pursuant to a treaty, the Claims Settlement Declaration. The conclusion that the arbitrators’ mandate stems from the international legal order is buttressed by our findings that Dutch arbitration law does not govern the tribunal’s proceedings, and that the awards are international in nature. Accordingly, we may infer that its *lex arbitri* for all purposes is international law.

4.2. ICSID tribunals

In 1965, the World Bank promulgated the ICSID Convention in an attempt to remove legal and political obstacles to the flow of foreign investment, particularly to developing states. For this purpose, the Convention provides for an International Centre for the Settlement of Investment Disputes (ICSID), facilitating the peaceful settlement of investment disputes between foreign investors and host states through arbitration. It is noted that the Convention is procedural in character; it does not contain any substantive rules to be applied to the merits of disputes brought before it.

The jurisdiction of ICSID tribunals is revealed by the name of the Convention itself: ‘The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States’. Article 25 adds that the dispute must be of a ‘legal’ nature, that the host state may agree to
include certain state subdivisions and agencies for the purposes of constituting both claimant and respondent; and that both the host state and the home state of the ‘national’ must be parties to the ICSID Convention.

For an investor to have standing, it must be a ‘national of another Contracting State’, which includes both natural and juridical persons. During the drafting of the Convention, a problem was foreseen with regard to this nationality requirement. Some states namely require that in order to invest on their territory, foreign investors must be organized under their laws. In that case, the investor would technically have the nationality of the host state, and the tribunal would consequently not have jurisdiction. For that reason, the Convention provides that juridical persons would have standing if ‘because of foreign control, the parties have agreed that they should be treated as a national of another Contracting State for the purposes of this Convention’.

Similar to territorialized tribunals, the consent of both parties constitutes an additional jurisdictional requirement. As explicitly provided in the ICSID Convention, no Contracting State shall by the mere fact of its ratification acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to arbitration. The Convention further stipulates that once a host state has given its consent to arbitrate a particular dispute, such consent may not be withdrawn unilaterally.


274 ICSID Convention (1965), art. 36(1) (emphasis added).


277 In order for states to ratify the ICSID Convention, they must first be members of the International Bank for Reconstruction and Development (World Bank). See ICSID Convention (1965), art. 67. The World Bank has 188 member states, 148 of which have ratified the convention. See World Bank, available at <http://www.worldbank.org> (last visited 1 May 2012) (under ‘About’ and ‘Member Countries’); ICSID, List of Contracting States and other Signatories of the Convention, available at <http://icsid.worldbank.org/> (last visited 1 May 2012). Note that article 67 of the ICSID Convention provides that it is also open for States not members of the Bank, but which are parties to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention. ICSID Convention (1965), art. 67 (footnote not in original).

278 ICSID Convention (1965), at Preamble, para. 7. See also Reinisch and Malintoppi, fn. 122, at 699.

279 See ICSID Convention (1965), art. 25(1).
4.2.1. The tribunals’ insulation from the law of the seat

In addition to the treaty nature of ICSID tribunals, the most important reason why they should be seen to operate within the international legal order is that by virtue of the ICSID Convention, their activities are not controlled by the states parties to the Convention. First, the Centre has full international legal personality and enjoys immunity from all legal process in the territories of all states parties. Such immunity extends to persons acting as arbitrators or appearing in the proceedings as parties, agents, counsel, advocates, witnesses, or experts, as long as the immunity relates to acts performed by them in the exercise of their functions. Secondly, the Convention explicitly provides that arbitration shall be conducted in accordance with the Convention and the Arbitration Rules of the Centre. Thirdly, it specifies that awards shall not be subject to any appeal or any other remedy except those provided for in the Convention itself, and fourthly, the Convention provides that ‘[e]ach Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories’. Combined, these features imply that a state party to the ICSID Convention cannot impose its own law on the proceedings taking place in its territory. Accordingly, and in order to shield ICSID awards from interference by national courts, the ICSID Convention provides that unless the arbitration is held at ICSID, in Washington DC or the Permanent Court of Arbitration, the Netherlands (the US and the Netherlands being parties to the ICSID Convention), the tribunal must approve the place of arbitration after consultation with the Secretary-General. The insulation of ICSID tribunals from national law is referred to by the ICSID tribunal in *Mihaly International Corp v Democratic Socialist Republic of Sri Lanka* (2002):

The Tribunal maintains that the jurisdiction of the Centre for Settlement of Investment Disputes (ICSID) and of this Tribunal is based on the ICSID Convention and the rules of general international law. It does not operate under any national law in particular, and certainly not under the law of the State of California or the law of the Province of Ontario.

