INVESTMENT TREATY ARBITRATION AND INSTITUTIONAL BACKGROUNDS: AN EMPIRICAL STUDY

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ABSTRACT

Investment treaty arbitration provides a unique vantage point to examine how tribunals' behavior changes according to the institutional context within which they act: similar legal norms, standards, and rules may be interpreted and applied by the same community of international arbitrators while acting on different institutional backgrounds. Yet, such a perspective has been overlooked in the literature, largely because the institutional context of the different dispute settlement mechanisms has been captured only through its formal arrangements or through focusing on individual arbitrators or tribunals. This paper argues that the neo-institutionalist tradition in the social sciences has much to contribute to our understanding of investment treaty arbitration, and demonstrates the potential of such an approach through an empirical study. The paper reveals that formal and informal institutional arrangements in investment treaty arbitration are linked to different tribunals' behavior in at least four variables: duration of proceedings, number of sessions held, number of references to investment treaty arbitration awards and even outcome of claims. Hence the study indicates the high potential for institutional arrangements to explain the behavior of arbitration tribunals in particular and of international judicial institutions in general and calls for devoting more attention to this type of inquiry.

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INTRODUCTION

Investment treaty arbitration provides a unique vantage point to examine how the behavior of judicial actors changes according to the institutional context within which they act. International investment agreements and treaties, often sharing common substantive provisions for the protection and encouragement of foreign investors, do not establish an exclusive dispute settlement mechanism. Instead, to settle disputes, these treaties direct parties to arbitration mechanisms already established in the international sphere. The result is that similar legal norms, principles, and standards may be interpreted and applied on different institutional backgrounds. The fact that the same arbitrators may be appointed to tribunals in different institutional contexts makes the comparison among those tribunals even more challenging.

Yet, the influence of different institutional backgrounds on the behavior of investment treaty tribunals or on the judicial reasoning of their awards has not yet been sufficiently explored. This paper shows that different institutional backgrounds are intended to serve different purposes, and that tribunals operating on such backgrounds behave differently. Specifically, this paper shows through an empirical study that tribunals operating on different institutional backgrounds show differences with regards to the duration of proceedings, the number of sessions they hold, the number of references to investment treaty arbitration case law, and even in the outcome of the proceedings. Hence, this paper calls for devoting more attention to the institutional backgrounds on which investment treaty tribunals are acting by acknowledging that those backgrounds may produce different outcomes, and by devoting more efforts to explore the specific dynamics causing such influence.

Following the neo-institutionalist tradition in political science,[1] the study identifies three arenas in the overall framework of investment treaty arbitration where distinct practices are expected to appear. The

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[1] JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS 1 (1989); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony Source*, 83 AM. J. SOC. 340, 345 (1977); James March & Johan Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 734 (1984); Peter Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 936 (1996); Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, *in* STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 1, 2 (Sven Steinmo et al. eds., 1994); PETER HALL, GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE 34-35 (1986).

first institution includes arbitration tribunals established according to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").[2] The second institution, the New York Convention framework ("NYC Framework"), combines several arbitration mechanisms established for settling commercial disputes and are also applicable for investment disputes. Arbitration awards in these mechanisms are enforced according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[3] The third institution consists of tribunals established according to Chapter Eleven for the North American Free Trade Agreement between Canada, Mexico, and the United States ("NAFTA").[4] The awards rendered in this last institution are also enforced according to the framework of the New York Convention, but for reasons that are explained in this paper they are treated as a distinct institution.

These institutional frameworks have different purposes: the ICSID as depoliticizing international investment disputes, the NYC as a mechanism aimed primarily at settling private disputes arising out of commercial transactions, and NAFTA as a regional and inclusive regime that covers both trade and investment. Both in ICSID and NAFTA, arbitration is offered as a dispute settlement mechanism not because the disputes are perceived as private, but rather to avoid resorting to national courts system in the host state. The institutional framework of the NYC, however, is shaped to settle private disputes as such. Accordingly, the hypothesis that is examined in this paper is that ICSID and NAFTA tribunals are more likely to depart from the contractual framework of arbitration, of which arbitration is an *ad hoc* and private dispute settlement mechanism driving its legitimacy from the parties' consent.

This Article examines variables that indicate the extent to which tribunals' behavior is consistent with a contractual framework covering both the proceedings (duration and sessions) and the award (citations and outcome). Examining those variables reveals that ICSID and NAFTA proceedings last longer and hold more sessions. As for the awards, this paper shows that ICSID and NAFTA awards refer more to investment

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[2] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter The New York Convention].

[4] North American Free Trade Agreement, U.S.-Can-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

treaty arbitration case law than the NYC group. Moreover, NAFTA tribunals refer almost exclusively to NAFTA case law while ICSID tribunals refer to investment treaty arbitration case law, regardless of their institutional context. In addition, this paper examines whether the outcome differs from one institutional background to another and shows that the outcome of claims is also dependent on the institutional context, as NAFTA tribunals are most likely to dismiss cases, while the tribunals within the NYC are least likely to dismiss cases.

Part I of this Article first explains the relevance of neo-institutional theories to the field of investment treaty arbitration and the potential contribution of such theories. Part II identifies three arenas as distinct institutions that are expected to produce different behavior: ICSID, the NYC Framework, and NAFTA. Part III examines empirical studies in investment treaty arbitration and shows that institutional arrangements are indeed underexplored. Part IV conducts an empirical study showing different behaviors arising in different institutional backgrounds. Part IV also shows that ICSID and NAFTA are departing from the contractual framework while the tribunals in the NYC institution are still, as a group, presenting a behavior that is typical of contractual arbitration. Part V concludes by suggesting that institutional arrangements should be considered as shaping the behavior of tribunals, whether directly or indirectly, and that the existing literature should devote more attention to the different institutional arrangements among different tribunals as one that is producing different practices covering both procedural and substantive law.

I. WHY NEW INSTITUTIONALISM?

New Institutionalism argues against understanding politics solely as a reflection of society (i.e., international relations) or as the macro aggregate consequences of individual players (i.e., tribunals or arbitrators).[5] Hence, one of the main contributions of New Institutionalism is the focus on the relative autonomy and independent effects of institutions and the importance of their organizational properties. Accordingly, these institutions can be understood neither solely as the reflection of law, politics, international relations, or culture nor as the macro aggregate consequences of individual players, such as judges, tribunals or arbitrators. Moreover, institutions are defined not

[5] March & Olsen, *supra* note 1, at 738, 740.

only through their formal settings, but also rather loosely through shared formal and informal procedures, routines, norms, and conventions.[6] Institutions define the framework where action takes place by shaping beliefs, preferences, practices, and norms.[7]

The institutional background on which arbitrators behave is usually described through formal institutional arrangements, mostly in the form of arbitration rules.[8] Following this approach, suggestions for reform, for example, addressed the procedures for arbitration rules,[9] appointment patterns,[10] or review mechanisms,[11] as the appropriate action for inducing change in investment treaty arbitration. This approach toward institutions may be identified by what is termed today as "old institutionalism" theories.[12] According to this approach, the analysis of institutions is based on formal and legal arrangements within the institution, notwithstanding any outcomes that culture, ideas, or informal practices may produce. These suggestions, significant as they can be, are usually limited to the formal arrangements, and do not offer a sufficient theoretical analysis on how these top-down reforms are expected to be applied on grounds when variance among different institutional backgrounds exists. Specifically, they give little consideration to the manner in which arbitrators who operate in more than one institutional

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[6] Hall & Taylor, *supra* note 1, at 938; Thelen & Steinmo, *supra* note 1, at 2; HALL*, supra* note 1, at 19.

[7] MARCH & OLSEN, *supra* note 1, at 18.

[8] *See, e.g.*, Stephen Jagusch & Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 79, 79 (Michael Waibel et al., eds., 2010).

[9] *See* Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *Suggested Changes to the ICSID Rules and Regulations* (ICSID Secretariat, Working Paper, 2005); Jason W. Yackee & Jarrod Wong, *The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns*, *in* Y.B. INT'L INV. L. & POL'Y 233, 235 (Karl P. Sauvant ed., 2011); Rep. of Working Grp. II on Arbitration and Conciliation, 55th Sess., Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration, Oct. 3 – Oct. 7, 2011, U.N. Doc. A/CN.9/WG.II/WP.166/Add.1, Add. (2011).

[10] *See, e.g.*, Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 TRANSNAT'L DISP. MGMT. 8-9 (2004), *available at* http://www.transnational-dispute-management.com/journal-browse-issues.asp; Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and its Significance for the Role of the Arbitrator,* 23 LEIDEN J. INT'L L. 401, 420-22 (2010); Jan Paulsson*, Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339, 446 (2010).

[11] Among suggestions for reform in this context is an appellate body and an advisory board. *See* Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators***,** 87 IOWA L. REV. 1337, 1369 (2001).

[12] James G. March & Johan Olsen, *Elaborating The "New Institutionalism", in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 3, 5 (Sarah A. Binder et al. eds., 2006).

context are expected to adjust to the reforms, and whether distinct norms of behavior are expected to emerge.

Formal adjustments aside, some studies in the literature address the behavior of individual arbitrators in order to explain the developments of this field of law. When examining studies that focus on the individual unit, we find that their assumptions are based mostly on sociological grounds or on rational choice analysis. In the sociological perspective, the arbitrator is perceived through the community of international arbitrators, which sets norms and practices of behavior guiding the behavior of its members.[13] In this regard, it is indicated that an arbitrator belongs to a small group of arbitrators hearing the claims, meeting and interacting in professional events, and exchanging ideas, which allows conventional norms of community behavior that influence the behavior of arbitrators to be shaped. The sociological approach is rooted in the illuminating work of Garth and Dezelay, who studied the relations and interactions in the community of international commercial arbitrators.[14] While Dezelay and Garth reinforced the myth of a "closed club" in describing the community of international commercial arbitration, it did nevertheless point to the strong potential of sociological analysis for explaining the behavior of arbitrators. We frequently find terms such as the "community" or "small community" in studies describing international arbitrators, implying the sociological impact of the community of arbitrators on the development of the field.[15] The most explicit indication of the potential of the sociological analysis for explaining the behavior of investment treaty arbitrators is found in Moshe Hirsch's article referring to "close-knit arbitrators" exchanging

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[13] Moshe Hirsch, *The Sociology of International Investment Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 143 (Zachary Douglas et al. eds., 2014); Catherine Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 960– 63 (2004).

[14] *See generally* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); *see also* JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 59 (2011).

[15] *See* Jose Alvarez & Kathryn Khamsi, *Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime,* 2008–2009 Y.B. INT'L INV. L. POL'Y 379, 468; see also the suggestion that "the community of international arbitrators exercises sufficient informal self-regulation and self-selection." Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1016 (2006); reference to the role of the "close-knit community" can also be found in Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418, 443 (2013).

ideas and information through "various channels of communication."[16] While sociological analysis would generally consider the context in which individuals behave, it barely touches on the institutional background, and presumes a similar context for arbitrators bracketed under the tag "investment treaty arbitration."

