International Arbitration Rules and Their Effect on the Merits of Energy Sector Disputes

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Abstract

International Arbitration Rules and Their Effect on the Merits of Energy Sector Disputes

Many countries around the world rely on the energy sector for industry, national security, mobility, economy, and countless other benefits. The importance of the energy sector makes disputes likely and necessitates dispute resolution mechanisms. Through International Investment Agreements (IIAs), arbitration has become an integral part of the dispute resolution process in international energy sector disputes. Thus, understanding the arbitration rules and how choosing one set of rules can affect the outcome of an international energy sector dispute becomes an important task. The most prevalent arbitration rules are the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the Stockholm Chamber of Commerce (SCC) Arbitration Rules, and the International Chamber of Commerce (ICC) Arbitration Rules. This thesis examines each of the different arbitration rules and determines which set of rules would be the best choice when initiating an arbitration (as an investor) against a state.

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Negotiation, arbitration, or all-out war –How disputes resolution in the energy sector evolved into its current form.

It is not that energy problems and solutions are occasionally in the news; energy problems and solutions are always in the news. Whether it is some new form of energy generation or news about good old fashioned crude oil, people are anxious to hear about how to satiate the desire, the need, for more energy. Coal, liquid coal, gasoline, diesel, crude, chemical, natural gas, liquid natural gas, wind turbines, solar panels, nuclear reactions, and hydro-electric power are some of the mediums used in the production of energy. Some are seen as vestiges of a past laden with acid rain and pollution; others as the gateway into a cleaner, more environmentally friendly, future. All are, or have been, used to power cities and drive industry; thus, perpetually further civilizing what one now sees as civilization. Without energy things would still be as they were in 1800, and people would quite literally be in the dark, because every light bulb needs a power source. If the importance of energy is not clear enough, think of every technological leap in the past 200 years, and odds are that it was powered or driven by electricity, combustible resources, or energy.

Energy, like all things precious or necessary to society, has been the source of great wealth and power. The rise in the importance of energy places it at the forefront of political, economic, and security concerns. Consequently, international disputes over energy (e.g. oil) are relatively commonplace, whether it be investor—state disputes

(discussed herein) or state—state disputes.[1] International law has developed dispute resolution mechanisms to handle investor—state disputes and to some extent state—state disputes.[2]

In many countries the energy sector is particularly susceptible to being nationalized or expropriated (i.e. a taking by a government).[3] Generally, states try to attract energy sector businesses which can exploit their natural resources.[4] When negotiating and attracting investment, the energy sector businesses generally have a strong position at the bargaining table.[5] However, once an energy sector business spends the time and money to invest in a state the state has the power to take advantage of the business and exploit the investment.[6] When the state goes too far in exploiting the energy investment (of a business) an expropriation can occur and the business will look for some way to recuperate its losses.[7] Typically, foreign investors in the energy sector resort to

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[1] Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 1-17, 79-81, & 233-238 (2nd ed. 2012) (discussing the disputes between states regarding oil; also discussing disputes arising out of investment contracts between investors and states over oil).

[2] O. Thomas Johnson, Jr. and Johnathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK OF INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011, 649-92 (Karl P. Sauvant eds., 2011) (discussing the development of FDI since the late 1700s); Craig Bamberger, Jan Linehan, and Thomas Waelde, *Then Energy Charter Treaty*, *in* ENERGY LAW IN EUROPE: NATIONAL, EU AND INTERNATIONAL LAW AND INSTITUTIONS, 171-91 (Martha M. Roggenkamp et al. eds., 1st ed. 2001) (discussing the state—state arbitration provisions under the ECT as well as other state—state dispute resolution options); Tim Martin, *Lex petrolea in international law*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 95-97 (Carolyn Boyle et al. eds., 1st ed. 2012) (discussing the commonly raised disputes between investor—states and states).

[3] David Isenegger, *Dispute Resolution: an Industry Perspective*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 76-77 (Carolyn Boyle et al. eds., 1st ed. 2012)

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 76-78.

using Bilateral Investment Treaties (BITs) to claim that the state has expropriated their investment.[8] Expropriation claims usually consist of a foreign party claiming that a government entity has deprived the party (who is an investor) of some sort of business value in the country where he is operating (directly or indirectly).[9] The international standard for expropriation is (and has been historically recognized as) that expropriation is allowed so long as the investor is given the fair value of what is taken.[10] Non-compliance with this standard could result in a number of outcomes and has been determined by the era in which the claim was made, but generally there were four eras for claims.[11]

The first era of expropriation claims was from about 1800 to the 1914.[12] During this period colonial powers were investing in their colonies, so most claims were on behalf of parties from the colonizing countries.[13] These parties would bring their claims to their respective home country, whereupon the home country would use any legal or diplomatic means to ensure that the colonial party was compensated for the taking.[14] Some of these measures included international claims tribunals, like the claims tribunals between the United States and Great Britain to compensate investors who lost property in the Revolutionary War.[15] If the colonial party was still uncompensated, then there was a

[8] *Id.*
[9] U.N. Conference on Trade and Development [UNCTAD], Investor-State Disputes Arising from Investment Treaties: A Review, UNCTAD Doc. UNCTAD/ITE/IIT/2005/4, 41-47 (2005).
[10] Johnson and Gimblett, *supra* note 2, 649-92.
[11] *Id.*
[12] *Id.* at 649-657.
[13] *Id.*
[14] *Id.*
[15] *Id.*

distinct possibility that the colonial power would send in the military to resolve the investment dispute.[16] In fact, the militaries of colonial powers were often used for investment protection during this era.[17] However, the tribunals between the U.S. and Britain eventually spurred more such arbitrations and helped establish arbitration as the primary means for resolving international investment disputes.[18] Thus the use of militaries to help investors was eventually phased out, which led to the second era in international investment law.[19]

The second era consisted of the period from about 1914 to the beginning of the cold war (about 1945).[20] During this period there were mass expropriations in places like Mexico and Russia.[21] However, instead of settling disputes on the battlefield, the international community chose to settle disputes through more civilized mechanisms such as the Permanent Court of Arbitration or the Permanent Court of International Justice.[22] In a case involving Mexico, the Mexican Government expropriated the U.S. and British oil industry in Mexico.[23] Instead of sending military forces to Mexico, the U.S. negotiated a settlement with Mexico two years later.[24] Further, this period was significant because individual parties (non-governments) were starting to gain rights which allowed them to directly claim against foreign governments.[25] However, a large number of

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 649-650, 657-667.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

disputes were still being settled through state to state negotiations to allow the expropriating state a chance at actually paying off the expropriated property.[26] The confusing state to state agreements of this second era eventually took their toll on international politics and lead to the third era.[27]

The third era of investment disputes happened throughout the Cold War era, about 1945 to 1989.[28] The first Bilateral Investment Treaties (BITs), treaties between states which allowed parties from one contracting nation to directly claim against the other nation, were created during this era.[29] Even with the creation of BITs, the era was marked with mass expropriations by communist countries and some lump-sum claim settlements between the expropriating states and the states of the investors.[30] Most countries who expropriated property during this period (and did not pay compensation) would eventually be brought to the bargaining table with hopes of attracting investors back to the countries.[31] Occasionally expropriation disputes would be resolved through international arbitration, like the expropriations of oil concessions in Libya and Kuwait.[32] The most notable case of a country not paying for the expropriation of property was the expropriation of U.S. investments (including oil companies) in Iran, but even Iran was brought back to the bargaining table in the early 1980s.[33] Iran and the U.S. set up the Iran-U.S. Claims Tribunal to start to resolve these claims, and further seemed to codify

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[26] *Id.*
[27] *Id.*
[28] *Id.* at 649-650, 667-685.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

the same standard of expropriation (that it is allowed with reasonable compensation) for the next era.[34]

The fourth, and last, era is the current BIT era; which extends from 1989 to the present.[35] The current era arose out of the first BIT created during the Cold War era.[36] After the first BIT was created between Germany and Pakistan, the number of BITs has snowballed to an overwhelming number.[37] Now there are over 2,500 BITs which grant individual parties the right to directly claim against foreign governments, instead of having to wait for their own governments to make a claim on their behalf, for an expropriation.[38] Thus, most disputes are no longer state—state and investors are left to resolve their own claims through BITs.[39] Since investors are left to resolve their own disputes, a significant network of resolution mechanisms have arisen to cope with the disputes.[40] The most significant mechanism for resolving investor-state disputes (through BITs) is arbitration, since arbitration mechanisms are typically built into BITs.[41]

If the connection between investor—state disputes, expropriation, and the energy sector is still nebulous, consider that the importance of the energy sector makes it particularly subject to the expropriation.[42] Venezuela, for instance, has had one series of

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[34] *Id.*
[35] *Id.* at 649-650, 685-692.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Isenegger, *supra* note 3, 76-77 (discussing the vulnerability of oil and gas companies after they invest in foreign countries).

expropriations back in the 1970s where the government expropriated the oil industry.[43] Then after the first set of expropriations, Venezuela found a way to attract more investments back to the oil and gas sector in the 1990s, only to cause the equivalent to another expropriation (which led to a subsequent investment dispute and arbitration award against Venezuela).[44] Thus, Venezuela essentially found a way to expropriate the oil industry, attract new investments only to cause an expropriation again.[45] A major event which showed of the vulnerability of the energy sector occurred in 1962, when the United Nations General Assembly passed a resolution declaring that countries have permanent sovereignty over their own natural resources.[46] The resolution did not, in of itself, explicitly state that it also included energy generating resources (e.g. oil and natural gas).[47] However, one of the results of that resolution was the nationalization of the petroleum industries in almost all of the OPEC countries.[48] To put that into perspective, just one U.N. resolution caused the nationalization of almost the whole petroleum industry in the OPEC countries, even though the industry in those countries was previously majority owned by foreign investors.[49]

International energy disputes (mainly investor—state disputes) can be resolved in a number of ways, though the most substantial options for investors are negotiating,

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[43] *Venezuela Holdings, B.V. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014).
[44] *Id.*
[45] *Id.*
[46] Permanent Sovereignty over Natural Resources, G.A. Res. 1803, 17th Sess., U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962).
[47] *Id.*
[48] U.N. Secretary-General, Permanent Sovereignty over Natural Resources: Report of the Secretary General, 29th Sess., U.N. Doc. A/9716 (Sep. 20, 1974).
[49] *Id.*

mediating, or arbitrating a dispute.[50] While each mechanism has different strengths and weaknesses, arbitration is the most concrete of these mechanisms and it offers the most significant enforcement options (discussed in depth later).[51] Arbitration can be appealing because it is neutral, flexible, and can be efficient for highly technical disputes.[52] It is also popular because it is usually binding and enforceable against a foreign country.[53] Further, as the above paragraphs show, arbitration (or some functional equivalent to arbitration) has also been the historical choice for the resolving international investment disputes. At the very least, arbitration is a much better option than going to war over investment disputes.

Moreover, the importance of the energy sector makes it important to understand how arbitration can affect the outcome of an investor—state dispute. More precisely, it is important to understand how choosing one set of arbitration rules may affect the outcome of an investor—state dispute in the energy sector.

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[50] Eric De Brabandere, *The Settlement of Investment Disputes in the Energy Sector, in* FOREIGN INVESTMENT IN THE ENERGY SECTOR: BALANCING PRIVATE AND PUBLIC INTERESTS, 130-168 (Eric De Brabandere & Tarcisio Gazzini eds., 1st ed. 2014) (discussing the importance of arbitration in the international energy sector). *Cf.* Georgia Quick & Deborah Tomkinson, *Alternative dispute resolution*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 51-70 (Carolyn Boyle et al. eds., 1st ed. 2012) (discussing the different types of ADR in the international energy sector and how to efficiently use each).

[51] *Id.*

[52] *Id.*

[53] *Id. Cf.* Thomas Roe & Matthew Happold, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY, 18-19 (James Dingemans et al. eds., 1st ed. 2011) (discussing the enforcement of arbitration awards against states under the New York Convention).

The Thesis –

The most prevalent arbitration rules utilized in the energy sector are the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the Stockholm Chamber of Commerce (SCC) Arbitration Rules, and the International Chamber of Commerce (ICC) Arbitration Rules. In examining the different arbitration rules it becomes clear that choosing one set of rules over the others will likely not significantly affect the merits of the dispute. Further, there are very few procedural advantages from using one set of arbitration rules over another. However, as to enforcement of the arbitral award, the ICSID Arbitration Rules provide the best, and the most effective, enforcement options.

The Progression –

The main concern of this thesis is which set of arbitration rules would be the best choice in an energy sector arbitration.

It first looks at the different ways to gain consent to arbitration and how each consent mechanism can impact arbitration and the choices between the arbitral rules. Then it looks at the different histories of the arbitration rules and provides some of the motivations behind them. Lastly, it provides the history of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and how it effects the enforcement of arbitration awards.

Section II of this thesis reviews each set of arbitration rules. It does this by providing their frameworks, how they function, and the provisions of each. This section looks at the UNCITRAL, ICC, SCC, and ICSID Arbitration Rules.

The last section analyzes the different arbitration provisions to determine which arbitration rules may be the most beneficial to an investor. It starts by looking at how the different arbitration provisions could affect the merits of a dispute. Then after examining the effect on the merits of the dispute, it analyzes the potential positive or negative effects on arbitrations. Following the effects of the arbitration rules, the analysis section concludes by looking at how parties can affect the enforcement of arbitration awards under the various arbitration rules. Upon completion of the analysis section, this thesis closes with an explanation of the complexities in arbitrations and how the rules fit within the whole scheme of arbitration.

I. History

The history of the ECT, BITs, and the energy sector in general.

Investor—State arbitration requires an agreement between the investor and the state, or between the investor's state and the host state.[54] These agreements usually state that the countries consent to arbitration, which is essential for either enforcement under the New York Convention or the submission of the claim to arbitration (depending upon the arbitration rules).[55] Either way, consent is key in investor—state arbitration and

[54] Dolzer & Schreuer, *supra* note 1, 254-262.
[55] *Id. See generally* UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules, available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations, available at http://www.sccinstitute.com/filearchive/4/44281/Skiljedomsregler%20f%C3%B6renklad

investor—state arbitration in the international energy sector is no different.[56] In the international energy sector, arbitration is most likely to be based on one (or more) of three types of International Investment Agreements (IIAs): 1) The Energy Charter Treaty; 2) Bilateral Investment Treaties; or 3) Free Trade Agreements.[57] These agreements contain important investment protections and procedural mechanisms.[58] The IIAs go further by limiting investor claims to certain defined criteria and specific arbitration institutions (or rules).[59] Most energy sector investor—state arbitrations brought under

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e%20engelska%202010.pdf (2010); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), June 10, 1958, 21 U.S.T. 2517 [hereinafter The New York Convention].

[56] Dolzer & Schreuer, *supra* note 1, 254-259 (discussing the consent to arbitrate under NAFTA and the ECT); De Brabandere, *supra* note 8, 130-145 (explaining how important consent is in and out of the energy sector); *Cf.* Stephen Jagusch & Anthony Sinclair, *The Limits of Protection for Investments and Investors under the Energy Charter Treaty*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY, 73-103 (Clarisse Ribeiro eds., 1st ed. 2006) (discussing how plaintiffs may bring claims under the ECT and other BITs).