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280 Cf. Blackaby et al., fn. 39, at 64 (‘Because it is governed by an international treaty, rather than by a national law, an ICSID arbitration is truly delocalised or denationalised’).
281 See ICSID Convention (1965), art. 18.
282 See ICSID Convention (1965), art. 20.
283 See ICSID Convention (1965), arts 21–22. Arbitrators and other persons involved in the proceedings before territorialized tribunals also enjoy a large degree of immunity, but this is a question of national law. On this issue, see, e.g., Yu and Shore, fn. 76, at 935.
284 ICSID Convention (1965), art. 44. See also Petrochilos, fn. 67, at 252.
285 ICSID Convention (1965), art. 53(1).
286 ICSID Convention (1965), art. 69.
287 See Lauterpacht, fn. 66, at 651; Heiskanen, fn. 11, at 396–7; *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, Case No. ARB/84/4, Decision on Annulment, 2 December 1989 (S. Sucharitkul, A. Broches, K. Mbaye, committee members), 5 ICSID Rev-FILJ 95 (1990); *Republic of Ecuador v Occidental Exploration and Production Company*, fn. 125, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, at para. 38. But see Chapter 5, Section 3.2.2.1 (on the corrective function of international law when the parties have agreed to the sole application of national law) (concerning the possibility that ICSID awards might be annulled when they are contrary to fundamental rules of international law).
288 See ICSID Convention (1965), art. 63. Cf. Lauterpacht, fn. 66, at 652 (‘It may be assumed that a decision to hold proceedings in a place not within the territory of one of the Contracting States would be dependent upon the absence of any risk that the local law could have any influence upon the conduct or validity of the proceedings’).
289 *Mihaly International Corporation v Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 (S. Sucharitkul, A. Rogers, D. Suratgar, arbs), para. 19. See also *Abaclat and Others* (Case formerly
The lack of control by the jurisdictional seat is compensated by a review mechanism within the ICSID system itself. According to article 52 of the ICSID Convention, either party to the dispute may request that an ad hoc committee, appointed by the Chairman of ICSID’s Administrative Council, annul the award on one or more of the following grounds: (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; and/or (e) that the award has failed to state the reasons on which it is based. The ad hoc committee may not amend or replace the award by its own decision on the merits; and a request for annulment must therefore be distinguished from an appeal: ‘An annulment committee […] cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on a question of merits it cannot create a new one.’ So far, ICSID has registered more than forty requests for annulment.

The clause on excess of powers has been interpreted to include failure to apply the proper law, one of the grounds for annulment of awards rendered by territorialized tribunals. During the drafting of the Convention, Broches, Chairman and World Bank General Counsel, stated that while a mistake in applying the law would not be a valid ground for annulment, applying a law different from that agreed by the parties would lead to an award that could properly be challenged on the ground that the arbitrators had gone against the terms of the compromis. This interpretation has been sustained in practice. The ad hoc committee held in Soufraki v United Arab Emirates (2007): ‘Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply...’

Known as Giovanna a Beccara and Others v Argentine Republic, ICSID Case No. ARB/07/5 (P. Tercier, S. Torres Bernárdez, A.J. van den Berq, arbit.), Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011, para. 6.

290 Cf. Lauterpacht, fn. 66, at 651 (the annulment provision ‘clearly indicate[s] the intention was that the system established by the Convention should be self-contained and independent of the local legal system’).

291 See ICSID Convention (1965), art. 52(1); C.H. Schreuer et al., fn. 269, at 899 (‘Under the Convention, Art. 52 is the only way of having the award set aside. In particular, domestic courts have no power of review over ICSID awards. During the Convention’s drafting […] the proposal to maintain the system embodied in the draft, providing for purely internal review, was carried with no opposition’).


294 ICSID Convention (1965), art. 52(1)(b).

295 For territorialized tribunals, see Section 3.2.1.2 (on annulment as an exercise of control); Section 3.3 (on the influence of the delocalization theory on state practice).