The second approach to individual behavior, identified with rational choice theory, often perceive arbitrators as free rational agents and apply an economic analysis to explain their behavior.[17] Underlying this approach is the assumption that arbitrators' actions are instrumentalized through rational behavior aimed at maximizing their own interest. Such an approach would predict that arbitrators will adjust their behavior to market preferences. Such market preferences are naturally shaped by the strong actors in the fields, such as states and investors, and are signaled through indicators such as appointment patterns. Arbitrators who do not comply with these preferences are not expected to be reappointed. Taking such an approach seriously requires a sophisticated analysis that considers the differences in appointing patterns between co-arbitrators and the presiding arbitrator. While co-arbitrators would be evaluated mainly by the outcome of the procedure and whether it is consistent with the appointing party's preferences, the evaluation of the chairperson will be considered only if he or she would likely present a balanced approach; otherwise, that person would be vetoed by the party against which the person is supposedly biased. If the appointing authority is not the parties, but rather an institutional authority or the two co-arbitrators, then the appointment of a biased arbitrator as the president of the tribunal may also deter future parties from designating them as an appointing authority, while the designating authority may also have its own additional considerations. Moreover, a tribunal is paid to deliver an enforceable award, and therefore, the tribunal has a clear interest that the award is upheld by the relevant review mechanism. Therefore, as in the case of the sociological analysis, due consideration should be given to the different institutional contexts in which arbitrators operate, in particular, if they follow different appointment patterns and review mechanisms.

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[16] Hirsch, *supra* note 13.

[17] *See* Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 516–18 (2005); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 5–6 (2007).

By following the literature on investment treaty arbitration, it is realized that the manner in which the different institutional backgrounds and individuals reflect on each other is still largely unexplored: Do appointment patterns vary? Do arbitrators reach different conclusions? Is judicial reasoning different? These questions become more critical when we consider the rich literature on institutions existing in various disciplines: the institutional background is identified according not only to its formal settings but also to distinct informal practices, ideas, or even culture that are developed on the institutional background.[18] This opens an entirely new set of questions that have never actually been examined in the context of investment treaty arbitration: Are distinct institutions on the basis of these various mechanisms and contexts for dispute settlement being developed? Or, stated differently, are culture, norms of behavior, ideological undertakings, and market preferences all similar in these different contexts? While this paper barely touches upon these specific questions, it nevertheless suggests that investment treaty arbitration should be understood through such a wide understanding of institutions as developed within the "New Institutionalism." According to this approach, this Article follows a loose definition of institutions to identify the different institutional backgrounds of investment treaty arbitration, by considering both formal and informal practices.

II. DEFINING THE INSTITUTIONS

Following the neo-institutionalist tradition in political science, an institution is defined as the "formal or informal procedures, routines, norms and conventions embedded in the organizational structure" of the legal system.[19]

In the following lines, distinct practices are expected to develop in three contexts: 1) Tribunals established according to the ICSID Convention ("ICSID tribunals"); 2) tribunals settling disputes based on NAFTA Chapter Eleven ("NAFTA tribunals"); and 3) tribunals established according to commercial arbitration mechanisms, mainly arbitrations held according to the Stockholm Chambers of Commerce Arbitration Institute ("SCC") and the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"). Arbitration awards in this context are reviewed by national courts

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[18] *Supra* note 1.

[19] Hall, *supra* note 1, at 19; Thelen & Steinmo, *supra* note 1, at 2.

according to national legislation and to the New York Convention (NYC Framework/Institution, or SCC and UNCITRAL tribunals).[20] Three elements that are distinct in each institution are specifically indicated: 1) the nature of the disputes that the mechanism is meant to settle; 2) the formal rules of proceedings; and 3) the review mechanism for awards.

The nature of the disputes is directly connected to the ideational basis of the institution, as it defines the primary mission of the institution. It is significant to the institution not only as the guiding paradigm when it is established, but also because it reflects on the design of the institution. The rules of proceedings specify the work routines of actors in four main stages: the constitution of the tribunal, the management of the proceedings once the tribunal has been established, the deliberation and rendering of an award, and finally, the rules specifying routines after an award was rendered.

These elements are distinctive but not necessarily separate. They are interrelated and derived from the ideational basis of each institution: the ICSID as depoliticizing investment disputes, the NYC as a flexible disputes settlement mechanism aimed primarily at settling private disputes arising out of commercial transactions, and NAFTA as a regional and inclusive regime that covers both trade and investment.

Finally, it is notable that these observations do not necessarily suggest that arbitrators acknowledge the institutions' paradigms or designs and consciously shape their behavior according to that acknowledgment. Following historical institutionalism, institutions are where action takes place, preferences are shaped, and behavior is defined. Yet that does not imply that the relation between the institution and the action can be reduced to a cause-result analysis through undermining the complex set of actors, practices, and arrangements taking place within the institutional context and *all in combination* shaping institutional behavior. The institutional context is taken as a whole, combining a much more complex set of variables existing in the institutional context and all in combination producing the variance. Hence, appointment patterns, arbitration centers, arbitration rules, review mechanisms, transparency, and many other institutional arrangements all in combination cause such variance.

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[20] *See generally* The New York Convention, *supra* note 3. The NYC Framework/Institution is distinguished from the New York Convention as an international convention. Accordingly the former is termed along this study as the NYC Framework/Group/Institution while the latter is termed as the New York Convention.

A. THE ICSID

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") was initiated to address the concerns about the lack of an appropriate mechanism for the settlement of disputes between host states and foreign investors.[21] ICSID arbitrations are held according to the ICSID Arbitration Rules, which offer a complete set of rules and procedures for holding the arbitration.[22] The ICSID Convention established the International Center of the Settlement of Investment Disputes ("ICSID"),[23] the leading institution today for settling international investment arbitration disputes: more than 60 percent of investment arbitrations are held under its auspices.[24] Hence, the Convention, arbitration rules, and the center that manages the proceedings are common to all ICSID tribunals.

ICSID's main goal is to depoliticize the settlement of investment disputes between investors and host states, and to promote and protect investments. As stated in the ICSID Convention, its primary purpose is to provide facilities for the conciliation and arbitration of international investment disputes.[25] These facilities were designed to separate investment disputes from international policy by prohibiting the investor's home state to extend diplomatic protection or to bring an

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[21] In the absence of such a mechanism, investment disputes were apt to increase the risk of conflict between home states and host states. *See* MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES 17 (1993).

[22] International Center for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings ICSID/15 (April 2006) *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID Arbitration Rules]. Debating parties cannot choose not to hold the arbitration according to the ICSID Arbitration Rules, but in many cases their provisions offer flexibility to the parties by allowing them to deviate from them.

[23] ICSID Convention, *supra* note 2, art. 1

[24] United Nations Conference on Trade and Development, Geneva, Switz., *Latest Developments in Investor-State Dispute Settlement* 2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/11 (2006).

[25] ICSID Convention, *supra* note 2, art. 1(2). According to ICSID's website, the "Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. . . ." *See About ICSID*, INT'L CTR. FOR SETTLEMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx (last accessed Apr. 28, 2016).

international claim with respect to the disputes that are settled according to the ICSID Convention.[26]

Article 25 of the convention limits the jurisdiction of ICSID tribunals only to "a legal dispute arising directly out of an investment, between a contracting state . . . and a national of other contracting state."[27] Hence, from its establishment ICSID was already intended to manage only investment disputes. Accordingly, arbitration is offered as a dispute settlement mechanism not because the disputes are perceived as private, but rather because the disputes concern the conduct of states as a *sovereign autonomy* with foreign investors. This potentially makes the dispute *international* rather than local or private. From an international perspective, arbitration is offered to isolate the dispute from international policy and avoid turning to national courts.

The ICSID Convention and Rules define the scope of arbitration for international investment arbitration,[28] and the powers and functions of the tribunal are defined in the convention.[29] Moreover, adherence to ICSID arbitration rules is mandatory for all ICSID arbitrations and the auspices of the ICSID–the center–is also mandatory.[30]

ICSID arbitration awards are reviewed by an *ad hoc* annulment committee established according to the provisions of the convention and

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[26] ICSID Convention, *supra* note 2, art. 27. *See also* Ibrahim F. I. Shihata, *Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, in* INVESTING WITH CONFIDENCE: UNDERSTANDING POLITICAL RISK MANAGEMENT IN THE 21ST CENTURY 2, 4 (Kevin W. Lu et al. eds., 2009).

[27] ICSID Convention, *supra* note 2, art. 25.

[28] *Id.*

[29] ICSID Convention, *supra* note 2, art. 44. Such a violation may expose the award to annulment. ICSID Convention, *supra* note 2, art. 52(1)(d); *see also* CRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 675 (2010).

[30] The ICSID Convention also offers ICSID Additional Facility (ICSID AF) Rules, which are applied to investment disputes, but whose arbitration rules and review mechanisms are different from those of ICSID. The ICSID AF is open to parties that subject themselves to ICSID's jurisdiction in cases that are outside its jurisdiction. The most common cases where ICSID AF Rules are applied are those in which only one of the disputing parties is either a party to the ICSID Convention or a national of such a party. While ICSID AF rules are designed to facilitate investment disputes, they are nevertheless reviewed according to the NY Convention and not the ICSID Convention. ICSID AF rules in this study are not considered part of the ICSID institution. The ICSID AF rules are those mostly commonly used in NAFTA arbitration. After excluding NAFTA awards from the ICSID AF group, less than ten such awards remain, of which at least three do not fall within the years relevant to this study. While the original intention was to use the ICSID AF group as a study group for both the ICSID and NY Convention Framework, the low number does not allow profound conclusions to be drawn, and hence, they were excluded from the study. *See generally* ICSID Convention, *supra* note 2.

it is usually composed of international law experts.[31] Hence, the ICSID convention is self-sustained, and is not dependent on national courts: when the award has been approved, it can be enforced directly by national courts with no further review.[32] The ICSID Convention allows the annulment of awards due to procedural aspects that undermine the legitimacy and the accountability of the tribunal. A basis for annulment exists when the tribunal was not constituted properly,[33] when it manifestly exceeded its powers,[34] when a member of the tribunals was involved in corruption,[35] or when there was a serious departure from the procedural rules.[36] Only one basis for annulment—that the award failed to state the reasons on which it was based—is centered on the award itself.[37] The actual application and interpretation of these bases for annulment are further explained below.

B. THE NYC INSTITUTION/SCC AND UNCITRAL ARBITRATION RULES

This group, or institution, shares mainly two features in common: their awards are reviewed according to the normative framework set by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and they are held through mechanisms intended to settle commercial disputes.

The New York Convention was adopted at the United Nations Conference on Commercial Arbitration in New York in 1958.[38] The convention is designed to address the needs of the international business community by setting a well-established mechanism for the enforcement

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[31] The Convention does not explicitly state expertise in international law as a pre-condition of appointment, but rather of law in general. The ICSID *ad hoc* annulment committee is appointed by the ICSID chairman, who is allowed to appoint only arbitrators who were designated to the ICSID panel of arbitrators. ICSID Convention, *supra* note 2, art. 40, 52(3). Article 14 of the ICSID Convention states that persons designated to serve on the Panel "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators." However, as a matter of practice, ICSID *ad hoc* annulment committee members were persons with established expertise in international law and international arbitration. *Id*. art. 14.

[32] *Id.* art. 54.

[33] *Id.* art. 52(1)(a).