[57] Dolzer & Schreuer, *supra* note 1, 254-259 (discussing the consent to arbitrate under NAFTA and the ECT); De Brabandere, *supra* note 8, 130-168 (explaining consent through the ECT and BITs); U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014); Tom Cummins & Ben Giaretta, *Investment treaty arbitration*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 225-234 (Carolyn Boyle et al. eds., 1st ed. 2012) (discussing the role of BITs and MITs). Contracts between investors and states can also be the basis of consent to an arbitration, but will not be covered in this thesis.

[58] *See generally* The Energy Charter Treaty, 2080 U.N.T.S. 95; 34 I.L.M. 360 (signed 17 December 1994, entered into force 16 April 1998) [hereinafter The Energy Charter Treaty]; North American Free Trade Agreement (NAFTA), U.S.-Can-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; Office of the U.S. Trade Representative, 2012 U.S. Model Bilateral Investment Treaty, available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (2012) [hereinafter The 2012 U.S. Model BIT]; Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124, amended by S. Treaty Doc. No. 103-2 (1993) [hereinafter The U.S.—Argentina BIT]; Cummins & Giaretta, *supra* note 57, 225-244 (discussing the protections in and uses of the ECT, MITs, and BITs).

[59] *Id.*

these IIAs claim some form of expropriation (whether or not they succeed on the issue of expropriation is a different matter).[60] These instruments provide the best protection for fostering investment, the knowledge that you have the opportunity to reclaim some of the losses caused by a state taking; essentially creating a guaranteed right of protection when

[60] Dolzer & Schreuer, *supra* note 1, 98-129 (discussing the different types of expropriation, and how it viewed and defined in the international realm). *See generally* AES Summit Generation Ltd. & AES-Tisza Erömü Kft. v. Hungary, ICSID Case No. ARB/07/22, Annulment Proceeding (June 29, 2012); AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Decision on Annulment (June 29, 2012); Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, Decision on Annulment (July 10, 2014); Azpetrol International et al. v. The Republic of Azerbaijan, ICSID Case No. ARB/06/15, Award (Sept. 8, 2009); Cementownia "Now a Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award (Sept. 17, 2009); CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005); El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award (Oct. 27, 2011); Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award (Aug. 13, 2009); EVN AG v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/10, Settlement Agreement (Sept. 9, 2011); Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue (June 12, 2009); Ioannis Kardassopoulos & Ron Fuchs v. The Republic of Georgia, ICSID Case No. ARB/05/18 & ARB/07/15, Award (Mar. 3, 2010); LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Liman Caspian Oil B.V. and NCL Dutch Investment B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award (June 22, 2010); Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008); Vattenfall AB et al. v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Settlement Agreement (March 11, 2011); Venezuela Holdings, B.V. et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014); Hulley Enterprises Ltd. v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014); Veteran Petroleum Trust v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014); Yukos Universal Ltd. v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014); Amto LLC v. Ukraine, SCC Case No. 080/2005, Div. 1602 (Jan. 19, 2007); Anatolie and Gabriel Stati et al. v. Kazakhstan, SCC Case No. 116/2010, Div. 1602 (Dec. 19, 2013); Mohammad Ammar Al-Bahloul v. Tajikistan, SCC Case No. 064/2008, Award (June 8, 2010); Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC Case No. 119/2001, Award (Dec. 16, 2003); Republic of Kyrgyzstan v. Petrobart Ltd., SCC Case No. T5208-05, Div. 1602 (Jan. 19, 2007) (alleging expropriation or indirect expropriation).

investing in a foreign country.[61] With one of the instruments below, a foreign investor probably needs to worry more about their business acumen than about losing their investment to a foreign country.

The Energy Charter Treaty (ECT) is one of the most prevalent energy investment treaties due to the sheer number of energy sector arbitrations brought under this one document.[62] The ECT was a product of the European Energy Charter in 1991, though the ECT was not officially formed or signed until much later.[63] The Energy Charter Treaty was created in 1994, and from then until June of 2013, 54 countries have signed onto the treaty.[64] The ECT sought to make eastern European states more marketable to western nations, at least with regard to energy, since the Eastern European States had significant sources of raw materials, but not the money needed to exploit them.[65] Out of this necessity the ECT became essentially a multilateral investment treaty, only a little more far reaching.[66]

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[61] De Brabandere, *supra* note 8, 130-145 (discussing the importance of BITs and the ECT in protecting investments, as well as the lengths they go to protect investments); Cummins & Giaretta, *supra* note 57, 225-244 (discussing the protections in and uses of the ECT, MITs, and BITs); Dolzer & Schreuer, *supra* note 1, 1-27 & 98-129 (discussing the evolution of these instruments and why they came about, also discussing the different types of expropriation).

[62] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).

[63] Energy Charter Secretariat, The Energy Charter Treaty and Related Documents, An Introduction to the Energy Charter Treaty, page 13-20, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (2004).

[64] Energy Charter Secretariat, Energy Charter 2013 Annual Report, available at http://www.encharter.org/fileadmin/user_upload/Publications/AR_2013_ENG.pdf (2014).

[65] Energy Charter Secretariat, The Energy Charter Treaty and Related Documents, An Introduction to the Energy Charter Treaty, page 13-20 (2004).

[66] *Id.*

The ECT is substantially composed of five sections.[67] The first is the protection of foreign investments in energy; the second focuses on free trade in line with WTO requirements.[68] The third section provides for the free transportation of energy (pipelines or grids).[69] The ECT then addresses environmental concerns in the fourth section by trying to improve efficiency.[70] The last section resolves disputes among the contracting countries or between a contracting country and an investor from another contracting country.[71] Thus, these five provisions provide the central components of the ECT protections and form the foundation for claims arising under the ECT.[72] The provisions pertaining to National Treatment (NT), Most Favored Nation Treatment (MFN), investment protections, and Investor—State Arbitration are immediately relevant.[73] These provisions make "[t]he Treaty. . . carr[y] the equivalent legal force of a unified network of bilateral investment protection treaties[;]" meaning that it provides substantial invest protection to investors from states that are part of the ECT.[74]

The most important provision of the ECT (at least for this paper) is Article 26, *Settlement of Disputes Between an Investor and a Contracting Party*.[75] To use the dispute resolution mechanism in Article 26, the investor's state and the defendant state must both

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[67] *Id.* at 14.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 13-20.
[73] Bamberger, Linehan, & Waelde, *supra* note 2, 171-91 (discussing the protections and their importance in the ECT); Cummins & Giaretta, *supra* note 57, 225-244 (discussing the protections, including MFN and NT, in the ECT, MITs, and BITs).
[74] Energy Charter Secretariat, The Energy Charter Treaty and Related Documents, An introduction to the Energy Charter Treaty, Investment, at 14 (2004).
[75] The Energy Charter Treaty, *supra* note 58, Part V, at Art. 26.

be parties to the ECT.[76] Further, the dispute must arise under Part III of the ECT, which concerns investment protections (which will be discussed later).[77] Article 26, sets out the provisions for allowing investor-state dispute settlement, in which (after a three month settlement period) the investor has the option of any of the following: 1) bringing the dispute before the courts of the defendant contracting state; 2) settlement of the dispute in line with an agreement between the parties (e.g. a contract between the investor and the state which states that the flip of a coin will resolve the dispute); or 3) arbitration under Article 26(3-8) of the ECT.[78]

To understand how the ECT effects the different arbitration rules, it is imperative to know the mechanics of arbitration under the ECT. Under Article 26(3), the countries who are part of the ECT give their consent unconditionally to any of the dispute resolution mechanisms in the treaty.[79] The consent extends to international arbitration, to the local courts of the host country, or to any other dispute resolution mechanism.[80] A contracting state (and apparently even an observer party) has to add its name to Annex ID in order to effectively prevent the re-submission of claims to arbitration, where they have already been settled in the defendant state's courts or by other agreement mechanisms.[81]

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[76] *Id.*
[77] *Id.* Art. 26(1) & Part III.
[78] *Id.* Part V, Art. 26.
[79] *Id.* Art. 26(3); Bernardo M. Cremades, *Parallel Arbitration Tribunals and Awards*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY, 304-315 (Clarisse Ribeiro eds., 1st ed. 2006); Juliet Blanch, Andy Moody, & Nicholas Lawn, *Access to dispute resolution mechanisms under Article 26 of the Energy Charter Treaty*, *in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY, 5-14 (Graham Coop & Clarisse Ribeiro eds., 1st ed. 2008).
[80] *Id.*
[81] *Id.* Energy Charter Secretariat, The Energy Charter Treaty and Related Documents, The Energy Charter Treaty, Annexes to the Energy Charter Treaty, 6. Annex ID (2004).

The same consent, as discussed above, provides additional consent under Article 26(5)(a) for the contracting state's consent to arbitration under the ICSID Convention (and the additional facility rules), UNCITRAL Arbitration Rules, and the New York Convention.[82] Article 26(5)(b) further provides that, should either party wish, the arbitration will occur in a state that is party to the New York Convention.[83] Also, it provides that the claim is deemed to be the product of a commercial transaction (or relationship) to satisfy Article I of the New York Convention.[84] Article 26(4) explicitly sanctions three different dispute resolution proceedings: 1) ICSID (if the investor's home state and the defendant state are parties to the ICSID Convention) or the ICSID Additional Facility Rules (if only one is a party to the ICSID Convention); 2) arbitration under the UNCITRAL Arbitration Rules (e.g. ad hoc tribunals); or 3) arbitration through the SCC.[85] Though state consent is automatic, an investor must write to the ICSID institution, the SCC institution, or the UNCITRAL tribunal and express its consent to international arbitration.[86] The award, under ECT Article 26(8), may include interest.[87] If the defending party is a part of the defendant state(e.g. a government institution), then award must include a provision which allows quantifiable monetary damages as an alternative to any other type of award (e.g. a monetary amount must be stated as an

[82] The Energy Charter Treaty, *supra* note 58, Part V, Art. 26; Blanch, Moody, & Lawn, *supra* note 79, 5-14.
[83] The Energy Charter Treaty, *supra* note 58, Part V, Art. 26.
[84] *Id.* Art. 26(5)(b).
[85] The Energy Charter Treaty, *supra* note 58, Part V, Art. 26; Blanch, Moody, & Lawn, *supra* note 79, 5-14. Presumably this section also covers the SCC Expedited Arbitration Rules which will be noted in further footnotes.
[86] The Energy Charter Treaty, *supra* note 58, Part V, Art. 26.
[87] *Id.*

alternative to specific performance).[88] Since the inception of the ECT to the end of 2013 there have been (or are) at least 43 arbitrations, though there may have been more since there are no notification requirements.[89] The vast majority of ECT disputes, 25, have been arbitrated under ICSID.[90] The SCC has with the second most number of arbitrations under the ECT, with ten disputes.[91] The UNCITRAL Arbitration Rules only garnered seven disputes.[92]

The substantive provisions which specify a cause of action under Article 26 of the ECT are listed under *Part III Investment Promotion and Protection*.[93] Article 10 provides broad substantive protections for investments including fair and equitable treatment, protection and security, non-discrimination, most favored nation (MFN) treatment, and national treatment (NT).[94] The specific terminology of Article 10 is broad and offers parties equally broad investment protections.[95] Article 11 provides protections for investors, and their personnel, of the contracting states to enter and remain in the territory

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[88] The Energy Charter Treaty, *supra* note 58, Part V, Art. 26, at Art. 26(8).
[89] Energy Charter Secretariat, Energy Charter 2013 Annual Report (2014).
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] The Energy Charter Treaty, *supra* note 58, Part III and V, Art. 26.
[94] The Energy Charter Treaty, *supra* note 58, Part III, Art. 10; *See* Andrea J. Menaker and Heather Van Slooten Walsh, *The Energy Charter Treaty and U.S. Investment Treaties: An overview of key contrasts*, *in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY, 312-315 (Graham Coop & Clarisse Ribeiro eds., 1st ed. 2008) (discussing MFN and NT under the ECT); Christoph H. Schreuer, *Fair and Equitable Treatement (FET): interactions with other standards*, *in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY, 63-100 (Graham Coop & Clarisse Ribeiro eds., 1st ed. 2008) (discussing FET and how it relates to other protections under the ECT); Dolzer & Schreuer, *supra* note 1, 98-129 (2nd ed. 2012) (discussing expropriation clauses and what they generally contain); Todd Weiler, THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW, 416-420 (1st ed. 2013) (examines the MFN and NT in investment treaties).
[95] *Id.*

of another contracting state in order to operate and further the investment.[96] Article 12(1) contains provisions for MFN and NT for benefits designed to reimburse investors who have been harmed as a result of unrest which caused the destruction of the investment.[97] However, adequate compensation is required if the investment was taken by the contracting state's forces or destroyed by them (when the destruction was not necessary).[98] Article 13 protects against expropriation (a taking) against the investor unless: 1) it is for a public purpose; 2) it is completed non-discriminatory; 3) it is pursuant to the due process considerations; and 4) the investor is appropriately compensated quickly and wholly.[99] The compensation offered has to be at a fair market value and the funds must be easily convertible to other types of currency (if the complainant so desires).[100] The taking of a company or of shares a company are considered expropriations against a foreign investor, even if they are a local company owned by an investor from a contracting state.[101] Transfers of money, from the investment, in and out of the host state are protected and must be allowed under Article 14.[102] Article 15 is about subrogation which allows one contracting state to claim, against another contracting state, on behalf of one of its home state investors.[103] The last immediately relevant article, Article 16, allows other agreements or treaties to circumvent

[96] The Energy Charter Treaty, *supra* note 58, at Art. 11.
[97] *Id.* Art. 12(1).
[98] *Id.* Art. 12(2).
[99] *Id.* Art. 13(1).
[100] *Id.*
[101] *Id.* Art. 13(3).
[102] *Id.* Art. 14.
[103] *Id.* Art. 15.

the ECT if the other treaty provides more protections than the protections guaranteed under the ECT.[104]

The most prolific type of agreement which may provide more investment protection than the ECT is the Bilateral Investment Treaty (BIT).[105] The concept of a BIT is that it attracts investment for a host state, from a home state, by protecting investors from both nations.[106] BITs are of ever-increasing importance in the international realm; in 2009, BITs numbered around 2,700 worldwide.[107] BITs have become immeasurably valuable in protecting investors, though there is still debate over whether they actually help foster investment.[108] BITs are most cherished for the sections which give consent to Investor—State Arbitration.[109] These protections can extend to investments in the energy sector; thus, taking BITs into consideration when looking at energy sector arbitrations becomes important.[110] Two examples, for the United States, are the 2012 U.S. Model BIT and the BIT between the United States and the Argentine Republic. The U.S.—Argentina BIT has been used, as the document granting consent, in a few energy sector arbitrations.[111] The 2012 U.S. Model BIT is likely to be the subject of future energy

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[104] *Id.* Art. 16.
[105] The Energy Charter Treaty and Related Documents, An Introduction to the Energy Charter Treaty (discussing how the Energy Charter Treaty is limited to energy matters); Bamberger, Linehan, & Waelde, *supra* note 2, 171-210 (discussing the limitations of the ECT and comparing it to BITs and FTAs).
[106] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress, at 3 (2013).
[107] Johnson & Gimblett, *supra* note 2, 649-92.
[108] *Id.* Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress, at 3 (2013).
[109] Johnson & Gimblett, *supra* note 2, 649-92.
[110] Cummins & Giaretta, *supra* note 57, 225-244 (discussing energy sector protections in and the uses of the ECT, MITs, and BITs).
[111] *See generally* CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005); El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award

sector cases. Both treaties provide for many of the same type of protections as the ECT.[112] The ECT is limited to energy production and investments relating thereto, whereas the BITs are concerned with many different types of investment, including energy production investments.[113] Reading the individual protections, in each of the three IIAs, it would be hard to distinguish between any of them with regard to substantive and procedural provisions.[114]

The procedural provisions in the United States BITs have changed only slightly in the wake of the new 2012 BIT.[115] The U.S.—Argentina BIT allows a broad category of entities to bring arbitration claims under the BIT, so long as they are from the opposite state and claim that their investment rights (guaranteed in the treaty) have been violated.[116] The complaining party has an obligation to try to negotiate a resolution, but if they cannot, the complaining party has the same options to recourse as in the ECT.[117]

(Oct. 27, 2011); LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006).