296 See Petrochilos, fn. 67, at 252 (referring to Dr Broches as ‘the spiritual father of the ICSID system!’).

the proper law.’\textsuperscript{298} Thus, according to the ad hoc committee in Azurix v Argentine Republic (2009): ‘while non-application by the tribunal of the law applicable under Article 42 may be a ground for annulment, the incorrect application by the tribunal of the applicable law is not.’\textsuperscript{299}

Some more recent ad hoc committees have given a wider interpretation of the grounds for annulment, so that ‘failure to apply the proper law is becoming increasingly indistinguishable from an error in the application of the law’.\textsuperscript{300} In an article entitled ‘From ICSID Annulment to Appeal: Half Way Down the Slippery Slope’, Schreuer criticizes this development:

\begin{quote}
[If] one is to take the annulments in Sempra and Enron as an indication of current practice, an ad hoc committee can annul an award whenever it disagrees with the way a tribunal interprets an applicable rule. In other words, failure to apply the proper law as a form of excess of powers has undergone two permutations: first the proper law became the proper rule. Second, the rule’s application became its correct application.\textsuperscript{301}
\end{quote}

Several of the requests for annulment have been initiated by the host state for failure to apply provisions of their national law.\textsuperscript{302} The decisions, many of which will be examined more fully in subsequent chapters, demonstrate the controversy regarding the applicable law in ICSID proceedings and the important role it plays for the resolution of the dispute and for the disputing parties.

\subsection*{4.2.2. States parties’ international obligation to comply with and enforce the awards}

In addition to their treaty nature and their insulation from the law of the seat, a third feature that adds to the international character of ICSID tribunals concerns the recognition and enforcement of their awards.\textsuperscript{303} Whereas ICSID—like the Iran–United States Claims Tribunal—does not have the ultimate means of enforcement and thus must rely on national courts,\textsuperscript{304} the ICSID Convention eliminates several of

\begin{footnotes}
\item[298] Soufraki v United Arab Emirates, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007 (F.P. Feliciano, O. Nabulsi, B. Stern, committee members), para. 86.
\item[299] Azurix Corp. v Argentine Republic, ICSID Case No. ARB/01/12, Decision on Annulment, 1 September 2009 (G. Griffih, B. Ajibola, M. Hwang, committee members), para. 137. See also MTD Equity v Chile, fn. 292, Decision on Annulment, at paras 47, 75; M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009 (D. Hascher, H. Danelius, P. Tomka, committee members), para. 42.
\item[301] Schreuer, ‘From ICSID Annulment to Appeal’, at 221. See also Sempra v Argentina, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010 (C. Söderlund, D.A.O. Edward, A.J. Jacovides, committee members), para. 164 (‘As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers’).
\item[302] See C. Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 Austrian Rev. Int’l & Eur. L. 147 (‘Over the last twenty years a number of attempts have been made to challenge arbitral awards in investment disputes on the ground that they were not based on the applicable law. ICSID ad hoc committees as well as domestic courts have dealt with these challenges in widely differing decisions’); Schreuer et al., fn. 269, at 554.
\end{footnotes}
the obstacles a winning party faces in respect of awards rendered by the territorialized tribunals examined earlier. First, once an award is issued, the host state—as a contracting party to the ICSID Convention—is under an international obligation to comply with it.\(^{305}\) Secondly, pursuant to article 54, an ICSID award shall be recognized as binding by all states parties to the ICSID Convention, and the pecuniary obligations imposed by the award shall be imposed as if it were a final judgment of a court in that state.\(^{306}\) As Justice Aikens explained in *AIG v Kazakhstan* (2005):

A party to an ICSID arbitration has the right, by virtue of the 1966 Act, to enforce an ICSID Award as a judgment of the English court. Execution of that judgment is an integral part of the 'trial' because it is part of the overall process of the ICSID arbitration procedure that was set up by the Washington Convention to which the UK is a party. The 1966 Act was passed to give effect to the Washington Convention in the UK and so as to assist in effective enforcement of ICSID arbitration awards in the UK.\(^{307}\)

No defence can be raised against the recognition and enforcement of ICSID awards based on the nature of the award or of the underlying transaction, or even public policy.\(^{308}\) Thirdly, Article 54 of the Convention makes the procedure for recognition and enforcement as simple as possible. The successful party need only furnish the competent court or authority designated in advance by each contracting state with a copy of the award certified by the Secretary-General of ICSID.\(^{309}\) In combination, these provisions contribute to the tribunals' international character.\(^{310}\)

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\(^{305}\) ICSID Convention (1965), art. 53(1) ('The award shall be binding on the parties'). See also art. 27(1) (The right to diplomatic protection revives if a host State does not comply with its obligation to enforce the award).