[34] *Id.* art. 52(1)(b).

[35] *Id.* art. 52(1)(c).

[36] *Id.* art. 52(1)(d).

[37] *Id.* art. 52(1)(e).

[38] *See* The New York Convention, *supra* note 3.

of commercial arbitration agreements and awards, and it is designed mainly to address private law disputes arising from commercial transactions.[39] As such, the disputes that the New York Convention addresses are *private* in their nature. While investment arbitration awards may vary in the arbitration rules followed during the proceedings, most available mechanisms in this context, as we shall show next, are designed for commercial arbitration.

The Convention focuses on the enforcement of arbitration agreements and arbitration awards of national courts, and does not offer rules for managing the arbitration proceeding. To complement the normative framework set through the New York Convention, the United Nations Commission on International Trade Law offered in the year 1976 its arbitration rules as a ready-made set of procedural rules to create a unified, predictable, and stable procedural framework for international arbitrations (the "UNCITRAL Arbitration Rules").[40] The UNCITRAL Arbitration Rules offer a dispute settlement mechanism, the purpose of which is to facilitate arbitration of disputes arising from international trade transactions,[41] but are sufficiently flexible to manage other kinds of arbitrations.[42]

A number of international arbitration centers offer institutional arbitration services, frequently tailored to the needs of the business community. The International Court of Arbitration ("ICA") established by the International Chamber of Commerce in Paris ("ICC"), The

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[39] Pieter Sanders, *The History of the New York Convention*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK 10, 11 (Albert Jan Van Den Berg ed., 1999); Part One of the New York Convention brings Excerpts from the Final Act of the United Nations Conference on International Commercial Arbitration stating that:

> [T]he Economic and Social Council of the United Nations, by resolution 604 (XXI) adopted on 3 May 1956, decided to convene a Conference of Plenipotentiaries for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of *private law* disputes.

See United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958) *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

[40] G.A. Res. 31/17, U.N. GAOR, 31st Sess., Supp. No. 39, (Vol. I), U.N. Doc. A/31/17 (Vol. I) (Dec. 15, 1976) [hereinafter UNCITRAL Arbitration Rules (1976)]. The UNCITRAL Arbitration Rules were revised in 2010. *See* G.A. Res. 65/22, U.N. GAOR, 56th Sess., A/65/17 (Dec. 6, 2010) [hereinafter UNCITRAL Arbitration Rules (2010)].

[41] U.N. Secretary-General, *Commentary on the Draft UNCITRAL Arbitration Rules*, ¶ 7, U.N. Doc A/CN.9/112/Add.1 (May 7, 1975).

[42] *Id.*; *see also* DAVID D. CARON, LEE M. CAPLAN, & MATTI PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES, A COMMENTARY 21 (2006).

Stockholm Chamber of Commerce Arbitration Institute in Stockholm ("SCC"), the London Court of International Arbitration in London ("LCIA"), and the Permanent Court of Arbitration in the Hague ("PCA") is only a partial list of arbitration centers that mainly manage commercial arbitration and also host investment treaty arbitration.[43] Arbitration centers today also offer their own arbitration rules for managing the proceedings, but these rules are mostly optional and parties are allowed to agree on other arbitration rules.[44] For practical reasons, this paper will focus only on the UNCITRAL Arbitration Rules and arbitration rules drafted by the SCC Institute ("SCC Arbitration Rules"),[45] as the group that will be examined in this study, according to the criteria set in Part II, includes only arbitrations held according to these two sets of arbitration rules.

Common to all these arbitrations, aside from being designed mainly for commercial arbitration, is that their awards are enforced and reviewed by the national courts system. The New York Convention prescribes uniform international rules that require national courts to recognize and enforce foreign arbitral awards, with a limited number of exceptions. Such exceptions are situations where the court finds that enforcing the award is contradictory to public policy or that the subject matter is not capable for settlement by arbitration under national law,[46] or

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[43] The PCA, however, is not a commercially oriented arbitration center, as it services include state-to-state arbitrations, and was originally established to provide such services for states. As stated in the PCA website:

> The PCA is an intergovernmental organization with 116 member states. Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. Today the PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties

About Us, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Oct. 10, 2014).

[44] *See SCC Arbitration Rules*, STOCKHOLM CHAMBER OF COMMERCE, http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf (last visited Nov. 17, 2014); *See also Rules of Arbitration*, INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration (last visited Nov. 17, 2014), *and LCIA Arbitration Rules*, LONDON COURT OF ARBITRATION, http://www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx (last visited Nov. 17, 2014).

[45] *See SCC Arbitration Rules*, *supra* note 44.

[46] Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds

where the party resisting the enforcement is able to prove that the agreement on which the arbitration is based is not valid,[47] that the arbitration proceedings lacked procedural regularity,[48] that the tribunal exceeded its jurisdiction,[49] or deficiencies in the constitution and appointment of arbitrators.[50] These exceptions, however, do not include a review of the bases on which the merits of the case were determined.

National legislation in states hosting the arbitration as formal seats also plays a role in enforcing the awards when the arbitration is considered local.[51] UNCITRAL also offers a Model Law for national legislation with regard to the enforcement of arbitration agreements and arbitration awards.[52] The Model Law is designed to support the international commercial arbitration framework as set in the New York Convention. It was adopted in a substantial number of jurisdictions and served as a model for legislation and judicial decisions in many others.[53] While the complexity and particularity of each national legislation will not be discussed here, it is fair to say that most national legislations,

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> that: *(a)* The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or *(b)* The recognition or enforcement of the award would be contrary to the public policy of that country.

The New York Convention, *supra* note 3, art. V(2).

47 > The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made[.]

The New York Convention, *supra* note 3, art. V(1)(a).

48 "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case[.]" The New York Convention, *supra* note 3, art. V(1)(b).

49 > The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced[.]

The New York Convention, *supra* note 3, art. V(1)(c).

50 "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place[.]" The New York Convention, *supra* note 3, art. V(1)(d).

51 An arbitration based on an international treaty may be considered domestic in the seat of arbitration, and hence, national legislation may apply. For a further explanation of the distinction between foreign/international arbitration and domestic arbitration, *see* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Vol. II, 2364–88 (2009).

52 G.A. Res. 57/18, U.N. GAOR 57th Sess., Supp. No. 17, U.N. Doc. A/57/17 (Nov. 19, 2002).

53 BORN, *supra* note 51, Vol. I, at 115; BORN, *supra* note 51, at 2340.

similar to the normative framework of the New York Convention, focus on the fairness and integrity of the proceedings as considerations for annulment, except in the United States and England, which allow reviewing the substance of an award in a very limited scope.[54]

C. NAFTA TRIBUNALS

NAFTA is a regional agreement between three neighboring states and covers the fields of both trade and investment. The protection standards and dispute settlement mechanism for investor-state disputes are set in Chapter Eleven of the agreement. As the agreement is regional and intended to cover all aspects of economic relations between these states, it does not fall under the two former institutions: investor-state arbitration is enforced according to the New York Convention, but the agreement defines procedural rules in the arbitration that capture the nature of the dispute as an investment dispute.

NAFTA Chapter Eleven tribunals are established to settle investment disputes. Hence, NAFTA Chapter Eleven tribunals are already shaped to settle disputes where one party, the state, is acting as a sovereign authority. We should still recall however that the overall framework of NAFTA is *regional* rather than international. The intensive mutual trade and investments among the states produced a relatively high number of claims. NAFTA states are sued repeatedly by investors on the basis of NAFTA Chapter Eleven, and for all three states none of the other investment agreements (mostly BITs) have produced so many claims against them. In addition, as the United States, Canada, and Mexico are all states that share their borders and intensive economic and political relations, the public concern in NAFTA tribunals in each state goes beyond its borders and carries a sense of shared concerns with regard to the legal order set by NAFTA tribunals. Accordingly, the regionalism of NAFTA has a critical implication for how NAFTA

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[54] The main arbitration jurisdictions for international arbitration, France, Switzerland, UK, and US, do not follow the Model Law suggested by the UNCTAD, but still follow the basic paradigm of no substance review. However, in the U.S., a court decision has ruled that an award may be annulled due to a manifest disregard of law. Also, in the U.K., an error in applying a U.K. law provides a basis for annulment. *See* Vladimir Pavic, *Annulment of Arbitral Awards in International Commercial Arbitration, in* Investment and Commercial Arbitration – Similarities and Divergences 131, 144 (C. Christian et al. eds., 2010); *See also* BORN, *supra* note 51, at 2340–43.

disputes are conceived by the public, policy decision makers, and courts in these contracting states.

NAFTA arbitrations are held according to the UNCITRAL arbitration rules or the ICSID Additional Facility arbitration rules ("ICSID AF"),[55] whether *ad hoc*, or facilitated by the ICSID.[56] NAFTA sets procedural rules that are valid for all NAFTA tribunals, whether held according to the UNCITRAL or ICSID AF; articles 1114, 1123–1137 set some restrictions on the proceedings covering issues of both substantive law and procedure. These rules, whether mandatory or default, not only restrict the tribunals and the parties, but also set a common basis for NAFTA tribunals, regardless of the arbitration rules that are followed.

Formally, the review of NAFTA awards falls in the framework of the New York Convention and of national legislations, specifically of Canada or the United States.[57] It follows that when the dispute is between Canada and a national of the United States, or between the United States and a Canadian national, the reviewing court falls in one of these two states, while in other New York Convention contexts—termed in this study the NYC Framework or Institution—the reviewing court usually falls in a third neutral state.[58]

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[55] "Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with: (a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or (b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules." NAFTA, *supra* note 4, art. 1130. As Canada and Mexico did not ratify the ICSID Convention, it could not be applied.

[56] It is noteworthy in the context of NAFTA that ICSID manages not only arbitration proceedings held according to the ICSID AF Rules, but also UNCITRAL Arbitration rules as well. *See, e.g.*, S.D. *Myers, Inc. v. Canada*, UNCITRAL *available at* http://www.state.gov/documents/organization/6029.pdf; *Pope & Talbot, Inc. v. Canada,* UNCITRAL *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-37.pdf; *Glamis Gold v. USA,* UNCITRAL (June 8, 2009), *available at* http://www.state.gov/documents/organization/125798.pdf.

[57] Pavic, s*upra* note 54, at 134.

[58] See, for example, the decision of the Federal Court of Canada in *S.D.* Myers, Inc. v. Canada*,* [2004] 3 F.C. 368, (Can. Fed. Ct.); Loewen Group, Inc. and Raymond L. Loewen v. United States, 2005 U.S. Dist. LEXIS 44999 (D.D.C. Oct. 31, 2005) (memorandum Opinion of the United States District Court of Columbia for the Motion to Vacate and Remand Arbitration Award), *available at* http://www.state.gov/documents/organization/36260.pdf.

III. INVESTMENT TREATY ARBITRATION: BETWEEN THE JUDICIAL AND THE CONTRACTUAL FRAMEWORKS

Arbitration, in general, has features of both contractual and judicial systems.[59] On the one hand, arbitration derives its existence and validity in law from the will and consent of the litigant parties.[60] As a contractual mechanism, the role of party autonomy is central to the understanding of the arbitral process. Thus, by having such privileges as appointing arbitrators[61] and defining the applicable law,[62] the parties control the procedure to a large extent.