[112] *See generally* The Energy Charter Treaty and Related Documents; The 2012 U.S. Model BIT, *supra* note 58; The U.S.—Argentina BIT, *supra* note 58 (these IIAs offer very similar protections).

[113] The Energy Charter Treaty and Related Documents; The U.S.—Argentina BIT, *supra* note 58; The 2012 U.S. Model BIT, *supra* note 58; Johnson & Gimblett, *supra* note 2, 649-92 (discussing the development of BITs since the late 1700s as well as their importance across all sectors). *See generally* CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005); El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award (Oct. 27, 2011); LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006).

[114] *See generally id.*

[115] The 2012 U.S. Model BIT, *supra* note 58; The U.S.—Argentina BIT, *supra* note 58; Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).

[116] The Energy Charter Treaty and Related Documents; The U.S.—Argentina BIT, *supra* note 58, at Art. VII.

[117] The Energy Charter Treaty and Related Documents; The U.S.—Argentina BIT, *supra* note 58.

Those options, for the complainant, under the U.S.—Argentina BIT are: 1) bringing the dispute before the courts/tribunals of the contracting state (which is the party to the dispute); 2) settlement of the dispute in line with an agreement between the parties (e.g. a contract between the investor and the state which states that the flip of a coin will resolve the dispute); or 3) arbitration under Article VII(3) of the U.S.—Argentina BIT.[118] The similarities between the dispute resolution mechanisms in the BIT and the ECT are so substantial that the only real discernable difference is the direction to the different arbitration clauses within each document.[119] Procedurally there are some differences, including ones where the BIT requires a six month wait period and disallows the resubmission of a claim to arbitration if the claimant has chosen to follow through with one of the other dispute resolution options.[120] The BIT is a little more lax (than the ECT) with regards to the institutions of arbitration by allowing more forums for arbitration.[121] Under the BIT, a party can arbitrate through ICSID arbitration, UNCITRAL arbitration, or through other institutions which the parties may agree.[122] Another procedural difference in the U.S.—Argentina BIT is that it mandates that the arbitrations take place in New York Convention States, unless the arbitration is conducted under ICSID.[123]

Although no BITs have been completed under the 2012 Model BIT it is important to understand how U.S. BITs will continue to work in the future (should they follow the

[118] The U.S.—Argentina BIT, *supra* note 58.
[119] *Id.* The Energy Charter Treaty, *supra* note 58.
[120] *Id.*
[121] *Id.*
[122] The U.S.—Argentina BIT, *supra* note 58, at Art. VII(3).
The parties could also arbitrate through the ICSID Additional Facility Arbitration Rules.
[123] The U.S.—Argentina BIT, *supra* note 58, at Art. VII(5).

2012 Model BIT format).[124] Under the 2012 Model BIT a claimant has limited choices of dispute resolution.[125] Options for resolving Model BIT disputes include settlement through mediation, negotiations, or arbitration; which presumably completely eliminates the option of submitting the dispute to the host state's court or other procedures agreed to by the state and investor.[126] The 2012 Model BIT also limits the entities who can submit arbitration claims.[127] The 2012 Model BIT limits claims to individuals who are claiming for loss or damage because of the state's violation of the BIT.[128] Claims are allowed to be brought by an investor as itself (e.g. a corporation claiming as itself) or by an investor claiming as a shareholder (e.g. a corporations claiming for a loss of its 100% owned subsidiary).[129] The most significant changes in the 2012 Model BIT are changes to the dispute resolution section.[130] The dispute resolution section was altered by including language to accommodate an appellate body, which would review arbitration awards.[131] This appellate body would be created by all countries party to the BIT, which seems to allow the countries to circumvent the arbitration process and arguably compromise the integrity of the arbitral proceedings.[132] Aside from the deviations listed above, the 2012 BIT contains only minor differences in procedural provisions from previous BITs.

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[124] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).
[125] The 2012 U.S. Model BIT, *supra* note 58.
[126] *Id.* The Energy Charter Treaty, *supra* note 58; The U.S.—Argentina BIT, *supra* note 58.
[127] The 2012 U.S. Model BIT, *supra* note 58.
[128] *Id.* Section B, Art. 24(1).
[129] The 2012 U.S. Model BIT, *supra* note 58.
[130] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).
[131] *Id.* at 11.
[132] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).

Substantively, the U.S.—Argentina BIT provides significant protections, which are similar to the ECT.[133] A few of those provisions include MFN and NT under Article II(1) of the U.S.—Argentina BIT.[134] Other provisions, under Article II(2)(a), include a minimum standard of treatment equal to that required by international law, treatment that is fair and equitable, and protection and security for investments.[135] The BIT also provides protections against discriminatory or arbitrary actions against investments as well as protections for previous agreements with a state.[136] Article IV protects against expropriation; which has essentially the same requirements under the ECT to be lawful, and includes the same compensation requirements as well.[137] The U.S.—Argentina BIT further protects moving capital in and out of the country, as well as allowing MFN and NT to any reimbursement given by the host country to people as a result of damages from an internal disturbance.[138] In fact, most of the provisions of the U.S.—Argentina BIT are similar to the investment protections in the ECT.[139]

The substantive protections under the 2012 Model BIT seem similar, though they are much easier to read, than the U.S.—Argentina BIT, due to being labeled.[140] Some of the substantive protections in the 2012 Model BIT include MFN and NT.[141] The 2012

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[133] Energy Charter Secretariat, The Energy Charter Treaty and Related Documents (2004); The U.S.—Argentina BIT, *supra* note 58.
[134] *Id.*
[135] The Energy Charter Treaty and Related Documents; The U.S.—Argentina BIT, *supra* note 58, at Art. II(2)(a).
[136] The Energy Charter Treaty and Related Documents; The U.S.—Argentina BIT, *supra* note 58, at Art. II(2)(b).
[137] The Energy Charter Treaty, *supra* note 58; The U.S.—Argentina BIT, *supra* note 58.
[138] The U.S.—Argentina BIT, *supra* note 58.
[139] *Id.* The Energy Charter Treaty, *supra* note 58.
[140] The 2012 U.S. Model BIT, *supra* note 58; The U.S.—Argentina BIT, *supra* note 58.
[141] The 2012 U.S. Model BIT, *supra* note 58.

Model BIT also includes provisions for certain standards for how a party state should treat investors under Article 5.[142] This also includes fair and equitable treatment, full protection and security, and MFN and NT for destruction of an investment due to internal conflicts.[143] Expropriation is also covered, under Article 6, and it contains the same requirements as the previous two agreements.[144] Transfers of money in and out of the country are also protected under Article 7.[145] Overall, the 2012 Model BIT does not add any substantive protections, in fact it seems to mostly leave out protections against arbitrary and discriminatory actions.[146] Most of the listed protections also seem to be limited with extra qualifications that are minor in scope, but may nonetheless restrict claims that would probably have succeeded under previous BITs.[147] However, each BIT is a separately negotiated document and there are generally five provisions that the United States tries to include into every Bilateral Investment Treaty.[148] The first provision covers National Treatment (NT) and Most Favored Nation (MFN) treatment.[149] The second defines expropriation, the different forms of expropriation, and the limits on the ability of a state to expropriate.[150] The third protection generally included is the protection of an investor's monetary transfers between the countries.[151] While not

[142] *Id.* Art. 5, at Art. 5(4).
[143] *Id.* Art. 5, at Art. 5(4).
[144] The Energy Charter Treaty, *supra* note 58; The 2012 U.S. Model BIT, *supra* note 58; The U.S.—Argentina BIT, *supra* note 58.
[145] The 2012 U.S. Model BIT, *supra* note 58.
[146] *Id.*
[147] *Id.*
[148] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).
[149] *Id.*
[150] *Id.*
[151] *Id.*

particularly relevant for this thesis, the fourth protection is against requiring certain performances inside of the host country.[152] The last protection that the U.S. tries to put into every BIT is an arbitration clause which allows an investor to file an international arbitration clause against the foreign government.[153]

Free trade agreements are the other big instrument which protect foreign investments.[154] Free trade agreements are a way to mesh the economies and policies of countries; they provide an incentive for trading with the other partner nations over other foreign entities.[155] For the purposes of this thesis, their relevance is that they are instrumental in protecting foreign investment.[156] The North American Free Trade Agreement (NAFTA) between the United States, Mexico, and Canada is one of the most notable free trade agreements that provides investment protections.

Since its inception to 2013, NAFTA has been the source of consent for 51 Investor—State Arbitrations.[157] Substantively NAFTA covers a range of investment measures including National Treatment, MFN, Minimum Standards of Treatment, non-discrimination, free transfers of assets, and provisions protecting against expropriation (or

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[152] *Id.* at 8.
[153] *Id.* at 8.
[154] *See generally* Weiler, *supra* note 94, 72-73 (stating the types of consent to investment arbitration); Federico Lenzerini, *Foreign Investment in the Energy Sector and Indigenous People's Rights*, *in* FOREIGN INVESTMENT IN THE ENERGY SECTOR: BALANCING PRIVATE AND PUBLIC INTERESTS, 201-205 (Eric De Brabandere & Tarcisio Gazzini eds., 1st ed. 2014) (giving examples of how NAFTA protects investors more than locals).
[155] Dolzer & Schreuer, *supra* note 1, 12-17.
[156] *Id.* Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).
[157] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).

providing compensation for such).[158] Much like the ECT and BITs, above, NAFTA requires that expropriation be 1) "for a public purpose; [2)] on a non-discriminatory basis; [3)] in accordance with due process of law. . . ; and [4)] on payment of compensation[,]" which must be paid quickly and at "fair market value[.]"[159] The requirements for allowing expropriation, and the other causes of action, are essentially the same as under the ECT and BITs; however, NAFTA does seem to have quite a few more procedural provisions which are different.[160]

There are many procedural similarities and overlap, regarding the arbitration mechanisms, between NAFTA and the other investment treaties.[161] Some areas of NAFTA become more taxing and specific than either the ECT or the BITs.[162] The main reason why NAFTA is stricter is due to the prerequisites which a party needs to follow before being allowed to arbitrate the dispute.[163] For instance, the investor has to be from one of the contracting countries and they must also claim within three years of the incident.[164] Further, the investor has to try to settle the claim first, file a notice with the opposing country that they intend to arbitrate (30 days after the cause of action), and wait at least six months (from the cause of action) before actually filing for arbitration.[165] Arbitration under NAFTA is expressly limited to the ICSID Arbitration Rules, the ICSID

[158] NAFTA, *supra* note 58, at Ch.11, Article 1105.
[159] *Id.* Art. 1110.
[160] The Energy Charter Treaty, *supra* note 58; The U.S.—Argentina BIT, *supra* note 58; The 2012 U.S. Model BIT, *supra* note 58; NAFTA, *supra* note 58.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*

Additional Facility Rules, or the UNCITRAL Arbitration Rules.[166] Any other form of arbitration, outside of these three, would seem to be in violation of NAFTA because Article 1122 of NAFTA, which provides the consent to arbitration and enforcement, only allows for arbitration under those three options.[167] Thus any other arbitration rules would likely lack jurisdiction over the case.[168] Under that same article, NAFTA expressly provides for the consent needed to enforce an award under the New York Convention and the consent needed to arbitrate (and presumably enforce the award) under the ICSID Convention, ICSID Arbitration Rules, and the ICSID Additional Facility Rules.[169] NAFTA goes further by allowing arbitration, under one of the above rules, and then limiting the parties by instituting procedural rules that may be different from the chosen arbitration rules.[170] Under the NAFTA procedural provisions, the default provisions are for three arbitrators, one picked by each of the parties, and a president picked by both of the parties.[171] If the parties are not able to agree on the president, or if one party does not appoint an arbitrator, then the Secretary-General of ICSID gets to choose the needed arbitrators.[172] An interesting feature of NAFTA is the ability, presumably exercised by a country, to consolidate arbitration cases against it into a single arbitration; though the arbitration must take place only under the UNCITRAL Rules and they must relate to each other in some way.[173] Then there are other important provisions in NAFTA which restrict

[166] *Id.*
[167] *Id.*
[168] NAFTA, *supra* note 58.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*

the place of arbitrations to countries who are part of the New York Convention.[174] Other procedural rules allow for interpretation of NAFTA (by a commission from the countries), the disclosure of evidence to both sides, having the selected tribunal decide rules of law, the hiring of experts by a tribunal, and interim orders.[175] NAFTA goes so far as to even include provisions about any final award that is issued and how it should be enforced.[176] Under the NAFTA arbitration award provisions, an award can have either a monetary damage amount (of which interest may be awarded) or order specific performance (but it must still have an alternative monetary amount for the party to pay).[177] Further, the award can award costs, but it is restricted from ordering any punitive damages.[178] An award can only be enforceable against the parties to an arbitration so long as the parties wait three months to enforce it or it is finalized.[179] Lastly, an award under NAFTA can be enforced through NAFTA since it has its own enforcement mechanism in Article 1136, however this provision is extremely narrow and suggest enforcing through ICSID or the New York Convention.[180]

The last way to gain consent against a foreign country is for the investor to negotiate a specific agreement with the state, which allows for international arbitration.[181] These agreements are going to be specific to the company and the country who negotiate these agreements. This means that they can contain any number of provisions; though the

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[174] *Id.*
[175] NAFTA, *supra* note 58.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] Isenegger, *supra* note 3, 78-82 (discussing contracting for arbitration provisions as well as other protections).

investor would be wise to include some of the provisions from the above consent agreements, to ensure they have recourse to international arbitration. Though important and worth mentioning, they will not be covered in depth in any of these analysis.