\(^{306}\) ICSID Convention (1965), art. 54(1).

\(^{307}\) *AIG v Kazakhstan*, Decision of the High Court of Justice, 20 October 2005 (per Justice Aikens) [2005] EWHC 2239 (Comm), para. 71 (emphasis in original). See also *Republic of Ecuador v Occidental Exploration and Production Company*, fn. 125, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, at para. 38 ('The ICSID scheme also differs in having its own enforcement mechanism, so that the New York Convention is inapplicable').

\(^{308}\) See *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Request for Stay of Enforcement, 5 March 2009 (C. Söderlund, D.A.O. Edward, A.J. Jacovides, committee members), paras 40–41; E. Baldwin et al., 'Limits to Enforcement of ICSID Awards' (2006) 23(1) *J. Int’l Arb*. 1 (there have been three decisions challenging the enforcement and execution of ICSID awards in national courts, and one case challenging only execution of the award. 'All of the enforcement challenges have been unsuccessful, whereas challenges to execution of the award against particular sovereign assets have been more successful'). Cf. ICSID Convention (1965), art. 55 ('[N]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'). See also Chapter 5, Section 3.2.2.1 (on the corrective role of international law when the parties have agreed on the sole application of national law) (on the possibility of non-enforcement of ICSID awards contrary to fundamental rules of international law).

\(^{309}\) See ICSID Convention (1965), art. 54(2); Benvenuti & Bonfant Company v The Government of the People’s Republic of Congo, Court of Appeals of Paris, France, Judgment, 6 June 1981, 20 I.L.M. 877, 881 (1981). If recognition and enforcement is sought in a state not party to the ICSID Convention, a successful claimant may have to rely on, e.g., the New York Convention. See A.J. van den Berg, ‘Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions’ (1987) 2 ICSID Rev.-FILJ 439.

\(^{310}\) Cf. *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986 (I. Seidl-Hohenveldern, F.P. Feliciano, A. Giardina, committee members), 25 I.L.M. 1439, 1446 (1986). See also Chapter 5, Section 3.2.2 (on the supervening role of international law).
4.2.3. **Interim conclusion**

By reason of the fact that the jurisdiction of ICSID tribunals rests on a treaty; that states parties to the ICSID Convention have relinquished their sovereign right to exercise control over the activities of ICSID tribunals in their territory, and that ICSID awards receive their validity in their international legal order, we can conclude that their *lex arbitri* is international law.\(^{311}\)

5. **General Conclusions**

Based on the foregoing, we conclude that the delocalization theory—with its de-emphasis of the role of national legal orders in the arbitral process—has had much influence on national arbitration laws. This is evidenced by the large degree of procedural freedom provided to the disputing parties and the arbitrators alike. Nevertheless, these laws—by continuing to subject arbitral proceedings and the subsequent awards to various, albeit limited, requirements—give testimony to the strength of the seat theory. State practice thereby corroborates that the mandate of such ‘territorialized’ tribunals partly stems from a national legal order, giving effect to the parties’ arbitration agreement.

States may also surrender the sovereign right of control over tribunals operating within their jurisdiction. When they do so by virtue of a bi- or multilateral treaty, according to which the awards become binding on the international level, the arbitral tribunals are not delocalized or a-national, but they operate in and are subject to the rules of the international legal order. These tribunals, which include the Iran–United States Claims Tribunal and ICSID tribunals, may thus be characterized as ‘internationalized’.

In the ensuing analysis of choice-of-law rules, we will examine the extent to which such grounding in the national or the international legal order influences the arbitrators’ choice-of-law methodology.

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\(^{311}\) Cf. Mann, fn. 205, at 13–14; Rigaux, fn. 208, at para. 85; Petrochilos, fn. 67, at 256.