An alternative approach to the contractual framework suggests that arbitration is not purely private and has adjudicative features as well. It is a method of settling disputes that involve the exercise of an independent, impartial decision-making process, supported by the national court system.[63] Thus, the arbitrator has functions that are public or judicial in character.[64] Naturally, focusing on this aspect of arbitration rather than the former would allow the imposing of greater constraints on the parties' autonomy than an ideal contractual approach would abide.[65] Proponents of this view, that arbitration has mixed features, suggest that the nature of arbitration is determined, to a large extent, by the character of the system of social relationships in which it takes place.[66] If we consider investment treaty arbitration we realize that already from its establishment it is hardly an ideal type of contractual approach, as a

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[59] Usually, the theory of international arbitration takes a different focus by examining the jurisdictional basis for international commercial arbitration. This includes the contractual approach, the juridical approach, the mixed approach and an autonomous approach: BORN, *supra* note 51, at 184–89. *See generally* EMMANUEL GAILARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010); JAN PAULSSON, THE IDEA OF ARBITRATION 20 (2013).

[60] BORN *supra* note 51, Vol. I, at 88; Kenneth S. Carlston, *Theory of the Arbitration Process*, 17 LAW & CONTEMP.. PROBS. 631, 631(1952) (quoting *Reily v. Russell*, 34 Mo. 524, 528 (1864)). *See also* ICSID Convention, *supra* note 2, art. 25(1). Consent may also be given in an agreement between the investor and the host state prior to the dispute, in a treaty between the investor's home state and the host state, and in national legislation of the host state. *See also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 238–244 (2008); HIRSCH, *supra* note 21, at 17, 47–57.

[61] ICSID Arbitration Rules, *supra* note 22, art. 3–4. UNCITRAL Arbitration Rules (1976), *supra* note 41, art. 8–10.

[62] ICSID Convention, *supra* note 2, art. 42; UNCITRAL Arbitration Rules (1976), *supra* note 41, art. 35.

[63] BORN, *supra* note 51, Vol. I, at 186.

[64] *Id*.

[65] *Id*.

[66] Carlston, *supra* note 60, at 633–34.

state's consent is not *ad hoc* for the specific dispute, but a general consent given in advance for a certain kind of disputes to known beneficiaries or claimants.[67] Moreover, as the field concerns regulating states' conduct vis à vis investors, many authors agree that investment treaty arbitration combines both public and private features,[68] and thus, it should be addressed as a regime that combines contractual and judicial features.

Yet, as investment treaty arbitration is shaped on different institutional backgrounds we expect that judicialization of investment treaty arbitration is not only driven from the substance matter of the field, but also from its institutional arrangements. Specifically, we suggest that the institutional design of ICSID and NAFTA makes their tribunals more amenable to following a judicial approach than the institutional design for tribunals that act through commercial mechanisms and are enforced according to the normative framework of the New York Convention.

While this conclusion is based on the evaluation of the overall framework of each institution, the relevance of three main arrangements is significant: the procedural framework that relatively places more *restrictions on the process*, the *review mechanism* that requires a more sophisticated account to deal with legitimacy concerns, and *transparency and (third party) participation* arrangements that show a higher level of responsiveness to demands on these issues. Again, these arrangements should be perceived through the institutional context as a *whole*, and not as an eclectic set of arrangements isolated from one to the other. Each component is elaborated in the following lines.

A. RESTRICTION ON THE PROCESS

The first feature or component in the contractual/judicial mixture is the existing restrictions on the process of arbitration. The normative contribution of arbitration, in the ideal type of contractual model, is captured only through the parties' consent to settle their dispute through a fair, impartial, and independent dispute settlement mechanism. Accordingly, mandatory restrictions are less likely to be imposed on the

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[67] *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 234 (1995).

[68] *See* Schill, *supra* note 10, at 404; Alex Mills, *The Public-Private Dualities of International Investment Law and Arbitration*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., 2012).

process, except to ensure impartiality and fairness.[69] As the nature of arbitration in a contractual framework is *ad hoc* and past-oriented, there is no normative value for *imposing* a uniform performance or conduct on the tribunals: the cases have no future normative implications and hence uniformity is not necessary, either as a normative value or as a practical concern of predictability.

When the contractual paradigm is weakened and the judicial paradigm is strengthened, it is more likely that restrictions on the process that aim to preserve specific normative aspirations will be found. Accordingly, the judicializing of an institution leads tribunals to act in a more unified manner. Hence, restrictions on the process are significant not only for examining existing paradigms, but also because they are expected to shape a more unified behavior required to the judicialization of the institutions.

The ICSID Convention, as mentioned above, restricts the jurisdiction of ICSID tribunals to investment disputes between one state (the host state) and nationals of another signatory state,[70] while also prohibiting home states from applying diplomatic protection.[71] The ICSID Convention and rules also contain provisions that limit the parties' control of the procedure and set constraints on the powers and functions of the tribunal.[72] Some arbitration rules are also mandatory, such as the rules concerning restrictions on the nationality of arbitrators,[73] a rule demanding that a preliminary session would be held,[74] and the submission of supporting documentation.[75]

The New York Convention, and arbitration rules offered for arbitrations that fall under this convention, are aimed at settling private

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[69] Most SCC Arbitration Rules, for example, are subject to parties' agreement or tribunal's discretion, except for provisions with regard to impartiality or to the authority of the SCC board: SCC Arbitration Rules articles 18-34 all include the phrases "may" or "unless parties agree otherwise," while a rules that concerns the impartiality and fairness, article 14(1), states that "every arbitrator **must** be impartial and independent," and article 19(2) states that "**[I]n all cases,** the Arbitral Tribunal shall conduct the arbitration in an impartial . . . manner, giving each party an equal and reasonable opportunity to present its case."(*emphases added*) *SCC Arbitration Rules*, *supra* note 44.

[70] ICSID Convention, *supra* note 2, art. 25.

[71] ICSID website, *supra* note 26.

[72] ICSID Convention, *supra* note 2, art. 44. In some cases derogation from the tribunal's powers may expose the award to annulment according to the ICSID Convention. *See* ICSID Convention, Art. 52(1)(d), *supra* note 30.

[73] ICSID Arbitration Rules, *supra* note 23, r. 1.

[74] *Id.*, r. 13.

[75] *Id.*, r. 24.

international commercial disputes, and thus, the principle of party autonomy plays a dominant role in their mechanisms. As mentioned above, the New York Convention does not address arbitration proceedings or applicable law. Arbitration rules, whether offered by UNCITRAL or SCC, naturally cover variant issues related to arbitration proceedings. The scope of arbitration, however, is not limited to either commercial or international disputes.[76] Also, these rules do not require that they be adopted as a "package," but parties can choose to accept or reject any arbitration rules freely.[77]

As in ICSID, arbitration proceedings in NAFTA are also constrained by the agreement. [78] NAFTA sets restrictions on the process covering issues such as documentation,[79] governing law,[80] and interpretation.[81] Article 1128 allows non-respondent states to file claims, and Article 1132 states that an interpretation submitted by the Free Trade Commission ("FTC") shall be binding on the tribunal. As mentioned above, these restrictions are significant in that they not only restrict the discretion of parties or tribunals, but also minimize the variance among tribunals' proceedings following different arbitration rules.

B. THE REVIEW MECHANISMS

The second feature concerns the review mechanism. In general, the scope of the review of arbitration awards is narrow, and annulment remains "an unusual remedy for unusual situations."[82] The ideal type of contractual arbitration is that in which the reviewing authority interferes only when the basis of an annulment concerns the integrity and fairness of the proceedings. This is related also to the fact that the impartiality and fairness of the process are the only normative contributions of the arbitration process. Accordingly, the substantive bases for the tribunal's ruling are less interesting from the perspective of the judicial system reviewing the award, and are more an issue that concerns mainly the parties only. Hence, it is expected that such a framework would shape the

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[76] UNCITRAL Arbitration Rules, *supra* note 40.

[77] *See* CARON, CAPLAN & PELLONPAA, *supra* note 42, at 20.

[78] *See* NAFTA, *supra* note 4, art. 1123-1137.

[79] *Id.*, art. 1129.

[80] *Id.*, art. 1131.

[81] *Id.*, art. 1132.

[82] CHRISTOPH SCHREUER, *Three Generations of ICSID Annulment Proceedings*, *in* ANNULMENT OF ICSID AWARDS 42 (Emmanuel Gaillard & Yas Banifatemi eds., 2003).

tribunals' behavior such that it would consider mainly the parties when addressing the dispute substantively. When the reviewing authority may have a direct interest in the substantive reasoning of the award, an informal review may indeed be applied.[83] In such a case, the considerations facing the tribunal are more complex and address more audiences. Accordingly, tribunals addressing a more complex set of audiences would invoke more sophisticated methods of judicial reasoning.

ICSID's awards are enforced in national courts as final national court decisions with no further review. Annulment petitions are to be reviewed by an ICSID annulment committee, appointed by the ICSID, and usually composed of international law experts.[84] The grounds for annulments are that the integrity of the process has been undermined, such as by corruption on the part of a member of the tribunal or a manifest excess of powers.[85] Yet, as a result of a process that is meant to handle issues having global or public concerns, the award is expected to be grounded on at least minimal reasoning, and the lack of such reasoning constitutes a basis for annulment.[86]

An ICSID annulment committee is usually constituted of international law experts who often serve as arbitrators and have a special interest in promoting the legitimacy of investment arbitration. Early annulment committees stated that failing to apply the proper law, the absence of reasons, insufficient reasons, or contradictory reasons, are grounds for annulment.[87] While later decisions took a more restrictive approach,[88] two recent decisions on annulment in cases concerning the Argentine economic crisis—Enron and Sempra—departed from the

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[83] An informal review may be conducted in several manners: one is to examine the award hypothetically; another is by considering whether a specific violation concerning the proceedings is grave enough to revoke the award, and if the substantive ruling of the tribunal is not desirable for the reviewing authority, then the decision to revoke is made.

[84] ICSID AF Rules, *supra* note 30.

[85] *See* ICSID Convention, *supra* note 2, art. 52(1).

[86] ICSID Convention, *supra* note 36, art. 52(1)(d).

[87] *See* Schreurer, *supra* note 82, at 20; Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on the application for annulment (May 16, 1986), 1 ICSID REP. 509 (1986); Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985).

[88] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on application for annulment (Feb. 5, 2002) 41 I.L.M. 933 (2002); Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the application for annulment (July 3, 2002), 41 I.L.M. 1135, ¶ 64 (2002) [hereinafter Vivendi v. Argentina I].

contractual model by deciding on the annulment of two ICSID awards on the basis of issues concerning the proper law that should have been applied.[89] The annulment *ad hoc* committees in these two cases stated that a failure to apply proper law provides a basis for annulment, as it amounts to a manifest excess of powers.[90]

The formal framework for reviewing awards according to the NYC Institution, whether as stated in the New York Convention or in national legislations, is indeed shaped to a great extent by the contractual paradigm. Aside from the formal framework, which sets the basis of review only on procedural fairness and integrity, it seems very unlikely that national courts would indeed revoke an award on the basis of outside considerations. Considering the national courts' perspective on the arbitration awards, it is also unlikely that these national courts—except for the national court of the host state—have special interest in the substantial dispute, but rather a major concern is to shape the normative framework for enforcing international arbitration awards as such.[91] Acknowledging the competition between the different jurisdictions for hosting commercial and investment arbitrations,[92] courts are also concerned in promoting their reputation as a "hospitable jurisdiction to arbitration."[93] Hence, it is very unlikely that the Geneva Court, when reviewing an award between a US national and the Czech Republic, will have an interest in reviewing the reasons on which the award was based,

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[89] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the application for annulment (July 30, 2010); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the application for annulment (June 29, 2010).