There are only a few select ways for a state to gain consent against an investor, and they are usually technicalities where the investor agrees to arbitration merely by operation of entry into the foreign state.[182] Bilateral Investment Treaties, Free Trade Agreements, the Energy Charter Treaty, and other such agreements usually do not give consent to arbitrate against an investor.[183] These agreements are usually like one-way streets, against the contracting states, which allow the investor to arbitrate against the state only.[184] The reason for this is because the treaties provide consent on behalf of the states, while the investor does not usually consent until he files the arbitration claim against the state (party to a certain treaty).[185] These treaties, more importantly, provide the scope of consent to arbitration by their respective state parties.[186] This means the above treaties control what can be arbitrated (i.e. what claims can be brought) as well as when a party has a cause of action (e.g. when there has been an expropriation).[187] Moreover, these treaties can change the merits of a dispute merely by changing what constitutes a breach of the consent document or what elements give rise to a cause of action.[188] One example, showing the importance of these treaties, could be seen if one

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[182] Dolzer & Schreuer, *supra* note 1, 254-264; U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] Dolzer & Schreuer, *supra* note 1, 254-264.
[187] *Id.*
[188] *Id.*

were to change the definitions of expropriation to exclude fair and adequate compensation. Doing so would allow a country to expropriate without paying any compensation, and allow the government to claim it lawfully expropriated under the consent agreement (i.e. it will not have to pay compensation). Alternatively, adding a clause to the consent document which requires the investor to show bad faith (on behalf of the host country) in order to be able to succeed in an expropriation claim would create an major hurdle to any expropriation claim. Under either example, changing the consent agreement has a dramatic effect on the merits of an investor—state dispute, so choosing the right consent agreement can be extremely important to the merits of a dispute. Once consent to arbitration is gained, through any of the consent mechanisms, the investor has to decide which set of arbitration rules to utilize to resolve the dispute.

A brief history of UNCITRAL (United Nations Commission on International Trade Law), the ICC (International Court of Commerce), the SCC (Stockholm Chamber of Commerce), and ICSID (International Centre for Settlement of Investment Disputes).

There are many different dispute resolution rules and institutions that an investor can choose from through IIA provisions). While it is probably not impossible to examine every institution and set of arbitration rules, such an analysis would be arduous and well beyond the scope of this thesis. The information in the proceeding paragraphs are meant to be an acquaintance to the arbitral institutions or treaties in order to further understand the motivations behind the rules.

UNCITRAL is shorthand for the United Nations Commission on International Trade Law, which was established in 1966.[189] UNCITRAL was established and mandated to facilitate uniformity in international trade law.[190] The mandate for UNCITRAL paved the way for the drafting of model laws and for helping facilitate international trade standards.[191] Part of furthering international economic standards was the development of international arbitration standards for commercial purposes.[192] Thus, the UNCITRAL Arbitration Rules were originally adopted in 1976 and designed to be used for commercial arbitrations.[193] The UNCITRAL arbitration rules are the most used ad-hoc arbitration rules.[194] This means that when conducting an arbitration the parties have to put together the tribunal and orchestrate the arbitration from essentially nothing (i.e. no institution is established to manage the rules or arbitrations under them).[195] The UNCITRAL arbitration rules have gone through two revisions since their inception in

[189] U.N. Commission on International Trade Law, A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law (2013), http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf (last visited Oct. 31, 2014).
[190] Establishment of the United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), at I; U.N. Commission on International Trade Law, A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law (2013), http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf (last visited Oct. 31, 2014).
[191] U.N. Commission on International Trade Law, A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law (2013), http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf (last visited Oct. 31, 2014).
[192] UNCITRAL Arbitration Rules, G.A. Res. 31/98, 31st Sess., U.N. Doc. A/RES/31/98 (Dec. 15, 1976).
[193] *Id.*
[194] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress, at 7 (2013).
[195] *Id.*

1976; one in 2010 and one in 2013.[196] The 2010 revisions provided a minor update that was supposed to make arbitration under the rules more efficient.[197] Under the 2013 rules, provisions were added for arbitrations between investors and the host states; these new provisions included a new set of rules called the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*.[198] The UNCITRAL arbitration rules have been used in Investor—State Arbitrations so frequently, that UNCITRAL arbitration is the second most popular set of arbitration rules behind ICSID.[199]

The International Centre for Settlement of Investment Disputes (ICSID) was created specifically for settling investor—state disputes through mediation or arbitration.[200] ICSID is an institution, created by the ICSID Convention, which manages its own arbitration rules (the ICSID Arbitration Rules).[201] Historically, the vast majority of Investor—State Arbitrations have been conducted through ICSID (counting both the ICSID Arbitration Rules and the ICSID Additional Facility Rules).[202] The ICSID

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[196] UNCITRAL Arbitration Rules, G.A. Res. 31/98, 31st Sess., U.N. Doc. A/RES/31/98 (Dec. 15, 1976); UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, 65th Sess., U.N. Doc. A/RES/65/22 (Dec. 6, 2010); UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[197] UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, 65th Sess., U.N. Doc. A/RES/65/22 (Dec. 6, 2010).
[198] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[199] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).
[200] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 17 U.S.T. 1270, 575 U.N.T.S. 159 (Mar. 18, 1965) [hereinafter The ICSID Convention].
[201] Yaraslau Kryvoi, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), 15-16, 27-28 (Roger Blanpain et al. eds., 2nd ed. 2013).
[202] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).

Convention settles arbitration disputes through the ICSID Arbitration Rules.[203] ICSID is a separate branch of the World Bank, which consists of an Administrative Council and a Secretariat.[204] The Administrative Council is made up of a representative from every state that is a party to ICSID and the Chairman is the president of the World Bank.[205] The Chairman, among many other functions, may add arbitrators to the list of arbitrators which the parties are able to choose from.[206] The Secretariat has a secretary general with deputies and other employees.[207] The Secretariat positions are elected by the Administrative Council.[208] The Secretary-General is in charge of mainly administrative matters, except where he can determine whether a "dispute is manifestly outside the jurisdiction of the Centre."[209] Unlike the SCC, ICSID (as an institution) is much more involved in the arbitration process and rules.[210] As of 2014, ICSID has had 159 states sign onto the ICSID Convention and 150 states have ratified the convention.[211] From 1972 to 2014, there have been a total of 420 disputes brought under the ICSID

[203] The ICSID Convention, *supra* note 200; International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006). The convention does not apply to the ICSID Additional Facility Rules.
[204] The ICSID Convention, *supra* note 200, at Sect. 1, Art. 2-3 (Mar. 18, 1965); Kryvoi, *supra* note 201, 15-16.
[205] The ICSID Convention, *supra* note 200.
[206] *Id.*
[207] *Id.* Section 3, Art. 9.
[208] The ICSID Convention, *supra* note 200.
[209] *Id.* Chapter IV, Section 1, Article 36.
[210] The ICSID Convention, *supra* note 200.
[211] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Centre for Settlement of Investment Disputes [ICSID], ICSID 2014 Annual Report (2015).

Arbitration Rules, through the ICSID Convention.[212] All of these disputes use various IIAs to establish consent to arbitration under ICSID, of which 5% have been brought through the ECT, 63% from BITs, 19% from contracts, 8% from the local state law, and about 4.5% from FTAs.[213] From the total number of disputes, about 39% (more or less) have been disputes in the Energy Sector; for the first part of 2014 alone the energy sector constituted about 65% of the arbitration cases (40 arbitration cases).[214]

The Stockholm Chamber of Commerce (SCC) has a separate entity within itself, called The Arbitration Institute of the Stockholm Chamber of Commerce, which administers the SCC Arbitration Rules.[215] The Arbitration Institute of the SCC (just SCC here forth) also has a secretariat an administrative board of directors.[216] The Board determines (among other things) whether the SCC has jurisdiction over a claim, whether any money needs to be paid before the arbitration can begin, which arbitrators are

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[212] International Centre for Settlement of Investment Disputes (ICSID), The ICSID Caseload –Statistics, Issue 2014-2 (June 30, 2014).
An additional 44 cases have been brought through the ICSID Additional Facility Arbitration Rules.
[213] International Centre for Settlement of Investment Disputes (ICSID), The ICSID Caseload –Statistics, Issue 2014-2 (June 30, 2014).
These numbers also include nine mediation (Conciliation) disputes brought to ICSID.
[214] International Centre for Settlement of Investment Disputes (ICSID), The ICSID Caseload –Statistics, Issue 2014-2 (June 30, 2014).
Includes nine mediation (Conciliation) disputes brought to ICSID, for the first 39%. Also, includes mining, which is not distinguished in the statistics.
[215] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules, available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations, available at http://www.sccinstitute.com/filearchive/4/44281/Skiljedomsregler%20f%C3%B6renklade%20engelska%202010.pdf (2010).
The SCC also administers the SCC Rules for Expedited Arbitrations.
[216] *Id.* Appendix I, Art. 1.

appointed and whether they should be removed, and also which party will bear the burden of arbitration costs.[217] The Secretariat is responsible for many of the administrative/procedural functions, including sending documents back and forth, residual functions from the board, and other miscellaneous functions.[218] The SCC operates independently of any arbitral tribunal and seems to mostly stay away from any substantive issues regarding arbitration.[219]

The ICC is the International Chamber of Commerce and it too has a separate body called the International Court of Arbitration (just the ICC here forth) which was created to administer the ICC Arbitration Rules.[220] The ICC explicitly excludes other arbitration proceedings from using their rules and only allows the ICC to review awards.[221] The ICC is composed of a president and a court, which has a secretariat, secretary-general, and various committees.[222] Essentially, the ICC acts as an administrative, appellate, and controlling body for arbitrations conducted under the ICC Arbitration Rules.[223]

The History and framework of the New York Convention.

The New York Convention is more important than the other treaties and agreements in the previous section. The New York Convention is another name for the

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[217] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).
[218] *Id.*
[219] *Id.*
[220] International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013).
[221] *Id.*
[222] *Id.*
[223] *Id.*

UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[224] The New York Convention has 155 states who are members.[225] It is a short treaty that covers, as the name implies, the recognition and enforcement of international arbitral awards.[226] The convention only applies to instances where an entity is seeking to have an arbitration award recognized or enforced in a country other than the country where the arbitration award was made.[227] Under the New York Convention a state must generally recognize and enforce an arbitration award made in another state, treating the award as binding as if it were created within the state where enforcement is sought[228] In order to get an arbitral award enforced and recognized, in another country, a claimant must provide the enforcing country with a certified copy or authenticated award.[229] The claimant must also provide the enforcing country with the agreement which provided consent for arbitration between the parties (any of the IIAs listed in the section above).[230] The agreement consenting to arbitration must be "in writing" in order to be effective, though the requirements for a writing seem to be rather broad.[231] If the award is in a different language, than the language of the place where the award is trying to be enforced, it must

[224] Peter Edworthy & Ronnie King, *International arbitration*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 23-38 (Carolyn Boyle et al. eds., 1st ed. 2012) (discussing the New York Convention); New York Convention Countries, New York Arbitration Convention (May 20, 2015, 1:38 PM), http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.
[225] *Id.*
[226] The New York Convention, *supra* note 55.
[227] *Id.* Art. I.
[228] *Id.* Art. III.
[229] *Id.* Art. IV(1).
[230] *Id.*
[231] *Id.* Art. II(1).

be translated by someone who can do so in an official capacity or who will testify to its veracity.[232]

There are only a few narrow grounds for refusing to enforce or recognize an arbitration award.[233] The first of many narrow grounds for non-recognition is essentially that the agreement, providing consent to arbitration, is not valid.[234] The second grounds for non-recognition is that a party did not have notice of the arbitration or that they were not allowed to present a case.[235] An award that exceeds the scope of arbitration can also be grounds for non-recognition.[236] Other grounds for non-recognition are a violation of a procedure of the arbitration or a violation of a law in the place of arbitration.[237] Recognition can also be denied if the award was not finalized or binding.[238] The previous grounds for non-enforcement are mostly based on defective arbitrations; however, the country (where the award is brought for recognition) has broad discretion when deciding whether to deny recognition or enforcement of the award.[239] The Convention allows the enforcing country to deny enforcement if it would be against public policy or generally cannot be settled by arbitration in that country.[240]

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[232] *Id.* Art. IV(2).
[233] The New York Convention, *supra* note 55.
[234] *Id.*
[235] *Id.* Art. V(1)(b).
[236] The New York Convention, *supra* note 55.
[237] *Id.* Art. V(1)(d).
[238] *Id.* Art. V(1)(e).
[239] The New York Convention, *supra* note 55.
[240] *Id.* Art. V(2).

Overall, the New York Convention is important for two reasons. First, it provides a mandatory basis to enforce arbitral awards, even against governments.[241] Secondly, so many states are a party to the treaty that it allows for enforcement in numerous countries where such a state may have assets.[242] For the purposes of this thesis, the New York Convention is important because it is a means by which a party can enforce an award in their favor; essentially, the New York Convention gives an arbitration award teeth and makes it worth the value it states.[243]

II. A review of each dispute settlement mechanism, how often they are used and which one is most common.

Each dispute resolution mechanism is different from the others. They each have their quirks which may provide one side with slight advantage over the others. To analyze the different rules and effects of each, there must be a dissection of the rules to expose their frameworks, potential problems, and potential benefits.

A. The framework, the problems, and the benefits of UNCITRAL.

As previously stated, there have been three sets of UNCITRAL Arbitration Rules; the first set was adopted in 1976, the next in 2010, then the last set in 2013.[244] The 2010 UNCITRAL Arbitration Rules were seen as a much needed update, and did so by allowing for electronic communications to suffice for many of the requirements for

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[241] Edworthy & King, *supra* note 224, 23-38 (discussing the New York Convention and enforcement under it).
[242] *Id.*
[243] *Id.*
[244] UNCITRAL Arbitration Rules, G.A. Res. 31/98, 31st Sess., U.N. Doc. A/RES/31/98 (Dec. 15, 1976); UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, 65th Sess., U.N. Doc. A/RES/65/22 (Dec. 6, 2010): UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).

written communications.[245] The 2010 Rules did little to effect the substance of the 1976 Rules, which have been used for decades by private individuals, and countries, in various types of commercial arbitration, including in the energy sector.[246] The 2013 UNCITRAL Rules did not really change the 2010 rules so much as it added a special section for investment arbitrations.[247] This special section is a set of rules for arbitrations between investors and host states, which are based off of the consent garnered through IIAs.[248] Over time the rules have essentially stayed the same, and the added Transparency Rules are divisible from the 2013 rules, thus all of the rules can be analyzed together and the Transparency Rules separately.[249]

All of the UNCITRAL Arbitration Rules are so similar that they substantially read the same and seem to accomplish the same results in arbitration. Overall, the UNCITRAL Arbitration Rules are a set of arbitration rules that are specific enough to provide a framework for arbitration, but also flexible enough to allow the parties to agree to modify any part of the rules.[250] In fact, the rules expressly provide for modification if the parties to the arbitration agree that they want to modify them.[251] Presumably, the provisions would apply to modifications based on whatever instrument granted consent as well.[252]

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[245] UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, 65th Sess., U.N. Doc. A/RES/65/22 (Dec. 6, 2010).
[246] *Id.*
[247] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[248] *Id.*
[249] UNCITRAL Arbitration Rules, G.A. Res. 31/98, 31st Sess., U.N. Doc. A/RES/31/98 (Dec. 15, 1976); UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, 65th Sess., U.N. Doc. A/RES/65/22 (Dec. 6, 2010): UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[250] *Id.*
[251] *Id.*
[252] *Id.*