[90] ICSID Convention, *supra* note 2, art. 52(b).

[91] Naturally, this may change in the future as public involvement in investment treaty arbitration increases.

[92] If a national system is seen as unfavorable, parties can choose a different seat for arbitration in future agreements. Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 458 (2000); Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48, 48–49 (1991); Jacques Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, 4 DISP. RESOL. MAG. 22, 22 (1998); Stephen R. Bond & Christopher R. Seppala, *The New (1998) Rules of Arbitration of the International Chamber of Commerce*, 12 MEALEY'S INT'L ARB. REP. 33-38 (1997). For a general overview on the competition between national courts systems on commercial arbitration, see JOSH KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 68–71 (2011).

[93] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 1143 (2d ed. 2000).

when the tribunal and proceedings seemed to have been fair, impartial, and even-handed.

This may not be the case, however, for NAFTA. The decisions of NAFTA tribunals are more likely to be reviewed substantially by national courts, despite the formal legal framework that states otherwise. The neutrality of the seat that exists in the case of NYC tribunals does not necessarily exist in NAFTA. The fact that NAFTA offers an inclusive regime between three neighboring states, as well as the fact that the Canada and United States are repeatedly sued in the context of NAFTA, makes national courts aware that the arbitration awards they are upholding or enforcing will also be guiding and proscribing for their own states. Accordingly, national courts reviewing the awards of NAFTA tribunals are more likely to be involved in the substance matter determined in the award and more attentive to the public debate on the evolving regime of NAFTA Chapter Eleven.

The case in *Metalclad v. Mexico* sets an example for the concerns in the three contracting states with regards to the normative implications of the evolving regime.[94] In that case, Mexico was ordered to pay compensations to an investor for losses that followed the annulment of a hazardous waste mill operation license. Understanding that the normative implications of such an award were not only relevant for Mexico, the award was criticized in Canada and the US for being too restrictive on the ability of states to regulate issues concerning the protection of the environment.[95] Eventually the award was partially annulled by the Supreme Court of British Columbia in Canada, a decision.[96] While this exceptional court decision is not necessarily influenced from the public critique on the award, it is necessarily a scenario that is considered by all NAFTA tribunals.[97] As explained

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[94] Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 8, 2000).

[95] Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD INVESTMENT 685 (2001); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 128-129, 136 (2003); *see* Anthony DePalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all. *See also* Editorial, *A "Fast Track" Attack on America's Values*, WASH. POST, Dec. 5, 2001.

[96] United Mexican States v. Metalclad Corporation, ICSID Case No. ARB(AF)/97/1, Supplementary Reasons for Judgment (Oct. 31, 2001) 2001 BCSC 1529 (Can).

[97] For an example of a hypothetical review of the merits by the Federal Court of Canada, see S.D. Myers v. Canada, [2004] F.C.R. 38, 72–74 (Can.).

earlier, such an intervention in a non-NAFTA context by national courts is very unlikely.

NAFTA tribunals are also subject to informal review mechanisms by states through NAFTA Article 1128 and NAFTA Article 1132. While the former allows states to file submissions as signatory states,[98] the latter allows states, through the Free Trade Commission ("FTC"), to intervene in the interpretation and scope of specific provisions in the agreement, which is binding on NAFTA tribunals.[99] In the case of *Pope & Talbot*, this authority was directly employed to influence ongoing proceedings: the FTC statement in the *Pope & Talbot* case stated that the obligation to provide investors with "fair and equitable treatment" as set in Article 1105 does not require treatment additional to the minimum standard of treatment in customary international law.[100] This FTC statement has challenged a prior judgment of the tribunal on the same issue, ruling that the "fair and equitable treatment" should be interpreted as providing the "benefits of the fairness elements" without any threshold limitation existing in the minimum standard of treatment.[101] As the response of the *Pope & Talbot* tribunal

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[98] "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement". NAFTA, *supra* note 4, art. 1128.

[99] *Id.* at art. 1132.

> 1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal. 2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Id.

[100] The FTC statement goes as follows:

> B. Minimum Standard of Treatment in Accordance with International Law: 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

Letter from Principal Counsel regarding Pope & Talbot v. Government of Canada, UNCITRAL, Trade Law Division to NAFTA Chapter Eleven Tribunals (Oct. 8, 2001).

[101] Specifically, the tribunal was referring to the threshold set in the standard set in the *Neer v. Mexico case* of which the minimum standard is violated when the conduct complained of is "egregious, outrageous or shocking, or otherwise extraordinary." *See* Pope & Talbot v. Canada, UNCITRAL, Interim Award On The Merits Of Phase Two ¶ 116 (Oct. 4, 2001); *see also*

implies, the FTC statement was perceived as interference in an ongoing judicial process.[102] The case reflects the power relations between NAFTA Chapter Eleven tribunals and signatory states and indicates that signatory states are not reluctant to use the authority granted them in article 1132 to restrict the tribunals. Accordingly, when the three signatory states present a similar approach through article 1128, the tribunals naturally give their submission due consideration in light of the FTC challenge to the tribunal in the *Pope & Talbot* case. This mechanism provides that NAFTA tribunals have a more complex set of legitimacy considerations which renders the contractual approach too simplistic to manage.

C. TRANSPARENCY AND PARTICIPATION

Transparency and participation are both a product and an indicator of a judicialization process.[103] It is a clear and direct indication for tribunals that it is not only the direct parties who have an interest in the process, but also third parties whose interests ought to be considered. Naturally, such a development is also expected to reinforce the judicialization process, as it introduces more audiences that need to be considered.

Support for ICSID's openness to the judicial framework can be found in the revised ICSID Arbitration Rules.[104] The revision aimed at enhancing transparency by allowing a limited scope of third party

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General Claims Comm.-United States and Mexico, Neer v. Mexico, Opinion, (Oct. 15, 1926), *available at* 21 AM. J. INT'L L. 555 (1927).

[102] The tribunal, in a letter to the parties, stated that:

> it appears to the tribunal that if the Commission viewed its interpretation to have retroactive effect on this case, its actions could be viewed as seeking to overturn a treaty interpretation already made by a NAFTA Chapter 11 Tribunal, Canada acting both as a disputing party and as a member of a reviewing body.

Tribunal Letter to Disputing Parties (II) regarding Pope & Talbot, UNCITRAL, Trade Law Division to NAFTA Chapter Eleven Tribunals (Oct. 8, 2001). After this case, no NAFTA tribunal did state that the "fair and equitable" treatment has an autonomous standing from the minimum standard of customary international law (see, for example, Merrill & Ring Forestry L. P. v. The Government of Canada, supra, Award, UNCITRAL (31.3.2010, at §190)). Yet a challenge to the FTC restrictive interpretation was reflected in the attempt of several NAFTA tribunals to suggest that the evolutionary nature of customary international law provides for a higher threshold of investment protection than that stated in the year 1926 by the Neer tribunal. *Id.* §§ 193–213.

[103] Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & ETHICS HUM. RTS. 48, 65 (2010).

[104] HIRSCH, *supra* note 13.

participation,[105] the publication of awards,[106] and the disclosure of arbitrators.[107] It is noteworthy that ICSID tribunals did not wait for these amendments to be in force to allow third party participation: three years after a request by third parties to participate in the proceedings was denied in the *Aguas Del Tunari v. Bolivia* case,[108] the tribunal in the *Suez v. Argentina* case decided otherwise on the basis of the inherent discretion set in Article 44 of the Rules.[109]

In the case of the UNCITRAL Arbitration Rules, the incorporation of transparency and participation instruments was much slower than in the case of ICSID. UNCITRAL revised its arbitration rules in the year 2010, without including transparency and participation measures. While transparency and participation in investment disputes were considered then, UNCITRAL decided to revise the rules and

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[105] The amendment was set in ICSID Arbitration Rules, art. 37(2) as follows:

> In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.

See also ICSID Arbitration Rules, *supra* note 22, art. 32, which authorizes the tribunal to allow 3rd parties to attend the proceedings. This amendment, however, does not allow non disputed parties to participate in deliberations, neither does it constitute the right to receive documents from the parties to the disputes.

[106] According to ICSID Arbitration Rules, *supra* note 22, art. 48(4), concluded rewards shall not be published without the consent of the parties. Yet, the rule was amended to state that "the center shall promptly include in its publications excerpts of the legal rules applied by conclusions of the Tribunal."; *see also* Robert Daniño, Opening Remarks at the ICSID, OECD, and UNCTAD Symposium: ICSID: Making the Most of International Investment Agreements, A Common Agenda (Dec. 12, 2005), *available at* http://www.oecd.org/dataoecd/5/8/36053800.pdf.

[107] ICSID Arbitration Rules, art. 6 was also amended to expand the scope of disclosure of arbitrators to include any circumstances likely to raise doubts as to the arbitrator's reliability to give an independent judgment.

[108] Aguas Del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB /02/3 (Oct. 21, 2005). The government of Bolivia granted a long-term concession to a foreign investor to operate the sewage and water system of one of its major cities. Within weeks of taking control of the water system, the investor raised water rates dramatically, which caused widespread public protests that ended in the injury of more than 100 people and the death of a 17 year-old boy. As a result, the investor abandoned its management of the water system and left the country. Later, it brought a claim under international arbitration against the government of Bolivia demanding compensation for anticipated profits lost as a result of its departure. As the nature of arbitration claims then dictated, the judicial procedure was confidential and no third parties were allowed to participate, despite the high level of public interest involved in the dispute.

[109] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (May 19, 2005).

consider transparency and participation at a later stage separately. This decision was based on concerns for confidentiality and the understanding that a distinction should be made between commercial arbitration and investment arbitration.[110] It was only recently that the working group on transparency in investor-state arbitration accomplished its work and offered a set of rules to be applied in treaty-based arbitration effective April 1, 2014.[111] These rules enhance transparency through making public the initiation of proceedings and the identity of the deliberating parties,[112] publishing all the tribunal's decisions and awards,[113] allowing the tribunal to accept written submissions from third parties,[114] and making the hearings public.[115]

This change, while expected to accelerate the process of judicialization, will not be examined in this study which focuses on an earlier period. At the time of this study, the UNCITRAL Arbitration Rules were still deliberated according to the UNCITRAL Arbitration Rules, mostly those set in the year 1976.[116] It is noteworthy, however, that despite the discussion on such arrangements, no investment tribunal in this institutional context—the NYC Framework with the exception of NAFTA—did accept third parties' participation on the basis of an inherent authority of the tribunal, as was the case not only for ICSID but also for NAFTA. In addition, the SCC Arbitration Rules still have no available formal instruments enhancing transparency and allowing participation.

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[110] At its thirty-ninth session in 2006, the UN Commission mandated Working Group II (Arbitration and Conciliation) to undertake work on a revision of the UNCITRAL Arbitration Rules with the objective of modernizing them and promoting their greater efficiency. The working group considered the need to address the topic of transparency in investor-state arbitration, and realized that arbitration proceedings in treaty-based arbitration raised issues that differed from purely private commercial arbitration, where confidentiality was an essential feature. The working group agreed that it would not be desirable to include specific provisions on transparency in treaty-based arbitration in the UNCITRAL Arbitration Rules. *See* Rep. of Working Group II (Arbitration and Conciliation) on the work of its forty-eighth session, ¶ 57, 69, New York, U.N. DOC. A/CN.9/646 (Feb. 4-8, 2008).

[111] United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules, U.N. Doc. A/RES/68/109 (Dec. 16, 2013), *available at* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html.

[112] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, *United Nations Commission on International Trade Law*, art. 2 (Jan. 2014) [hereinafter UNCITRAL Rules on Transparency].

[113] *Id.* at art. 3.

[114] *Id.* at art. 4–5.

[115] *Id.* at art. 6.

[116] UNCITRAL Arbitration Rules, 31 U.N. GAOR, Supp. No. 17, U.N. Doc. A/31/17 at 46–57 (1976).

In the context of NAFTA, participation and transparency have been well institutionalized for several years now, regardless of the arbitration rules that are followed. First, when the respondent state is Canada or the United States, any party to the dispute may make the awards public.[117] In addition, in the year 2001, the tribunal in the case of *Methanex v. USA* had already accepted a similar request for third party participation based on the UNCITRAL Arbitration Rules.[118] The submission of amicus briefs was further institutionalized in the year 2003, when the FTC of NAFTA issued a statement establishing several criteria for the submission and admission of amicus briefs.[119] Hence, NAFTA tribunals did not need revised UNCITRAL Arbitration Rules to allow third party participation or follow any transparency measures: the publication of awards,[120] participation of third parties,[121] as well conducting open sessions,[122] are all measures that are common to the NAFTA Chapter Eleven tribunals.[123] Information concerning NAFTA claims, such as notices of claims, parties' submissions, protocols, decisions, and awards, are routinely published by the NAFTA secretariat, signatory states, and other non-official websites.[124]

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[117] NAFTA, *supra* note 4, annex 1137.4.

[118] Methanex v. USA, Decision on authority to accept amicus submissions, UNCITRAL (Jan. 15, 2001). The tribunal relied in its decision on UNCITRAL arbitration art. 15(1) which states that "*. . .the arbitral tribunal may conduct the arbitration in* such *manner as it considers appropriate. . .provided that the parties are treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting its case*". *Id.*

[119] In particular, it states that the tribunals, when exercising their discretion, should consider "whether the submission would assist the tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties, but within the scope of the dispute." Statement of the Free Trade Commission on non-disputing party participation (Oct. 7, 2003), *available at* http://www.state.gov/documents/organization/38791.pdf.

[120] *See NAFTA Trilateral*, NAFTA SECRETARIAT, https://www.nafta-sec-alena.org (last visited Mar. 13, 2016).

[121] *See generally* Chemtura Corporation v. Government of Canada, UNCITRAL (Aug. 2, 2010); Glamis Gold Ltd. v. USA, Award (June 8, 2009) (NAFTA/UNCITRAL Arb. Trib. 2008); Methanex Corp. v. USA, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005) (NAFTA/UNCITRAL Arb. Trib. 2005).

[122] The UNCITRAL Arbitration Rules, art. 25(4) states that hearings are held in camera, but that does not necessarily mean that they are open. UNCITRAL Arbitration Rules, *supra* note 22, art. 25(4), *available at* http://www.uncitral.org/en-index.htm.

[123] It is noteworthy that formal transparency arrangements are set in article 1182, by stating that states shall promptly publish "laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement."

[124] *See NAFTA Trilateral*, NAFTA SECRETARIAT, https://www.nafta-sec-alena.org (last visited Mar. 13, 2016); *Free Trade Agreements: NAFTA*, UNITED STATES TRADE REPRESENTATIVE, ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (last visited Mar. 13, 2016); *North American Free Trade Agreement*, GLOBAL AFFAIRS CANADA,

To conclude, NAFTA tribunals, as ICSID tribunals, are expected to consider a more complex set of audiences than other NYC tribunals. Hence, a judicialization process is more feasible. Significant from ICSID, however, is that NAFTA tribunals are more likely to address the *local* rather than the *global* public, whether they are the national courts of Canada and the United States, signatory states' decision-makers, or the wide public in those states.

In the following part we will examine whether empirical data supports these observations, by indicating that distinct behavior is being followed, and examining whether ICSID and NAFTA are indeed more judicialized than the NYC institution.

IV. THE EMPIRICAL STUDY

In this part, I conduct an empirical study to examine the variables that reflect the behavior of each institution as defined in Part I. The purpose of this survey is twofold. The first is to provide preliminary information about the behavior of different institutions in investment treaty arbitration. While empirical studies on investment treaty arbitration cover variant issues, such as outcome, costs, compensations, and judicial reasoning, the institutional distinction within investment treaty arbitration is hardly addressed in these studies.[125] The second purpose is to examine the feasibility of capturing distinct practices among these institutions through quantitative observations. These distinct practices are explained through the dominance of the judicial and the contractual normative frameworks.

The empirical study examines all the arbitration proceedings that were decided by an award concluded on merits between the years 2001 and 2011, divided into three groups according to their institutional context.[126] The tested variables are quantitative and demand less discretion which provides higher certainty. Accordingly, four variables are examined to capture the dominance of the judicial and contractual paradigms: the duration of proceedings and the number of sessions as

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http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/index.aspx?view=d (last modified Mar. 11, 2016); NAFTACLAIMS, http://naftaclaims.com (last visited Mar. 13, 2016); NORTH AMERICAN FREE TRADE AGREEMENT, http://naftanow.org/ (last modified Apr. 12, 2012).

[125] *See infra* Part IV.A.

[126] The awards, seventy three in number, are divided as follows: thirty seven awards are ICSID awards, twenty awards are based on commercial mechanism, and sixteen awards are NAFTA's.

indicating the efficiency and costs of the proceedings; the citations of investment treaty arbitration awards as indicating whether an aspiration to present a belonging and a commitment to a specific body of case law exists; and the outcome of the awards to examine whether eventually the institutional context impacts the outcome. This Article shows that variance among these three institutions is observed in the average duration of proceeding, in the average number of sessions that are held during the proceedings, in the use of references to case law, and even in the final outcome of the claims.

A. DATA AND EMPIRICAL STUDIES ON INVESTMENT TREATY ARBITRATION

The total number of known treaty-based claims reached 450 by the end of 2010.[127] By the year 2010, it is estimated that 197 cases had been concluded, and in the year 2011 at least twenty five additional cases were concluded.[128] Since ICSID is the only arbitration center that maintains a public registry of investment treaty claims in these years, the total number of actual treaty-based cases is likely to be higher.[129]

ICSID publishes annual reports about the ICSID caseload, covering statistics about the cases, the proceedings, parties involved, and outcome. According to the issue of 2012, which covered cases up to the end of 2011, 369 claims were filed to the ICSID, 74 percent of which were based on an investment treaty and only 26 percent on a contract between an investor and a host state or a national legislation. Of all the arbitration claims, only 61 percent were decided by tribunals, while in the remaining claims the dispute was otherwise settled or the proceedings were discontinued. Among disputes decided by tribunals, in 23 percent of cases jurisdiction was denied, 31 percent were completely dismissed, and in 46 percent the claims were upheld in part or in full. This means that among awards concluded on the merits, about 41 percent dismissed all claims and 59 percent upheld claims partially or fully.

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[127] U.N. Conference on Trade & Dev., Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/3 (Mar. 2011), *available at* www.unctad.org/diae.

[128] U.N. Conference on Trade & Dev., Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1, U.N. Doc. UNCTAD/WEB/DIAE/IA/2012/10 (Apr. 2012), *available at* www.unctad.org/diae.

[129] U.N. Conference on Trade & Dev., Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1, UNCTAD Doc. UNCTAD/WEB/DIAE/IA/2010/3 (2010), *available at* www.unctad.org/diae.

In addition to the statistics provided by UNCTAD and ICSID, several empirical studies were conducted to evaluate the different normative challenges that the investment treaty arbitration faces, specifically addressing concerns of bias or concerns for the integrity of the regime.[130] Those studies, addressing institutional backgrounds, followed the formal arrangements of such backgrounds and hardly ever examine the possibility of producing informal practices. Accordingly, NAFTA arbitration was often grouped with UNCITRAL arbitration tribunals or with ICSID, when held according to the ICSID AF Rules. For example, a study conducted by Franck explores whether there are differences associated with each type of arbitral forum.[131] More specifically, it examines whether there is an "ICSID bias," where ICSID cases are settled differently from other cases.[132] The author identifies the ICSID status in two ways: first by comparing all cases at ICSID including the ICSID AF Rules with all the others, and second by identifying ICSID cases as cases arising exclusively from the ICSID Convention, and managed according to ICSID arbitration rules, as compared to all the other cases enforced according to the New York Convention, including the ICSID AF Rules.[133] The independent tested variables were the amounts claimed, ultimate winner, and amounts awarded.[134] According to this study, ICSID arbitrations did not generally appear to be meaningfully different (presumably biased) in terms of

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[130] Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007). The study, published in 2008, explores, *inter alia*, who is involved in arbitration and what disputes are arbitrated, win/loss rates, amounts claimed and awarded, arbitration costs, and nationality and gender of arbitrators in a more recent study. Another study conducted by Franck explored whether arbitration inappropriately favors the developed or the developing world, and whether a presiding arbitrator's developmental status is associated with the outcome. After reporting that the study reveals no statistically significant association between development status of the presiding arbitrator, the development status of the respondent, and winning or losing an investment treaty arbitration, Franck concluded that there is a procedural integrity in investment arbitration that "undercuts the argument that development variables inappropriately affect outcome by unfairly harming the developing world or that arbitrators' decisions vary by virtue of their development backgrounds.": Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 464 (2009); *see also* Gus Van Harten, *The Use Of Quantitative Methods To Examine Possible Bias In Investment Arbitration*, 2010-2011 Y.B. INT'L INV. L. & POL'Y 859, 863 (Karl P. Sauvant ed.); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211, 222–23 (2012).

[131] Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825 (2011).

[132] *Id.* at 850.

[133] *Id.* at 851.