The arbitration framework created by the rules has the claiming party give notice to the defendant party which states they intend to submit a dispute to arbitration.[253] The notice must state which instrument gave the defendant's consent to arbitration and what the claim is regarding.[254] Then the defendant party has to respond in 30 days and can accompany the response with a statement claiming against the other party, denying the claims, or accepting the other proposals made by the claimant party.[255] The parties can then choose to utilize an international organization for the appointment and removal of arbitrators, or else the decision will default to the Permanent Court of Arbitration (PCA) to choose an entity to be the appointer.[256] If the parties choose to have one arbitrator but cannot agree to a single person, the appointer will choose based on the recommendations of the parties.[257] However, if the parties choose to have three arbitrators, then each party gets to pick one and the two arbitrators will pick the third as the head of the arbitral tribunal.[258] Removing any of these arbitrators requires a showing that someone could reasonably infer that an arbitrator is biased; when that happens the appointer/appointing body gets to make the decision of whether to remove an arbitrator.[259] Aside from the above listed rules, the arbitral tribunal has the independence to make almost every other decision regarding the arbitration, including: the language, where it will be held, whether the tribunal has jurisdiction, which law will be applied, and even preliminary awards.[260]

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[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*

After the tribunal has been gathered, the parties have to give each arbitrator a copy of their claim, counterclaim, or defense; essentially the parties provide the tribunal with the equivalent of a court brief with every relevant document attached.[261] The defending party can prevail during this stage in two ways.[262] The first happens when the tribunal gives a default award because the claimant has not given the tribunal a copy of the claim.[263] The second occurs when the defending party raises the issue of whether the tribunal has jurisdiction and the tribunal holds a separate proceeding in which they determine that they do not have jurisdiction.[264] If the defending party does not raise the jurisdiction issue at this time they are estopped from raising jurisdiction as an issue, even if the tribunal waits until the final award to decide the issue of jurisdiction.[265] After this pleadings stage the tribunal gets to conduct what is the equivalent of a trial by deciding on evidence, conducting hearings, and even hiring their own experts to investigate the claims.[266] After gathering all of the evidence, the tribunal will issue an award or end the arbitration.[267] When the two parties decide to settle, before the award is issued, they may have the tribunal write an award adopting the settlement agreement or they can have the tribunal end the proceedings.[268] Absent settlement, the tribunal issues an award that must be by a majority of the arbitrators and state why they came to that conclusion (the reasons).[269] The award must also be in writing, and signed and distributed to the

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[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*

parties.[270] The tribunal can create minor awards at other times throughout the arbitration; though the final award is supposed to establish the facts of the case and the final decision.[271] Moreover, the final award answers who the parties are, what the dispute was regarding, when it took place, where it took place, why the dispute arose, and how it will be settled.[272] The award should also include the fees and costs of the tribunal and of the arbitration; the default rule is that the costs are to be paid by the losing party, but that decision is ultimately up to the tribunal.[273] If there is a problem or deficiency with the award, the tribunal has about 30 days to give the parties an interpretation, correction, or additional award.[274]

If the arbitration is an investor—state arbitration, where the consent is garnered through a treaty and the treaty was signed after April of 2014, then the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration apply.[275] The new transparency rules recently went into effect and apply to treaties made after 2014, so it may be a while before any arbitration cases are brought under them.[276] Apparently, there have not been any energy sector arbitrations (or any for that matter) under the new transparency rules.[277] Nonetheless, they will eventually become important in the future as

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[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[276] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).
[277] *Id.*

more treaties are made and fall subject to these rules.[278] These Transparency Rules are rather rigid and do not allow deviation from them unless the treaty, granting the consent, allows the parties to forego them.[279] The rules require publication of the arbitration notices and the pleadings; the tribunal may have other documentation published if they decide it would be beneficial to transparency, or if someone asks them to.[280] Under the Transparency Rules, the tribunal can allow third party input regarding the treaty, law, or facts of the case.[281] Also, any hearings that take place are supposed to be public.[282] The Transparency Rules allow for certain exceptions to openly publicizing information, but only if the information is confidential or if the information would corrupt the arbitration.[283]

B. The framework, the problems, and the benefits of the ICSID.

The ICSID institution was created by the ICSID Convention; however, the institution has developed a series of rules and governing documents which overlap to build the ICSID institution as it is today.[284] For the purposes of this thesis the concentration will be on the Convention, *The ICSID Rules of Procedure for the Institution and of Conciliation and Arbitration Proceedings* (Institution Rules), and *The*

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[278] *Id.*
[279] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); *Cf.* Kryvoi, *supra* note 201, 21-26, 29-40 (showing how the arbitration rules, procedural rules, and convention overlap).

ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules).[285] These sections intertwine to create the foundation for ICSID and must be read together to fully understand arbitrations under the ICSID Arbitration Rules.[286]

ICSID is the product of an international agreement, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*.[287] The convention creates ICSID and lays the foundation for basic rules and procedures that eventually govern the more specific arbitration rules.[288] The first chapter of the agreement create the ICSID institution and describes what its functions should be.[289] Chapter II of the convention touches on jurisdiction and gives ICSID jurisdiction over investor—state disputes, so long as there is some written consent and one party is a state that has signed onto the convention and the other party is from another signing state.[290] Chapter II also talks about the supremacy of the arbitration over other remedies and touches on an exhaustion requirement, which states can add.[291] The convention goes further by setting up basic arbitration rules, which are eventually translated into the final ICSID Arbitration Rules.[292] Under the convention, the request for arbitration needs to be sent to the defending party and the Secretary-General; where he can decide if "the dispute

[285] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[286] Thomas H. Webster, HANDBOOK OF INVESTMENT ARBITRATION, 3-5 (1st ed. 2012) (discussing the roles of the arbitration rules, procedural rules, and the convention); *Cf.* Kryvoi, *supra* note 201, 21-26, 29-40 (showing how the arbitration rules, procedural rules, and convention overlap).
[287] The ICSID Convention, *supra* note 200.
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Id.*

is manifestly outside the jurisdiction of the Centre."[293] This function essentially lets the Secretary-General become the gatekeeper of arbitration disputes.[294] The place of the arbitration must generally be held at ICSID, unless the parties agree to have it at the PCA or another institution that ICSID approves.[295] If the parties cannot agree on a single arbitrator then they will have to abide by the convention default of three arbitrators, one picked by each party and the president by both parties jointly.[296] If any arbitrator is not picked, the Chairman of ICSID receives that privilege.[297] The convention mandates that the arbitrators should not be from the same state as any party, unless both parties agree.[298] Sometimes an arbitrator must be replaced, and if that happens without his/her asking for prior consent, then the Chairman will pick the replacement arbitrator.[299] Where an arbitrator is removed, or resigns with permission, then the party/parties who appointed the arbitrator may choose the replacement arbitrator.[300] An arbitrator can also be removed by the other members of the tribunal (with the Chairman as the tie-breaker).[301] Under the convention, the tribunals have broad powers including the ability to decide whether they are competent, decide jurisdiction, require the production of evidence, decide whether ancillary or counterclaims will be allowed, and institute temporary measures.[302] The tribunal is not allowed to choose which law applies, that is up to the parties or else the

[293] *Id.* Art. 36(3).
[294] Webster, *supra* note 286, 37-63 (discussing the role of the Secretary-General); Kryvoi, *supra* note 201, 31.
[295] The ICSID Convention, *supra* note 200.
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Id.* Ch. IV, Sec. 3.

state party's law will govern the arbitration.[303] The convention also requires that the tribunal award be based on a majority of arbitrators, signed and in writing, describe the tribunal's reasoning, and address all of the questions posited by the parties.[304] Under the convention, the tribunal can apportion the costs and fees of the arbitration, as well as the costs of the parties, and however they see fit; in any case, it needs to be in the award.[305] There are further award provisions under the convention for interpretations, revisions, and annulments.[306] Annulments under the convention can only take place if the tribunal was not created correctly, the tribunal surpassed their powers, the tribunal was corrupt, they did not follow the rules or procedures, or if the award was not reasoned[307] If a party tries to get a decision annulled, the Chairman may put together a new tribunal called "an *ad hoc* Committee" that gets to decide the issue of annulment.[308] So long as all of the members have no connection with the previous tribunal, and they are not from the same country as either party, the ad hoc committee gets to rule on annulment.[309] The dispute can even go through arbitration again if a party decides that they want to try to arbitrate again (after the first award is annulled).[310] If the award survives any scrutiny, the ICSID convention already includes provisions for the recognition and enforcement of the award.[311] The provisions on recognition of the award mandate that every member of the

[303] The ICSID Convention, *supra* note 200.
[304] *Id.* Ch. IV, Sec. 4, Art. 48.
[305] The ICSID Convention, *supra* note 200.
[306] *Id.*
[307] *Id.* Ch. IV, Sec. 5, Art. 52.
[308] *Id.* Ch. IV, Sec. 5, Art. 52(3).
[309] *Id.* Ch. IV, Sec. 5, Art. 52(3).
[310] The ICSID Convention, *supra* note 200.
[311] *Id.*

ICSID convention recognize and enforce the award.[312] Member states, under the convention, are supposed to afford the award precedence over any other resolution.[313]

The *ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings* (Institution Rules) are a set of rules which govern the procedures from when a claim is filed until the parties are sent a notice that the claim has been registered.[314] Meaning that the Institution Rules are merely a set of rules that deal with requesting the beginning of arbitration.[315] They do not deviate from the convention provisions stated previously.[316] Further, they do not pose any major hurdles for conceiving arbitration proceedings, but should be looked at in more detail before beginning ICSID arbitration proceedings.

The *Rules of Procedure for Arbitration Proceedings* (Arbitration Rules) apply to everything after the pleadings stages and were designed to address any problems that might arise through the conclusion of the arbitration.[317] These provisions function in a complementary manner to the ICSID Convention, by confronting many different

[312] *Id.* Ch. IV, Sec. 6, Art. 53.
[313] *Id.*
[314] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), at preamble (April 2006).
[315] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[316] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[317] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), at preamble (April 2006).

potential problems and interpretations of the ICSID Convention.[318] One of the key provisions in the Arbitration Rules is hidden in Chapter III, Rule 20, which allows the parties to agree on different procedures where the convention is silent; however requires the adherence to the convention, or other rules, where they exist.[319] These rules also allow for an informal mediation with the tribunal, before any hearings are conducted, to attempt to peacefully resolve the dispute.[320] The rules give the tribunal the power to allow third party submissions, the ability to decide other related claims, and the ability to have separate jurisdictional proceedings (and decide jurisdiction separately or in the award).[321] Under the Rules, the tribunal has the ability to proceed with the arbitration if a party does not participate, or stops showing up; alternatively if a settlement is reached they may also record the settlement as an award.[322] If the parties do not make any progress (do not further the arbitration in any way) for six months then tribunal may stop the proceedings.[323] If, however, the arbitration continues to the award then the tribunal must state the why they had jurisdiction, their reasoning, the facts (as they interpret them), and must address all of the questions given to them by the parties.[324] More or less, the rules

[318] Webster, *supra* note 286, 3-5 (discussing the roles of the arbitration rules, procedural rules, and the convention); *Cf.* Kryvoi, *supra* note 201, 21-26, 29-40 (showing how the arbitration rules, procedural rules interpret and augment the convention).
[319] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[320] *Id.* at 111-112, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Ch.3, Rule 21.
[321] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[322] *Id.*
[323] *Id.*
[324] *Id.*

do nothing more than augment the convention by providing guiding rules to better enforce the convention, as they are designed to.[325]

ICSID has a separate body of rules called the ICSID Additional Facility Rules, which are not associated with the convention.[326] The Additional Facility Rules have many commonalities with the ICSID Convention, however, the dissimilarities require a separate analysis.[327] The ICSID Arbitration Additional Facility Rules, are much more streamlined and concise than the regular ICSID Arbitration rules.[328] The ICSID Arbitration Additional Facility Rules are peculiar because they do not require that both parties be (or have the nationality of) a state who is a signatory of the ICSID Convention.[329] Instead, the Additional Facility Rules allow for arbitration if only one party is (or has the nationality of) a signatory of the ICSID Convention and ICSID would not normally have jurisdiction.[330] Other glaring differences in the Additional Facility Arbitration rules include lack of an annulment process, no time limit for raising jurisdiction, and the limitation of the place of arbitration to New York Convention States.[331] Arbitrations under the Additional Facility Arbitration Rules are limited to states which have joined the New York Convention, most likely to ensure enforcement under a treaty since the ICSID Convention does not apply to these arbitration rules.[332] Overall, the benefits of the ICSID Additional Facility Rules mainly concern a streamlined and

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[325] *Id.*
[326] International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006).
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Id.*

broadened version of the ICSID Convention, by providing more forums and jurisdiction for arbitration that would not normally fall within ICSID.[333]

C. The framework, the problems, and the benefits of SCC.

The SCC also has two sets of arbitration rules, but only the Arbitration Rules are immediately relevant.[334] Much like ICSID, the SCC is designed as an organization which acts as a consultant for the parties so they do not have to deal with one another.[335] The SCC Arbitration Rules start with the basic provisions for a pleadings stage, followed by a collection of fees, and preliminary decisions by the SCC Board to look at a number of factors before allowing the arbitration to proceed.[336] The Board decides (depending on the agreement between the parties) whether the SCC has jurisdiction to decide the dispute.[337] The board also decides if there are cases that need to be consolidated, how many arbitrators there should be (and who should appoint them), where the arbitration will be held, and how much money should be paid to the SCC before the arbitration begins.[338] If the Board finds that the SCC does not have jurisdiction, or that the preliminary payment to the SCC has not been completed, they can dismiss the dispute.[339]

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[333] *Id.*
[334] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).
The SCC Expedited Arbitration Rules consist of minor changes to dispose of the arbitration more quickly. These changes include a shorter over-all arbitration, one arbitrator, and generally an unreasoned award (unless specifically requested by the parties.
[335] *Id.*
[336] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010).
[337] *Id.*
[338] *Id.*
[339] *Id.*

If the dispute is allowed to continue, and the parties do not agree on the basic factors of the arbitration, the Board gets to choose between having one or three arbitrators.[340] In cases where there is one arbitrator, if the parties do not agree, the Board will appoint the arbitrator; if there will be three arbitrators each party picks one arbitrator and the Board will pick the president (subject to nationality restrictions).[341] If there is a problem with an arbitrator, a party can complain to the Board and have an individual arbitrator removed, but only if he or she is inadequately performing or there are reasonable doubts about his or her abilities or neutrality.[342] Even if an arbitrator has been removed it is possible for the arbitration to continue without the missing member, if the Board deems it acceptable to do so.[343]

After the arbitrators have been chosen, the arbitral tribunal will start taking control of the dispute and the proceedings by determining the language of the arbitration, if the parties do not agree.[344] In the same manner they will also decide which law applies to arbitration (based on what seems to best fit the dispute) and a schedule for the proceedings.[345] There is only one way for the claim to lapse at this stage, and that is if the claimant fails to give the tribunal their pleadings.[346] If the defendant does not give the tribunal an answer nor proceed in any manner, then the arbitration will continue as it normally would.[347] After the schedule is set by the arbitrators the parties will make their

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[340] *Id.*
[341] *Id.*
[342] *Id.* Articles 15 & 16.
[343] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010).
[344] *Id.*
[345] *Id.*
[346] *Id.*
[347] *Id.*

pleadings again, only to the tribunal instead of the Board.[348] Afterwards, the tribunal is able to gather evidence, conduct hearings, and even hire their own experts.[349]The tribunal has the power to issue temporary awards, or take other actions, as a situation may necessitate.[350] Once the proceedings make it to the awards stage, the tribunal gets to decide the award based on a majority or else the chairman will be allowed to make the award.[351] The main requirements of an award are that it is signed, is in writing, has the reasoning for issuing the award, and is handed down within six months from the time the tribunal was formed (though that time can be extended by the Board).[352] The rules also provide for separate awards, additional awards, award corrections, award interpretations, and consent awards.[353] Under the regular SCC Arbitration Rules, the tribunal also has the discretion to award all of the arbitration costs to one party; they can even include the other party's legal costs if they deem it prudent.[354]

D. The framework, the problems, and the benefits of ICC.

As discussed before, the ICC acts as a quasi-appellate/administrative/controlling body for arbitrations under the ICC Arbitration Rules.[355] Under the ICC Arbitration Rules the Court, the Secretariat, and President of the Court have some powers over the arbitration, but the main focus of the ICC seems to be oversight.[356]

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[348] *Id.*
[349] *Id.*
[350] *Id.*
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] *Id.*
[355] International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013).
[356] *Id.*

To start arbitration under the ICC Arbitration Rules a party must give the Secretariat the pleadings.[357] The ICC Arbitration Rules have a qualification which requires copies of the pleadings, and other documents, be submitted to the other party and the tribunal as well as the Secretariat.[358] Here, a claimant must provide information about her case, her claim, the value of her claim, all of the agreements, all of the arbitration agreements, and the claims that correspond to the arbitration agreements.[359] The rules go further by requiring suggestions about how many arbitrators should decide the case, choices for arbitrators, ideas where the arbitration should take place, which rules apply, and what language should be used.[360] The defendant must provide much of the same information, and if he fails to do so the arbitration will continue on without it.[361] After the pleadings the tribunal may determine whether they have jurisdiction, but the Secretary General can step in and have the Court decide jurisdiction instead.[362] The parties can then join other parties to the arbitration by filing pleadings against a third party; however, no arbitrators can be appointed before the other parties are joined.[363] Any party that is joined to the arbitration can claim against any of the parties, and presumably new parties, so long as the parties have not yet came to an agreement regarding which claims are at issue and it is not yet signed by the arbitrators.[364] The ICC Arbitration Rules require that either one or three arbiters settle the dispute.[365] If the parties cannot decide on how many

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[357] *Id.*
[358] *Id.*
[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] *Id.*
[365] *Id.*

arbitrators the default provisions call for one arbitrator, but the Court may choose three arbitrators if they think that it is necessary.[366] Further, if the parties cannot agree on the arbitrator then the Court may pick the arbitrator; if the court decides there should be three, each party picks one arbitrator and the Court picks the president of the tribunal.[367] Even if the parties choose the arbitrators the choice is ultimately a discretionary choice to the Secretariat as to whether to confirm any arbitrator.[368] If a party does get their choice of an arbitrator and the person is found to be partial to, or influenced by, one party then the other party may file a complaint with the Court, seeking to get the arbitrator replaced.[369] Once a party has complained about an arbitrator the court will determine whether the individual needs to be removed and, to a further extent, replaced or not.[370] Once the arbitrators are assembled, and the Court decides where the arbitration should take place, the tribunal decides which rules and language should be used in the arbitration (unless the parties have already agreed otherwise).[371] After the tribunal gains control of the dispute they are tasked with having the parties submit their contact information, summaries of their claim, how much money is at issue, issues which need decided, and any other agreed upon procedural rules.[372] Once this writing is formed the parties gather together with the tribunal for a meeting to lay out a schedule for the arbitration as well as other procedures to govern the arbitrations.[373] After the procedure is set the tribunal will

[366] *Id.*
[367] *Id.*
[368] *Id.*
[369] *Id.*
[370] *Id.*
[371] *Id.*
[372] *Id.*
[373] *Id.*

start to gather the evidence, conduct hearings, and even appoint experts.[374] The tribunal has the power to issue preliminary awards or measures if they think it is necessary.[375] So long as nothing else arises the proceedings then draw to a close and the tribunal may begin working on their award.[376] The Award, under the ICC Arbitration Rules, needs to be made by a majority of the arbitrators and have the reasons why the arbitrators came to that decision.[377] The award can be a consent award, but either type of award must be given to the Court within six months after the parties have the procedural agreement in writing, though extensions may be granted.[378] Once the award is submitted to the Court, the Court may modify it as they see fit and ultimately decide whether to approve the award.[379] If there are any problems or deficiencies with the award, the tribunal can correct or interpret an award.[380] The award, after being vetted by the Court, needs to include the costs of arbitration, legal fees, and any expenses of the parties; then the costs must be paid by one or both of the parties, depending on what the award decides.[381] Other miscellaneous provisions of the ICC Rules include a waiver for the parties, if they do not raise an objection timely, and a limitation of liability for the arbitrators and the Court.[382]

III. Analysis of the potential outcomes.

For the purposes of this thesis, and efficiency's sake, any comparison of the rules is going to have to be based the default provisions. Any other comparison would require

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374 *Id.*
375 *Id.*
376 *Id.*
377 *Id.*
378 *Id.*
379 *Id.*
380 *Id.*
381 *Id.*
382 *Id.*

an infinite number of choices, so it is best to assume that the parties do not agree and revert to the default rules. From that assumption, that only the base default rules will apply, one can examine the different rules for any clauses that may present difficulties or advantages while arbitrating.

A. A comparison of the UNCITRAL, ICC, SCC, and ICSID rules to determine which is the most problematic.

It is hard to gauge what sorts of problems would give way to flaws in the different arbitral rules, mostly because any major flaws in the rules are likely to be discovered and corrected over time. No arbitration rules are going to be perfect though the subtleties involved with finding the imperfections are immense. Further, depending on the dispute, some arbitration rules may better suit the specific situation than others. Thus, to decipher what problems exist one must look at how they are administered, problems fundamental to their design, their ease of use, and whether they leave out provisions that may be helpful or important to the arbitral process.

UNCITRAL is a great example of how a set of arbitration rules continues to evolve over the course of its use, to adapt with the times, and fix some of the flaws that may have existed in its original form.[383] However, it is also an example of how arbitration rules may be tailored to specific situations that may not work well for all arbitrations. The UNCITRAL Arbitration Rules suffer from a potentially frustrating problem of having the claimant send the notice of arbitration to the defendant and then

[383] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, 65th Sess., U.N. Doc. A/RES/65/22 (Dec. 6, 2010); UNCITRAL Arbitration Rules, G.A. Res. 31/98, 31st Sess., U.N. Doc. A/RES/31/98 (Dec. 15, 1976).

attempting to get them to agree on a third party to potentially appoint the arbitrators.[384] Then if they cannot reach an agreement, then they have to rely on the Permanent Court of Arbitration, a series of waiting periods, and a multi-step process to eventually appoint three arbitrators, which could be accomplished in a much more efficient manner.[385] Therefore a party could theoretically abuse the system in such a way which causes undue delay on the other party.

Perhaps a major flaw with UNCITRAL is that the UNCITRAL Arbitration Rules do not create any concrete administration or organization which would be prepared to govern arbitration disputes.[386] This means that the parties will have to fund the creation of the tribunal and whatever costs they will incur with all of the associated costs mentioned previously.[387] Whereas under the other arbitration rules, they provide institutions which provide all of necessities and staffing associated with conducting arbitrations.[388] Having an institution already established to handle arbitrations helps the

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[384] *Id.*
[385] *Id.*
[386] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress, at 7 (2013).
[387] *Id.*
[388] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013); UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).

parties effectively determine the projected costs of the arbitration.[389] This is especially true when the institutions already have the cost schedules posted. Unfortunately for UNCITRAL, having to figure out the logistics of an ad-hoc arbitration may present more of a headache than parties care to deal with, especially when there are already other institutions set up to deal with all of the extraneous and mundane issues.[390]

Alternatively, having an arbitral institution set up to administer arbitrations can be a bit of a double-edged sword. While having an institution may make arbitration easier for parties, especially when they do not get along, it could also be a hindrance for parties who do manage to get along fine. Most of the arbitration rules require that the institutions or tribunals act as a sort of consultant between the parties, which could frustrate any attempt by the parties to resolve the dispute in an amiable manner.[391] Under the SCC, ICC, and ICSID Arbitration Rules the parties use the tribunals or the institutions as proxies, rather than dealing more directly with one another (like arbitrations under UNCITRAL).[392] If the parties are reluctant to deal directly with one another, there is

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[389] Paul Oxnard and Benoit Le Bars, *Arbitration of Energy Disputes: Practitioners' Views from London and Paris*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE ENERGY SECTOR, 55-57 (Ass'n for Int'l Arbitration ed. 2009) (information about costs rising when parties do not agree and the efficiency of institutions).
[390] Shayerah Ilias Akhtar & Martin A. Weiss, Cong. Research Serv., R43052, U.S. International Investment Agreements: Issues for Congress (2013).
[391] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).
[392] *Id.*

hostility between them or etc., the parties would probably be desirous of a proxy and utilize one of the aforementioned rules. The ICSID Arbitration Rules balance this responsibility admirably by allowing the parties to utilize the institution as a consultant or deal directly with one another (while still informing ICSID).[393]

Another possible hindrance in arbitrations could be the rigid application of arbitration rules. A rigid application of the arbitration rules can be hindering to arbitrations where the parties are getting along, more or less cordially, and agree that some of the rules may not need to apply to the arbitration. In such a situation, the ICSID Arbitration Rules or Additional Facility Rules may not be the best choices.[394] These rules require strict adherence to the arbitration rules, or any other rules that may apply to the arbitration, before parties can deviate from them.[395] The SCC Arbitration Rules allow for broad discretion to the tribunals, allowing the tribunal powers to determine most matters "[s]ubject to these Rules and any agreement between parties[.]"[396] The conjunctive "and" suggests that the arbitration rules must be satisfied in any matters regarding the arbitration; whereas a disjunctive "or" would have suggested that an agreement between the parties could override the arbitration rules.[397] The ICC Arbitration Rules explicitly state that the rules are of paramount importance, followed by any agreement between the

[393] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[394] *Id.* International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006).
[395] *Id.*
[396] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules, at Art. 19 (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations, at Art. 19 (2010).
[397] *Id.*

parties, and then decisions by the arbitral tribunal.[398] As discussed earlier, the UNCITRAL Arbitration Rules specifically allow for the ability of the parties to change the arbitration rules (also discussed later).[399] Thus, if it is likely that the parties to an arbitration are going to get along and dispense with many of the procedural hurdles, then they may want to seriously consider utilizing the UNCITRAL Arbitration Rules.

Some problems that may affect the merits of a dispute, in the energy sector, are with the admission of evidence and other evidentiary problems (e.g. the tribunal deciding how much discovery to conduct and etc.). There are no Federal Rules of Evidence to apply to the arbitrations (unless the parties agree to apply them), let alone an internationally recognized evidentiary admissibility standards to apply to arbitrations. The current *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (the Evidence Convention) is meant to only govern the production of evidence, not the admissibility or discoverability of the evidence.[400] The Evidence Convention applies when a judicial body in one of member states sends a request to an agency, in another member state, asking for the production of evidence.[401] The convention only limits admissibility based on whether the parties intend to use it in a judicial action (or a body with equal authority) and whether it is for a civil matter (the convention only applies to civil or commercial actions).[402] Since the convention only applies when a

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[398] International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG, at Art. 19 (2013).
[399] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[400] Hague Conference on Private International Law, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague Evidence Convention), (1970).
[401] *Id.*
[402] *Id.*

judicial agency requests the production of evidence an arbitration tribunal may suffice, especially when one considers that U.S. law allows arbitrators to subpoena witnesses and evidence.[403] Logically, it also means that an arbitration tribunal would have to rule whether the evidence is admissible (and also request it) before it could be produced.[404] Thus, for this thesis, the Evidence Convention is irrelevant.

Here, all of the rules provide for the arbitrators to decide issues of evidence, leaving it as a substantive issue for the tribunal to decide.[405] This means that to choose an arbitrator (or arbitral tribunal) is an important choice for determining the merits of the dispute, probably more so than choosing what arbitration rules to use. Choosing the right arbitrator is similar to choosing which judge you wish to hear your case, it matters immensely. Some judges are more sympathetic to certain issues, and some are more lenient than others. Sometimes being able to pick the right judge is more important than having a winning case. Similarly, choosing the wrong arbitrator would be like going to court with all of the procedure on your side, but the judge you chose has a propensity to deny discovery or to rule against you on key pieces of evidence, which then causes your case to fail. In the same way if a party agrees on a sole arbitrator (who does not like discovery) and relies on the ability to conduct discovery to help prove their case, then it is

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[403] *Id.;* 9 U.S.C. § 7 (2012).
[404] *Id.*
[405] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).

likely they will have a failing case. On the same issue of evidence, all of the rules provide for the tribunals to be able to call experts and investigate a complaint.[406] While having the tribunal call experts and gather evidence normally would not be an issue by itself, if the tribunal does not hire the correct expert or gather reliable (and correct) evidence, it could affect the substantive issues of the arbitration.[407] This illustrates, once again, how choosing the tribunal can be more important than choosing the rules. Further, all of the rules have the same difficulties which cannot be solved by choosing one set of rules over the other.

Issues of jurisdiction produce much of the same problems as with evidence; the issues of jurisdiction are, by and large, up to the tribunal to determine.[408] While some rules require a supervisory body to agree that there is jurisdiction before the dispute can proceed to arbitration, most explicitly or implicitly allow the tribunal to ultimately determine whether there is jurisdiction.[409] Some of the rules may subject the complainant to jurisdictional scrutiny once before the arbitration by the outside body's review and

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[406] *Id.*
[407] Tim Reid & Joanna Wallis, *Managing large-scale energy disputes*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 23-38 (Carolyn Boyle et al. eds., 1st ed. 2012) (discussing the collection of evidence, hiring of experts, and problems which can arise during the dispute).
[408] *See* UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).
[409] *Id.*

once before tribunal.[410] This raises some of the same concerns, similar to the concerns about evidence, about the lack of an international standard or criteria for jurisdiction. The other problem with jurisdiction under the different arbitration rules is that most of the rules are vague, at best, on the issue.[411] This all means that the tribunals, and the outside bodies that review jurisdiction, exercise tremendous discretion in deciding whether to allow a claim to proceed. However, since all of the arbitral rules have the same flaws with regards to deciding jurisdiction, then none of the rules can set themselves apart from the others.[412]

The problem with all of the arbitration rules is that they do not have any provisions which would directly affect the merits of a dispute. At best, they all tangentially effect the merits by deferring the decision to the arbitration tribunal. This makes it impossible to judge which set of rules would have the most positive or negative impacts on the merits of the dispute. Another aspect of this problem can be attributed to the ability of parties to agree to changes in the arbitration rules, or agreeing to deviate from the default rules. Furthermore, the laws governing the arbitration could also have a huge impact on the merits of a dispute, but the decisions of which laws apply are usually left to the tribunals which emphasizes the wide discretion of the arbitration tribunals when conducting arbitrations.[413]

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[410] *Id.*
[411] *Id.*
[412] *Id.*
[413] *Id.*

B. A comparison of the rules to determine which offers the most or best benefits.

Comparing the rules to one another distinguishes the different effects of each set of rules. The benefits of each set of arbitration rules are not easy to gauge, and harder to compare to one another. Mostly, the benefits offered by the rules are only beneficial based on certain circumstances. Regardless of the specific circumstances, this analysis attempts to show certain benefits of each set of arbitration rules.