[134] *Id.* at 855.

amounts claimed or outcomes.[135] Accordingly, the author reported that "there was no reliable statistical relationship between the mean amount awarded and resolving an ITA dispute at ICSID or at some other forum."[136] The author indicated that the study's limited database raised critical concerns, and suggested replicating it through future research with a larger sample of the growing population.[137]

Some empirical studies examined only ICSID awards and hence their conclusions should as such be acknowledged as being limited to the institutional context of ICSID. Such is the case for the study conducted by McArthur and Ormachea that reviewed all publicly available ICSID decisions on jurisdiction up to February 2007, and examined whether case outcomes at the jurisdictional stage were affected by certain variables.[138] Another study that examined only ICSID awards was conducted by Kapeliuk, which attempted to follow the practices of repeated arbitrators of investment treaty arbitration.[139]

The theoretical assumptions of this Article imply that due consideration should be given to the institutional contexts in which tribunals act. Consider, for example, Franck's study on the ICSID effect through the institutional perspective as suggested in this paper; the ICSID/non ICSID classification made in that study undermines the institutional differences among non-ICSID tribunals. Specifically, such a classification undermines the differences between NAFTA and the NYC Institution. Hence, examining whether there is an ICSID effect or an ICSID bias is largely dependent on the control group in comparison with which ICSID is examined. In this case, it is doubtful whether one group consisting of both NAFTA and non NAFTA awards may serve as an appropriate control group for a comparison with ICSID.

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[135] *Id.* at 859.

[136] *Id.* at 858.

[137] *Id.* at 914.

[138] Kathleen S. McArthur & Fablo Ormachea, *International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LITIG. 559 (2009). The authors concluded that it is more likely that jurisdiction will be denied where the state's consent is based on a contract rather than a BIT (*Id.*, at 574), that poorest countries were more likely to be successful in the jurisdictional stage (*Id.*, at 579-580) and that ICSID tribunals were less likely to extend jurisdiction for claims against a country with a particularly low institutional quality score (*Id.*, at 581).

[139] Daphna Kapeliuk, *Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators, The*, 96 CORNELL L. REV. 47 (2010). The research showed that repeat presiding arbitrators are less averse to extreme outcomes than are party-appointed arbitrators, and that the arbitrators' decision records do not always display a balanced decision pattern over time.

B. THE GROUPS: GENERAL OVERVIEW

This Article examines publicly available investment treaty arbitration awards rendered between 2001 and 2011 in the English language, and decided through an analysis of the merits. Awards rendered before 2001 were excluded, because tribunals then had a very limited case law to which to refer, which may undermine institutional variance, given that these tribunals are not expected to refer to investment treaty awards. In addition, most arbitration awards found before that year are ICSID's and hardly any were found in the context of the NYC Institution and NAFTA, which may produce bias in the findings.[140] Finally, the database used in this study is the italaw.com database, which provides access to (almost) all publicly available investment treaty awards. When this database was compared to an additional database, no additional public awards were found.[141]

As to the focus on awards rendered by the merits, it stems from both practical and theoretical reasons. First, formal institutional differences are more established through formal legal settings with regard to the jurisdictional than the merits phase. The similarity of protection standards among the different institutional contexts is higher than that of the jurisdictional conditions, which makes the comparison more useful. Moreover, the number of sessions, the duration of proceedings and the reference to case law are likely to be lower when jurisdiction is denied than when it is accepted and the case is determined on its merits. Hence, by excluding cases where jurisdiction is denied, methodological challenges of producing bias are avoided.

TABLE 1: DISTRIBUTION OF GROUPS

GROUP	NUMBER OF AWARDS
ICSID	37

[140] Non-ICSID cases that were found are mostly in the context of NAFTA and only one such award of the NY Convention Framework was found. *See* Sedelmayer v. The Russian Federation, Award, SCC (July 7, 1998).

[141] I compared the available awards in the Investment Treaty Arbitration database available at italaw.com with the *Oxford Reports on International Law* database available at http://opil.ouplaw.com/page/IIC/oxford-reports-on-international-investment-claims and found that all italaw.com cases are found in the other database. Franck's research included a conclusive cross-checking between investment treaty arbitration databases and seemed to indicate that that indeed almost all publicly available cases are found in this database, and only some awards were not available at italaw.com. Franck, *supra* note 131, at 76–78.

NYC	20
NAFTA	16
TOTAL	**73**

The ICSID group is homogenous if we consider the fact that all ICSID arbitrations are institutionalized and managed by ICSID and held according to the ICSID Arbitration Rules. This does not, however, apply to NAFTA and NYC groups. The following table shows the distribution of the cases in the NYC Framework. It is noteworthy that only two arbitration rules were applied in the group: the SCC and the UNCITRAL Arbitration Rules. While other arbitration rules, such as the ICC Arbitration Rules, may be available, they are less in use, and in any case, none were concluded on merits in the specified years. The UNCITRAL arbitration rules may be applied in both institutionalized and *ad hoc* arbitration, while the SCC Arbitration Rules were followed in institutionalized proceedings that are managed by the SCC Arbitration Center:[142]

TABLE 2: NYC CASES

	INSTITUTIONALIZED	AD HOC	TOTAL
UNCITRAL	8	7	15
SCC	5	0	5
TOTAL	**13**	**7**	**20**

NAFTA arbitrations are held according to ICSID AF or UNCITRAL Arbitration Rules, and may be *ad hoc* or institutionalized. The institutionalized arbitrations of NAFTA are all managed by ICSID. The following table shows a clear preference for institutional proceedings:

TABLE 3: NAFTA CASES

ADMINISTRATION RULES	INSTITUTIONALIZED	AD HOC	TOTAL
ICSID AF	7	—	**7**

[142] In one case, the arbitration was held by the SCC but UNCITRAL Arbitration Rules were applied: *see* Eastern Sugar B.V. v. The Czech Republic, SCC Case No. 088/2004 (SCC 2007).

UNCITRAL	7	2	**9**
TOTAL	**14**	**2**	**16**

C. THE DURATION OF PROCEEDINGS

Supposedly, the duration of proceedings is expected to be influenced mostly by the parties to the dispute and the tribunal's approach to managing the proceedings. The availability of the people engaged, the ability of the parties to agree over procedural issues and avoid turning to the tribunal to decide over procedural issues, and the willingness of the tribunals to decide over written submission and avoid oral sessions are all major components that affect the duration of the proceedings.

Assuming that the "community" of lawyers and tribunal members is not significantly different from one institution to another, it is not expected that the duration of proceedings will be significantly different either. Rules of arbitration, whether ICSID, UNCITRAL, or the SCC, do set defaults for managing the procedure, but leave wide discretion to the tribunal and to the parties to agree over procedural matters.

1. Arbitration Rules

In the following paragraph, I will state the main arbitration rules in ICSID, UNCITRAL, SCC, and ICSID AF that may affect the duration of proceeding. I will indicate that arbitration rules do not vary significantly and that all may be changed or extended by the tribunal and/or by agreement of the parties.

The ICSID Arbitration Rules set time limits for various stages of the proceeding: for the process of appointing the arbitrators,[143] for the constitution of the arbitral tribunal,[144] and for holding the first session.[145]

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[143] *See* ICSID Arbitration Rules no. 4 and 5.

[144] *See* ICSID Arbitration Rules no. 5 and 6.

[145] *See* ICSID Arbitration Rule no. 13(1). Article 29 sets a default for managing the proceedings in two distinct phases: a written procedure followed by an oral hearing, which may cause the proceedings to be prolonged, but parties may agree otherwise; and Article 41(4) allows the tribunal to decide whether a jurisdictional objection will be dealt with as a preliminary question or joined to the merits, and to decide to hold further proceeding with regard to the objection. Finally, Rule 46 states that the tribunal will draw up and sign the award within 120 days after the

The ICSID Arbitration Rules also allow the tribunal to set time limits for the completion of various stages in the proceedings.[146] Finally, Rule 46 states that the tribunal will draw up and sign the award within 120 days after the closure of proceeding, with an option to extend the period sixty days further.

The UNCITRAL Arbitration Rules were amended in 2010. Since the majority of cases in this study were filed before 2010, this Article examines the former version of the UNCITRAL Arbitration Rules that were drafted in 1976.[147] Rule 6 sets time limits for the process of the appointment of arbitrators by the parties, but unlike ICSID, there is no time limit for holding the first session.[148] Article 21 states that an objection to jurisdiction will be decided in a separate decision, which may prolong the proceedings, but the tribunal may proceed with the arbitration and decide on the objection in the final award.[149] Article 23 limits the discretion of the tribunal to set time limits for a written statement for time periods that do not exceed forty-five days, but allows the tribunal to extend such limits.[150] The UNCITRAL Arbitration Rules leave it to the discretion of the tribunal whether or not to hold a hearing session, unless it was requested to do so by one of the parties.[151] Finally, the UNCITRAL Arbitration Rules set no time limit for the tribunal to draft and sign the award.

The SCC Arbitration Rules were amended twice: in the year 2007 and in the year 2010.[152] Most SCC arbitration cases in this study

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closure of proceeding, with an option to extend the period sixty days further. Otherwise; and Article 41(4) allows the tribunal to decide whether a jurisdictional objection will be dealt with as a preliminary question or joined to the merits, and to decide to hold further proceeding with regard to the objection. Finally, Rule 46 states that the tribunal will draw up and sign the award within 120 days after the closure of proceeding, with an option to extend the period sixty days further.

146 *See* ICSID Arbitration Rule 26.

147 UNCITRAL Arbitration Rules (1976), *supra* note 40.

148 *Id.*, art. 6.

149 *Id.*, art. 21.

150 *Id.*, art. 23.

151 UNCITRAL Arbitration Rules (1976), *supra* note 40, at art. 15(2) provides as follows:

> If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

Id.

152 For information about different versions of SCC Arbitration rules, see *Rules*, SCC, http://www.sccinstitute.com/dispute-resolution/rules/ (last visited Mar. 18, 2016).

were initiated before the year 2007, and hence, this Article examines the SCC Arbitration Rules that were drafted in 1999. The rules in general leave wide discretion to the tribunal in the management of the proceedings, stating, "[t]he manner of conducting the proceedings is to be determined by the Arbitral Tribunal in compliance with the conditions set down in the arbitration agreement and these Rules, with due account taken of the wishes of the parties."[153] Time limits for managing the proceedings are not set in the rules, except for rendering the award: article 30 states that the award shall be rendered no later than "six months as from the date when the case was referred to the Arbitral Tribunal."[154]

The ICSID AF Rules contain only a few fixed time limits:[155] article 22 sets a time limit for holding the first session within sixty days after the constitution of the tribunal, while other time limits are provided in cases of disagreement on the methods for constituting the tribunal,[156] and filling vacancies on the tribunal.[157] It is noteworthy that no time limit was set for the tribunal to render an award after the proceedings are declared closed.[158]

As we can see, we cannot conclude from the arbitration rules as such which proceeding may last longer. On the one hand, some rules in ICSID set time limits that do not exist in UNCITRAL and the SCC, and may seem more efficient, such as the time limit for the holding of the first session and concluding the award. On the other hand, some rules in ICSID may seem less efficient, such as the need to distinguish between the oral and written phases. Finally, as noted above, the majority of these rules constitutes default rules, and can be changed by parties' agreement or by the tribunal. For this reason, even if the default rules may have some influence on the duration of proceedings, it is expected that these differences will not be statistically significant.

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[153] Stockholm Chamber of Commerce [SCC], Rules of the Arbitration Institute, art. 20(1) (1999).

[154] *Id*., art. 33.