The UNCITRAL Arbitration Rules are extremely advantageous in that they are flexible enough to allow the parties to agree to change any of the arbitration rules.[414] The flexibility to allow parties to change the arbitration rules may, in turn, improve efficiency by allowing the parties to dispense with whatever formalities the rules may require. Further, this flexibility would help the rules apply to a broad array of topics, treaties, and agreements; which would also work, and apparently has worked, to ensure the longevity of the rules.[415]

Another advantage, though it would likely not affect the merits of a dispute, is the option of allowing the parties to go to a type of mediation; something which the ICSID

[414] UNCITRAL Arbitration Rules, G.A. Res. 31/98, 31st Sess., U.N. Doc. A/RES/31/98 (Dec. 15, 1976); UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, 65th Sess., U.N. Doc. A/RES/65/22 (Dec. 6, 2010): UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
[415] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).

Arbitration Rules seem to allow.[416] The ICSID Arbitration Rules, as discussed briefly above, allows the tribunal to meet with the parties before any hearings to try to get them to settle any dispute.[417] While there is no guarantee that mediation will work, or even be productive, it gives the parties a chance to work out their problems without conducting a full arbitration.[418] Avoiding full arbitration proceedings helps the parties avoid wasting time and money which could be better put to use by either party.[419] However, if the mediation does not work it could waste time and make the parties spend extra money on representation. Either way the ICSID Arbitration Rules make the mediations optional, which allows the parties to first determine if they believe they can reach a settlement.[420] If the parties believe that they can reach a settlement then they must request the mediation, apparently the request must be made jointly.[421] Thus, the parties will only be mediating if they believe that they may be able to come to an agreement without a complete arbitration; meaning the mediation provision is only likely to be exercised in furtherance of efficiency.[422] Further, nothing precludes the parties from attempting mediation before they resort to arbitration, so allowing mediation also becomes a moot point.

C. A comparison of the frameworks to determine which set of rules is most efficient.

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[416] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[417] *Id.*
[418] Quick & Tomkinson, *supra* note 50, 51-70 (discussing the different types of ADR and the costs and benefits of each).
[419] *Id.*
[420] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[421] *Id.*
[422] *Id.*

Efficiency is the hardest factor to measure. Mainly the problem with measuring efficiency is that significant deviation comes from the discretion which the Tribunals and parties possess.

All of the rules give the parties an ability to join multiple parties, which can be efficient for cases where a string of contracts and parties led to the problem that is now the subject of the dispute.[423] The ability to join parties to the arbitration could potentially alter the merits of the dispute by changing the dynamics of the of the arbitration proceedings. It is hard to imagine how such a case would arise, but imagine the following: Party *A* (who is from state *Z*, which has BITs with states *X* and *Y*) tried to institute arbitration proceedings against country *X* for the loss of a property in territory claimed by both *X* and *Y*. Country *X* then joins party *Y* because both countries *X* and *Y* were demolishing buildings in the vicinity of party *A*'s property to create an reservoir to serve both *X* and *Y*. Party *A* could have legitimately thought that the demolition was an expropriation by country *X* on country *X*'s land; party *A* may be trying to conduct separate claims against both parties and double-dip in arbitral awards. Alternatively country *X* could try to keep party *A* from joining country *Y*, so that country *X* can point the finger at county *Y* and attempt to evade liability by claiming that it was country *Y*'s

[423] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010). Edworthy & King, *supra* note 224, 23-38 (discussing the joinder of parties and how it can arise from a string of contracts).

land and that country *Y* was the one conducting the demolitions. Country *Y* could try to do the same thing to avoid the same liability, and if both succeeded, then countries *X* and *Y* could effectively deprive party *A* of any remedy. While it may seem like a rather far-fetched scenario, there is still plenty of disputed territory in the world and such a claim is not outside of the realm of possibility.[424] Thus, the ability to join parties can either be a potential liability or advantage depending on the specifics of a case. As the example illustrates, allowing joinder which helps a complainant prove a dispute may be akin to allowing a plaintiff prove joint and severable liability among multiple defending parties. The best aspect of joinder is that it provides for judicial efficiency, allowing multiple cases to be brought together so that there are not multiple separate cases about the same subject matter or dispute.[425] While this is the standard rational in court rooms across the United States, it can also be used in the case with investor—state arbitrations.[426] While the joinder of cases in the international realm are not commonplace, it does happen.[427] The most recent set of cases, where joinder helped efficiently resolve the dispute, were a series of cases against Russia brought by companies claiming expropriation and other

[424] *See* Drazen Petkovich, *International boundary disputes*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 245-61 (Carolyn Boyle et al. eds., 1st ed. 2012) (discussing international boundary disputes, how they arise, and ones that are ongoing).
[425] *Id. See* Hulley Enterprises Ltd. v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014); Veteran Petroleum Trust v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014); Yukos Universal Ltd. v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014).
[426] *Id.*
[427] *See* Hulley Enterprises Ltd. v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014); Veteran Petroleum Trust v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014); Yukos Universal Ltd. v. The Russian Federation, Ad hoc UNCITRAL Rules, Permanent Court of Arbitration, Award (July 18, 2014).

violations of the Energy Charter Treaty.[428] The total claims were collectively over $100 billion USD, and the companies eventually won a total collective amount of about $50 billion USD from Russia.[429] The joinder of these cases allowed the parties to bring the claims under one arbitration, thus saving at least one or two of the parties from having to plead a case on their own.[430] Statistically speaking, it also may have saved one or two of the claimants from having their claims fail, since (at least per 2013 statistics) claimants generally only win 31% of claims.[431] Joinder may have saved a claim (which could have been defective) if one of the parties inadequately claimed the elements of expropriation, called the wrong witnesses, or if the cases separately would not have independenly shown expropriation.[432] The majority of the rules either expressly, or seem to implicitly, approve of the possibility of multiparty arbitration.[433] The rules which expressly or implicitly allow multiparty arbitration are the UNCITRAL Arbitration Rules, the SCC Arbitration

[428] *Id.*
[429] *Id.*
[430] *Id.*
[431] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).
[432] *Id.* Edworthy & King, *supra* note 224, 23-38 (discussing the joinder of parties and how it is not mandatory, but allowable); *But cf.* James Farrell, *Expert determination*, *in* DISPUTE RESOLUTION IN THE ENERGY SECTOR, 39-49 (Carolyn Boyle et al. eds., 1st ed. 2012) (discussing the benefit of using experts as fact finders).
[433] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).

Rules, and the ICC Arbitration Rules.[434] The ICSID Arbitration Rules and the ICSID Additional Facility Rules are all silent on the issue.[435] Not specifically endorsing multiparty arbitration does not necessarily preclude multiparty arbitration. However, it does seem to leave the issue up to the arbitration tribunal, who may very well decide that the rules do not contemplate the issue and thus do not have jurisdiction. Nonetheless, since all of the rules seem to allow multiple party arbitrations in some form, the playing field is level in this respect.[436]

Counterclaims may be a way to improve efficiency in the realm of energy sector arbitration. In the United States, counterclaims are a way for parties to preserve judicial efficiency by ensuring that the parties air all of their complaints in one proceeding rather than maintaining separate actions. In investor—state arbitration the opposite may be true.[437] The problem with factoring counterclaims is that they are detrimental to the claimant and provide an avenue for defendant states to claim against investors, a power which they typically would not have.[438] Thus, these provisions could add arbitration claims that would not have otherwise been part of the proceedings.[439] While allowing for counterclaims detracts from efficiency by adding claims to a dispute, it does seem to increase the fairness of the proceedings. For analysis sake, counterclaims could also

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[434] *Id.*
[435] *Id.*
The SCC Rules for Expedited Arbitrations are also silent on this issue.
[436] *Id.*
[437] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014); *See* Dolzer & Schreuer, *supra* note 1, 254-264 (discussing how investors provide their consent to arbitration in limited instances and is not the normal function of most IIAs).
[438] *Id.*
[439] *Id.*

affect the merits of a dispute by broadening the dispute or adding issues not already part of the dispute. However, more often, counterclaims are a way of putting the claimant on a defensive stance about the same or similar issue(s). As between the arbitration rules though, they all have some sort of counterclaims provision.[440] Thus, for the purposes here of efficiency all of the rules are equal in this regard.

While it will not affect the merits of a dispute, attaching a schedule of costs with a set of arbitral rules is a great benefit and magnificent way to help the parties determine what the costs of arbitration will be. Only the SCC Arbitration Rules and the ICC Arbitration Rules have attached cost schedules; the rest do not specify the estimated costs of the arbitration.[441] With a cost schedule a claimant can look at how much they think their claim is worth, how much they expect to spend on representation, and then do a cost—benefit analysis as to whether they think the claim will be worth pursuing. Further, a defending party can make the same sort of cost—benefit analysis when determining what to offer as a settlement or whether the claim is even worth defending. If one or both parties think that it is a pretty strong case, but not that profitable, then they could try to resort to negotiations or mediations instead of having to go through the expense of arbitration. If a party has a weak case, and sees that the costs of the arbitration are

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[440] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).

[441] *Id.*
The SCC Expedited Arbitration Rules also include a cost schedule.

significant, then it would still produce motivation to settle so that they can either avoid having to pay into the arbitration (on top of having a losing case) or avoid incurring additional fees for a case they will know they will lose. Essentially the most efficient part of having a fixed cost schedule is that it allows a lawyer or representative to put a number on the over-all costs of the arbitration that they can take to their client to show them hard numbers before delving into the arbitration. Of course arbitration cost schedules only specify certain costs, the parties still have to factor in the costs of their own counsel, and possibly the costs of the other party's counsel, while calculating settlement figures.[442]

D. Whether a choice of any of the above rules has any bearing on the enforcement of an Arbitral Award.

i. General enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The New York Convention, as stated earlier, provides for the recognition and enforcement of arbitral awards.[443] To gain recognition and enforcement under the New York Convention, a party must ensure: 1) that an arbitration award is made in a country that is a party to the convention; 2) that the award is an original or a copy which is certified; and 3) that a party produce a copy of the consent agreement.[444]

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[442] *See* Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013) (not showing the cost of legal fees).
[443] The New York Convention, *supra* note 55.
[444] *Id.*

The third (and last) requirement is the least complex for a party to meet. There is no definition, under the New York Convention, of what constitutes certification of the consent agreement; leaving it ambiguous and open for interpretation by the jurisdiction where enforcement or recognition is sought.[445] A party may be able to use a print a copy of a BIT, FTA, or the ECT and coerce a government authority to certify it as a true representation of the consent agreement. A notary or a sworn affidavit that it is a true copy may even suffice to meet any requirements. Proving the originality of a consent agreement to the local courts, of a state where a party is seeking enforcement or recognition, would likely be the easiest part of the New York Convention to satisfy.[446] Especially when one considers the availability of treaties and information on the internet, it should be easy to prove the existence of whichever consent agreement is relied upon for the arbitration and the New York Convention.

Requiring that the award be authenticated or certified should not be too difficult for the prevailing party to prove either.[447] Under the ICSID Arbitration Rules each party is automatically given a certified copy of the award, certified by the Secretary General, so that it can be enforced.[448] The ICSID Additional Facility Rules and the ICC Arbitration Rules provide for the same certification procedures as under the aforementioned ICSID Arbitration Rules.[449] The UNCITRAL Arbitration Rules and the SCC Arbitration Rules

[445]The New York Convention, *supra* note 55, at Article IV 1(b).
[446] *Id.*
[447] The New York Convention, *supra* note 55, at Article IV 1(a).
[448] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[449] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11

are similar, but these rules provide the parties with just a copy signed by the tribunal.[450] Whether a copy of a signed arbitration award would be enough to satisfy a court, would likely be up to the court deciding the award's recognition or enforcement. It seems that it would be enough to have a copy of the signed award, however, it is always easier to prevent problems before they exist than attack them retroactively.

The rules all have express provisions regarding the place of the arbitrations.[451] Under the SCC Arbitration Rules and the ICC rules, the outside body (the Court or the Board) will determine the where the arbitrations will take place, if the parties do not agree otherwise.[452] UNCITRAL is similar to the SCC and ICC in regards to determining where the arbitrations will take place.[453] The differences between UNCITRAL and the

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(April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013).

[450] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010); UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013).

[451] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).

[452] Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013).

[453] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013).

SCC or ICC, in regards to choosing the place of arbitration, is that the UNCITRAL rules allow the tribunal to decide where the arbitration should take place if the parties do not agree.[454] It seems very likely that under the ICC or SCC arbitration rules, the parties, tribunal, Court, or Board, would have a strong incentive to choose the corresponding organization as the place for arbitration.[455] If nothing else, it would be convenient and efficient to have the arbitrations in the institutions which already have space readily available and are tasked with helping employ the rules.[456] Even if the parties, tribunal, Board, or Court chose a different country for the arbitration, than the institution's home country, it would be foolish to take the arbitration to a country where an award would not be enforceable under the New York Convention.[457] Further, it is likely that the parties, tribunal, Board, or Court would recognize that any arbitration outside of the New York Convention states would lead to problems in the enforcement and recognition of the award, and thus restrict the arbitration accordingly.[458] However, it should be noted that these actions turn on the knowledge possessed by the individuals choosing the place to arbitrate. Lastly, even if the person choosing the place of arbitration does not purposefully choose a New York Convention state the odds are pretty good that they will choose one anyways.[459] There are 155 member states to the New York Convention,

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[454] *Id.*
[455] *Id.*
[456] *Id.*
[457] The New York Convention, *supra* note 55.
[458] *Id.*
[459] New York Convention Countries, New York Arbitration Convention (May 20, 2015, 1:38 PM), http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.

leaving very few states where a party can have an arbitration not subject to the convention.[460]

The ICSID Arbitration Rules and the ICSID Additional Facility Rules are completely different from other arbitration rules when choosing the place of the arbitration.[461] Under the ICSID Additional Facility Rules, arbitration can only take place in a country which is part of the New York Convention, thus essentially mandating compliance with the New York Convention in this regard.[462] Narrowing the possibility of countries, in which the arbitration can be held, vastly simplifies the considerations and the steps in deciding whether or not the award will become enforceable under the New York Convention.[463]

ii. Enforcement under the Convention on the Settlement of Investment Disputes.

The ICSID Arbitration Rules have a complex relationship with the New York Convention. While ICSID does not prohibit a party from enforcement under the New York Convention, it does not mandate compliance with the New York Convention.[464] As discussed earlier, the ICSID Arbitration Rules come from (and are sanctioned by) the

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[460] *Id.*
[461] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006).
[462] International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006).
[463] International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); The New York Convention, *supra* note 55.
[464] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); Webster, *supra* note 286, 264-265 (stating that ICSID awards can be enforced through other contracting states or through the New York Convention).

ICSID Convention.[465] Under the ICSID Convention, arbitration is to take place at the ICSID Institution unless the proceedings are taking place at the Permanent Court of Arbitration or somewhere else after being approved by the Secretary-General.[466] Which means that most arbitrations under the ICSID Convention will be taking place in the United States or Europe (though a few may occur in other locations).[467] Thus increasing the odds of enforcement since the U.S. is a party to the New York Convention and most of Europe is as well.[468] Further, the ICSID Arbitration Rules mandate that the arbitration parties be given a certified award copy.[469] This means that so long as an enforcing party has a certified copy of the IIA, which provided consent for the arbitration, they will meet the final requirement for the enforcement of an award under the New York Convention.[470] Thus, if the enforcing party does not change the place of arbitration they will be able to meet the requirements of the New York Convention with relative ease by following the ICSID Convention.[471]

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[465] *Id.*
[466] *Id.*
[467] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); Kryvoi, *supra* note 201, 27-28.
[468] Webster, *supra* note 286, 264-265 (stating that ICSID awards can be enforced through other contracting states or through the New York Convention); New York Convention Countries, New York Arbitration Convention (May 20, 2015, 1:38 PM), http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.
[469] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[470] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); The New York Convention, *supra* note 55.
[471] *Id.*

The ICSID Convention is important because every state is obligated to recognize awards made in line with the ICSID Convention.[472] This streamlines the enforcement process so that it is essentially part of the arbitration and a party only needs a certified copy of the award in order to have the award recognized or enforced.[473] This drastically simplifies the requirements of the New York Convention for enforcement.[474]

iii. The potential for overlapping enforcement and other enforcement issues.

Currently there are 155 parties to the New York Convention, meaning there are 155 states to enforce arbitration award under the NY Convention (so long as the arbitration occurred in one of the other 155 states).[475] The ICSID Convention has been ratified by 150 countries meaning that there are 150 countries who would enforce an ICSID arbitration award without having to resort to the New York Convention.[476] Between the New York Convention and the ICSID Convention there are 125 countries which are a members of both conventions.[477] Meaning there should be a total of about 180 Countries (150 countries through the ICSID Convention plus the additional 30

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[472] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[473] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006).
[474] International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); The New York Convention, *supra* note 55.
[475] New York Convention Countries, New York Arbitration Convention (May 20, 2015, 1:38 PM), http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.
[476] International Centre for Settlement of Investment Disputes [ICSID], ICSID 2014 Annual Report (2015).
[477] New York Convention Countries, New York Arbitration Convention (May 20, 2015, 1:38 PM), http://www.newyorkconvention.org/contracting-states/list-of-contracting-states; International Centre for Settlement of Investment Disputes [ICSID], ICSID 2014 Annual Report (2015).

countries who are only members of the NY Convention) where an ICSID award could be enforced under either the New York or ICSID Conventions.[478]

Further, these two provisions are perfectly complementary so that they could act in concert if an arbitration award is in compliance with, or made under, the ICSID Convention then the award can be enforced in any of the ICSID countries.[479] The interesting part of the ICSID Convention is the overlap created between the New York Convention and the ICSID Convention.[480] This overlap could extend to situations where a party could get his award enforced or recognized under either (or both) convention(s) if the state where the award is rendered is a country which is a party to both conventions, and the enforcing state was a party to both.[481] The most likely case would be an arbitration award rendered through ICSID in the United States and then enforcement is sought in France, Britain, Spain, or etc., since they are all members of both ICSID and the New York Convention.[482] In total there are 125 countries which are parties to both conventions, and thus there are that many countries where enforcement of an arbitration award is all but guaranteed under the ICSID and the New York Conventions.[483]

The most complicated aspects of the New York Convention are the limitations on enforcement and recognition, briefly discussed earlier.[484] These limitations have

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[478] *Id.*
[479] Webster, *supra* note 286, 262-266; The New York Convention, *supra* note 55.
[480] *Id.*; Kryvoi, *supra* note 201.
[481] Webster, *supra* note 286, 262-266.
[482] New York Convention Countries, New York Arbitration Convention (May 20, 2015, 1:38 PM), http://www.newyorkconvention.org/contracting-states/list-of-contracting-states; International Centre for Settlement of Investment Disputes [ICSID], ICSID 2014 Annual Report (2015).
[483] *Id.*
[484] The New York Convention, *supra* note 55.

significant interplay between the various arbitration rules.[485] The New York Convention allows countries to deny the recognition of arbitration awards on a number of grounds, some of which are not immediately relevant.[486] The grounds for non-recognition of the award based upon lack of notice provided to a party or because extraneous matters were included in the award, from what the parties had agreed to arbitrate, are both not relevant for discussing enforcement.[487] Not providing a party with notice is not particularly relevant because all of the rules mandate the defending party have notice of the arbitration.[488] Further, the claimant must bring the arbitration for there to be an arbitration, thus both parties will inevitably have notice.[489] Awarding or creating an award that is based on different subject matter from what the parties have agreed, while a valid reason for not enforcing an award, would be a problem created by a tribunal and not something which could be accounted for by any of the rules.[490] The other available exceptions for not recognizing an arbitration award are based on conflicts between the award and conflicts of law with the place where the arbitration was conducted or conflicts between the award and the law applied to the arbitration.[491]

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[485] *Id.*
[486] *Id.*
[487] *Id.*
[488] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); International Centre for Settlement of Investment Disputes (ICSID), ICSID Convention, Regulations and Rules, ICSID/15 (April 2006); International CentreId for Settlement of Investment Disputes (ICSID), ICSID Additional Facility Rules, ICSID/11 (April 2006); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations (2010).
[489] *Id.*
[490] The New York Convention, *supra* note 55.
[491] *Id.*

Of the different provisions of the New York Convention allowing non-recognition of an award, there are two which can potentially cause trouble for a party seeking recognition. The first potentially vexing clause allows denial if the award is not enforceable under the laws of the state that issued the arbitration award (i.e. whatever territory issued the arbitration award will not enforce it).[492] The second allows denial of recognition if the award is not enforceable under the laws applied to the arbitration.[493] Both clauses raise questions of fairness and of a country's ability to influence the recognition or enforcement of an arbitration award. Especially when considering that arbitrations are subject to the laws and courts of the state where they are issued (except in the case of ICSID Arbitrations.[494] These caveats in the New York Convention coupled with arbitration rules being subject to the laws of the issuing country create potentially ominous situations.[495] They create the potential for abuses where countries could pass laws to manipulate the arbitrations occurring within their boundaries or under their laws.[496] There are two examples to this problem. The first would be if the SCC had an arbitration case against China for $1 trillion and, while the case was pending, Sweden passes a law providing China with immunity from any arbitration award produced in Sweden.[497] That would mean that any award issued to a party, against China in Sweden, would be unenforceable. The second example would be if the SCC had an arbitration

[492] *Id.*
[493] The New York Convention, *supra* note 55.
[494] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3, at 24 (Apr. 7, 2014).
[495] *Id.*; The New York Convention, *supra* note 55.
[496] *Id.*
[497] The New York Convention, *supra* note 55.

case, between China and an investor, applying Chinese Law which (hypothetically) mandates there will be no arbitrations against China and that any awards against China are void.[498] This second example would also result in an award that can be denied enforcement in other countries. Practically speaking, this all becomes a terrible problem for people who draft contracts or begin arbitration, who are then required to know the laws of a multitude of different countries to ensure enforcement of any arbitration awards.

Arbitrations under ICSID Convention are not restrained by the local laws of any state.[499] A problem that can arise with the other arbitration rules (besides ICSID) occurs when local state governments are still able to place restraints, and review, awards under the other arbitration rules.[500] This claim may sound suspicious at first, however, it is a logical conclusion. The ICSID Convention was a treaty which eventually created the ICSID institution and the ICSID Arbitration Rules under international law, however the other arbitration rules were created though state institutions (or at the very least were not created through a convention).[501] Even though the UNCITRAL Arbitration Rules were adopted by the United Nations they are meant to be applied individually by ad-hoc tribunals and are not meant constitute international recognition of the arbitration

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[498] *Id.*

[499] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3, at 24 (Apr. 7, 2014).

[500] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).

[501] *Id. See* Kryvoi, *supra* note 201, 15-24 (discussing the history of ICSID, how it came about, and how it is different from the other arbitration institutions).

proceedings.[502] Thus (similar to the Swedish hypothetical above) if the United States decided to change the law and eliminate any claims against the United States, but the party adverse to the United States took the case to ICSID, the U.S. laws would be irrelevant. It would not matter because even if the award was not enforceable under the New York Convention (and you could make a good case that it still would be) it would still be enforceable under the ICSID Convention.[503]

Enforcement of arbitration awards seems to be accomplishable through only the New York Convention in all of the arbitration rules except ICSID.[504] With the self-enforcing provisions in the ICSID Convention it is the only set of rules which can be enforced independently of the New York Convention, thus broadening the options for enforcement.[505] While the ICSID Arbitration Rules do not interfere with the enforceability of its awards under the New York Convention, they do provide superior enforcement protections by creating a second level of enforcement not available under the other rules.[506] The ICSID Convention, being an international convention, also places it beyond the scope of local control.[507] Being beyond local control makes the ICSID

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[502] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014); *Contra* Kryvoi, *supra* note 201, 24 (showing the self-contained enforcement mechanism of the ICSID Convention).
[503] *Id.*
[504] *Id.*
[505] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014); Kryvoi, *supra* note 201, 24 (showing the self-contained enforcement mechanism of the ICSID Convention).
[506] *Id.*
[507] U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).

Arbitration rules the superior choice for arbitrations, especially if a party was concerned with enforceability under the New York Convention or the willingness of countries to enforce an arbitration award.[508]

While ICSID may present the most appealing arbitration option, it does present hurdles not present in the other arbitration rules. As briefly discussed earlier, the biggest difficulty with ICSID arbitration is getting a claim into ICSID because ICSID arbitration is not available to everyone from every country.[509] To get a case into ICSID, both parties must consent to the ICSID institution having jurisdiction, the claim must stem from foreign investment, and one party has to be member country of the ICSID convention and the other either a member country or a citizen or entity from a different member country.[510] Requiring the parties to both be members of (or from) one of the contracting states restricts the number of claimants and ICSID arbitrations.[511] Thus, a party may not be eligible to arbitrate under ICSID and they will be forced to arbitrate under one of the arbitration rules.[512] If a party does have the ability to arbitrate under ICSID it would probably be the best course of action for enforcement purposes. However, if a party must arbitrate under one of the other arbitration rules (other than ICSID) they will inevitably have to resort to New York Convention enforcement.[513]

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[508] *Id.*
[509] Kryvoi, *supra* note 201, 44-45.
[510] *Id.*
[511] *Id.*
[512] *Id.*
[513] *Cf. id.*

Under the New York Convention, the denial of enforcement or recognition is not mandatory.[514] Denying enforcement or recognition is up to the discretion of the courts charged with potential enforcement and they may only deny if there is some sufficient proof which justifies the non-recognition upon one of the aforementioned grounds.[515] This means that a court can still enforce an award in the face of overwhelming evidence that enforcement of the award could be denied; which leaves significant discretion in the hands of local courts.[516] Ultimately, meaning that arbitration rules are relatively irrelevant to whether an award will be enforced, and such concerns are beyond the scope of most arbitration rules. There are always potential or perceived problems with any convention or treaty, whether or not they actually exist in practice. Whether or not enforcement of arbitral awards would face any of these problems, in practice, is a completely separate matter. However, lawyers are experts in exploiting nuances in the law, so it may only be a matter of time.

Concluding Remarks

Choosing a certain set of arbitration rules matters when it comes to dictating the procedural flow of the arbitration and maintaining some semblance of cooperation. However, attempting to effect the merits of an arbitration dispute by choosing a specific set of arbitration rules is relatively futile. All of the arbitration rules are designed (or at least have the unintended consequence) of controlling the procedure of arbitration disputes while simultaneously allowing the parties, tribunals, and IIAs to control the merits of a dispute. Further, the most important distinction between arbitration rules is in

[514] The New York Convention, *supra* note 55.
[515] *Id.*
[516] *Id.*

the realm of enforcement of arbitration decisions. Under the UNCITRAL, ICC, and SCC arbitration rules the parties are supposed to do their best to ensure compliance with the arbitration award.[517] Without direct enforcement mechanisms, the parties can attempt to enforce the arbitration awards through the NY Convention.[518] However, if a party can get into ICSID, ICSID Arbitration offers a level of enforcement apart from arbitration under any of the other arbitration rules.

Ultimately, the choice of arbitral rules is up to the discretion of whomever brings the claim; if they do not bring the claim then there is no dispute to arbitrate. Usually, in energy sector Investor—State Arbitrations, it is the investor bringing suit against the state for a claim of expropriation against the state.[519] The IIAs provide the necessary consent for the arbitrations and give a verbatim definition of what constitutes expropriation.[520] These IIAs state what claims (investor protection provisions) will be allowed into arbitration, as well as the definitions for each of the claims.[521] Additionally, the IIAs

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[517] UNCITRAL Arbitration Rules as revised in 2013, G.A. Res. 68/109, 68th Sess., U.N. Doc. A/RES/68/109 (Dec. 16, 2013); Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Rules (2010); International Chamber of Commerce & International Court of Arbitration, Arbitration Rules, ICC Publication 865-0 ENG (2013).
[518] *See generally* The New York Convention, *supra* note 55.
[519] Dolzer & Schreuer, *supra* note 1, 98-129 & 254-264 (discussing the importance of expropriation, how all IIAs contain expropriation clauses, and how investors usually provide their consent by bringing the arbitration proceedings); Energy Charter Secretariat, The Energy Charter Treaty and Related Documents, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (2004); U.N. Conference on Trade and Development [UNCTAD], Recent Developments in Investor State Dispute Settlement, UNCTAD Doc. UNCTAD/WEB/DIAE/PCB/2014/3 (Apr. 7, 2014).
[520] Dolzer & Schreuer, *supra* note 1, 98-129 & 254-264 (discussing the importance of expropriation, how all IIAs contain expropriation clauses, and how countries can limit their consent); Energy Charter Secretariat, The Energy Charter Treaty and Related Documents (2004); The U.S.—Argentina BIT, *supra* note 58; The 2012 U.S. Model BIT, *supra* note 58; NAFTA, *supra* note 58.
[521] *Id.*

define the protections in ways that are substantially similar to one another.[522] These instruments provide protections which weigh in favor of the investors over the state.[523] The investor is required to consent to the arbitration before an arbitration can begin, which for the most part leaves arbitration as a one-way street between the investor and the host state.[524]

This project started by trying to answer the question of whether or not different arbitration rules affect the merits of a dispute in arbitration in the energy sector. After reading through the different arbitration rules, it quickly becomes evident that the rules are irrelevant to the merits of a dispute. What really matters for the merits of a dispute is the choice of arbitration instrument to garner consent for arbitration; a further advantage may be available by utilizing the procedural aspects of the different rules to gain a little bit of an upper hand in some cases. Ultimately though, the merits of a dispute are not affected by the arbitration rules.

How would using one set of arbitration rules affect the merits of an arbitration dispute in an energy sector? In sum, it would not. The arbitrations rules have no bearing on the merits of an energy sector dispute. Additionally, there are very few procedural advantages from using one set of arbitration rules over another. However, the ICSID Arbitration Rules provide the best, and most effective, means of enforcing an arbitration award; that is if a party can get the claim into ICSID for arbitration.

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[522] *Id.*
[523] *Id.*
[524] *Id.*