[155] I refer to ICSID AF rules that were in effect from September 27, 1978 until December 31, 2002 as most relevant cases were initiated in this period [hereinafter: ICSID AF Rules (1978)]. The full text of these rules is available at ICSID's website *ICSID Additional Facility Rules*, ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Additional-Facility-Rules.aspx (last visited Mar. 18, 2016).

[156] *See* ICSID AF Rules (1978), *supra* note 155, at art. 10.

[157] *See id.*, art. 18.

[158] *See id.*, art. 45. *See also id.*, arts. 24–25, stating the procedure for deliberations and decisions of tribunal as well as the procedure upon rendering an award in Chapter IX of ICSID AF Rules (1978).

Another consideration concerning the duration of the proceeding is whether the arbitration is *ad hoc*, or held by an arbitration center. Seemingly, the assistance of an experienced arbitration center may shorten the proceedings and make administrative arrangements, such as finding an appropriate location at which to hold the sessions and setting dates for the session, proceed more smoothly. When these services are lacking in an *ad hoc* arbitration, the tribunal may face difficulties with administration or employ less experienced staff, which may lead to more time being consumed. ICSID arbitrations are naturally held with the assistance of ICSID. Most NAFTA arbitrations are held with the assistance of ICSID as well, including even those managed according to the UNCITRAL Arbitration Rules.[159] As to the NYC group, seven of the arbitrations are *ad hoc*,[160] while thirteen are held with the assistance of one of the arbitration centers.[161] Thus, the distinction between *ad hoc* and institutional arbitration is not supposed to produce differences between the three institutions, mostly because the NYC group includes both *ad hoc* and institutionalized arbitration. If the assistance of an arbitration center produces variance, however, it is expected that the proceedings of the ICSID and NAFTA group will be shorter, as they are mostly managed with institutional assistance. The hypothesis in this study, based on the institutional perspective and the distinction between the judicial and contractual approaches, states otherwise.

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[159] Only two NAFTA arbitrations are *ad hoc* and without the assistance of ICSID: Chemtura v. Canada, (UNCITRAL); Gami Inc. v. Mexico (UNCITRAL).

[160] CME B.V. v. The Czech Republic (UNCITRAL Mar. 14, 2003); Eureko B.V. v. Republic of Poland (UNCITRAL Aug. 19, 2005); Lauder v. The Czech Republic (UNCITRAL Sept. 3, 2001); Link-Trading Joint Stock Co. v. Dep't for Customs Control of the Republic of Moldova (UNCITRAL Apr. 18, 2001); Paushok v. Mongolia (UNCITRAL Apr. 28, 2011); Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand (UNCITRAL July 1, 2009); White Industries Australia Ltd. v. India, (UNCITRAL, Nov. 30, 2011).

[161] Al-Bahloul v. Tajikistan, Case No. V (064/2008), Partial Award (SCC); Ltd. Liability Co. Amto v. Ukraine, Case No. 080/2005 (SCC); BG Group Plc. v. Argentina (UNCITRAL Dec. 24, 2007); Chevron Corp. v. Ecuador (UNCITRAL, Aug. 31, 2011); Eastern Sugar B.V. (Netherlands) v. The Czech Republic (SCC, Mar. 27, 2007); Frontier Petroleum Services Ltd. v. The Czech Republic (UNCITRAL, Nov. 12, 2010); EnCana Corporation v. Republic of Ecuador (UNCITRAL, Feb. 3. 2006); National Grid plc v. The Argentine Republic (UNCITRAL, Nov. 3, 2008); Nykomb Synergetics Technology Holding AB v. The Republic of Latvia (SCC); Occidental Exploration and Production Company v. The Republic of Ecuador, Case No. UN 3467 (UNCITRAL); Petrobart Limited v. The Kyrgyz Republic (SCC, Mar. 29. 2005); RosInvestCo UK Ltd. v. The Russian Federation (SCC, Sept. 12, 2010); Saluka Investments B.V. v. The Czech Republic (UNCITRAL).

2. The Hypothesis: The Duration of ICSID and NAFTA Proceedings is Longer than That of the NYC Proceedings

The hypothesis proposed by this Article, that the duration of ICSID and NAFTA arbitrations is longer than that of the NYC proceedings, is based on the judicial/contractual distinction. NAFTA and ICSID arbitrations were classified as dominated by features of a judicial system, while the NYC arbitrations were classified as dominated by contractual features. The duration of proceedings is relevant to evaluating the effectiveness of the tribunal's management of the proceedings. A consent-based-legitimacy will pay primary attention to managing the proceedings effectively and rapidly, and consequently with reasonable costs, which is one of the main advantages of (contractual) arbitration.[162] Thus, the longer the duration of the proceedings, the greater the extent to which the tribunal is behaving like a judicial institution, and the less it is focused on the parties' expectations with regard to the procedure. Consistent with this assumption is the behavior of institutions with regard to demands for transparency. Responding to these demands—a clear departure from the contractual approach toward the judicial approach—indicates the need to consider legitimacy with regard to third parties, even if this consideration has efficiency costs. As a result, the duration of NAFTA and ICSID arbitrations, as judicialized institutions, can be expected to be longer than that of arbitrations within the NYC group, which are dominated by a contractual approach.

3. Method and Findings

The duration of proceedings was calculated from the day the notice of arbitration was filed to the day a final award was rendered.[163] According to the data collected, the lengthier proceedings were ICSID's proceedings and their duration on average was 1643 days. The duration of NAFTA proceedings was on average 1566 days, while NYC arbitrations were significantly shorter, with an average of 1137 days.

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[162] On the importance of efficiency in the competition between different commercial arbitration institutions, *see* KARTON, *supra* note 92, at 66–67.

[163] In many cases, a tribunal's award was divided into an award on merits, award on the damages, and in some cases into an award on costs. The relevant award was the last award that settled all the remaining issues in the disputes, including decisions over clarification of awards or amendments of a final award. Annulment proceedings, however, were not considered.

TABLE 4: DURATION OF PROCEEDINGS

GROUP	NUMBER OF CASES	DURATION	STANDARD ERROR
ICSID	37	1643	14.98
NYC	19	1137	24.10
NAFTA	16	1566	28.1

Statistical analysis shows that the duration of ICSID and NAFTA proceedings is significantly longer than that of the NYC group proceedings,[164] while no significant difference is shown between ICSID and NAFTA. Moreover, within groups, no statistical significance difference is shown when different arbitration rules are used.

4. The Impact of Arbitration Rules

A comparison of different arbitration rules when applied in the same institutional context showed no statistically significant variance. This conclusion is valid for UNCITRAL and SCC arbitration rules when both are applied by NYC tribunals[165] and also for ICSID AF and UNCITRAL arbitration rules when both are applied by NAFTA tribunals.[166] This implies that the institutional context explains variance better than do the arbitration rules, which showed a weak relation with regard to duration in the same institutional context.

D. NUMBER OF SESSIONS

As in the case for duration, the number of sessions held depends on the parties and the tribunals, that is: the parties' ability to agree over procedural matters without a need to hold an oral meeting, their insistence on holding meetings or their waiving of such a request, the tribunal's willingness to hold oral meetings, and finally, whether the scope of the dispute demands that the witnesses be examined. Most arbitration proceedings comprise at least two sessions: one preliminary session to decide procedural issues, and a hearing on the merits that

[164] t=3.184, df=67, p=.001. The significance applies to one-tail T test; Levine Homogeneity test allows assuming equal variance.

[165] *t*=.893, *df*= 67, *sig*=.375.

[166] *t*=.826, *df*= 67, *sig*=.412.

includes an examination of witnesses. In addition, it is common to hold a hearing on jurisdiction when bifurcation of proceedings is decided. Some tribunals prefer to invite the parties for additional sessions, such as a pre-hearing session, telephone conference, or procedural meeting to settle disputes with regard to discovery and document production, or oral post hearing briefs.

1. Arbitration Rules

Arbitration rules provide wide discretion over these matters, and are dependent on the parties and the tribunal. Only on one occasion do we observe an arbitration rule that does not allow any discretion on behalf of the tribunal for holding sessions: in ICSID, Rule 13(1) sets an obligation to hold a first preliminary session within a time limit.[167] Other rules set only defaults: Article 21 allows a pre-hearing conference to be held between the tribunal and the parties in order to expedite the proceedings or to reach an amicable settlement on disputed issues;[168] Article 29 sets a default for managing the proceedings in two distinct phases: a written procedure followed by an oral hearing, which requires that a hearing session be held.[169] Article 41(4) does not set any default for managing a jurisdictional objection but leaves it to the discretion of the tribunal, including the need to hold a hearing on jurisdiction.[170]

UNCITRAL Arbitration Rules do not even set default rules for holding sessions. Article 21 states that an objection to jurisdiction will be decided in a separate decision unless the tribunal decides to proceed with the arbitration and to decide on the objection in the final award.[171] While this rule does not directly address the issues of holding sessions, it may nevertheless lead tribunals to hold a separate hearing on jurisdiction, unless the jurisdiction is decided on written submissions only. A hearing session is neither mandatory nor even a default rule, but the tribunal is obliged to hold such a session if required to do so by a party.[172]

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[167] ICSID Arbitration Rule 13(1).
[168] ICSID Arbitration Rule 21.
[169] ICSID Arbitration Rule 29.
[170] ICSID Arbitration Rule 41(1).
[171] UNCITRAL Arbitration Rules, Art. 21 (1976).
[172] UNCITRAL Arbitration Rules (1976), *supra* note 40, art. 15(2).

The SCC Arbitration Rules are flexible and hardly contain any default rules for holding sessions.[173] Article 20(1) states that the manner of conducting the proceedings is to be determined by the tribunal in compliance with the arbitration agreement and with due consideration to parties' wishes.[174] Moreover, holding a hearing session is not obligatory unless requested by either party, or if the tribunal finds it necessary.[175] Other than this rule, there is neither guidance nor even default rules for which sessions to hold, but all is at the discretion of the tribunal. Finally, ICSID AF Rules do not contain any explicit guidance on which sessions to hold, but only states the obligation to hold the first session within time limits (Article 9).[176]

2. The Hypothesis: ICSID and NAFTA Tribunals Hold More Sessions than Tribunals in the NYC Group

ICSID rules do in one case set an obligation to hold a preliminary session, while no such obligation exists in UNCITRAL Arbitration Rules. This may lead ICSID tribunals to hold more sessions than arbitrations falling under the NYC Framework. This is not the basis for my hypothesis, however, which is based on the institutional distinction rather than arbitration rules as such, as arbitration rules capture only partially the institutional perspective. My hypothesis goes to a deeper dimension of the institutional perspective, implicating the dominant paradigm and the extent to which efficiency is valued. As in the case for duration, legitimacy concerns that address the parties as in a contractual arbitration will cause tribunals to decrease the number of sessions to minimize costs to the parties and promote efficiency in

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[173] *See supra* note 152 for a discussion on the relevance of different versions of the accompanying text.

[174] SCC Rules of the Arbitration Institute, art. 20(1) (1999) states that: "The manner of conducting the proceedings is to be determined by the Arbitral Tribunal in compliance with the conditions set down in the arbitration agreement and these Rules, with due account taken of the wishes of the parties."

[175] SCC Rules of the Arbitration Institute, art. 25 (1999) states:

> (1) An oral hearing shall be arranged if requested by either party, or if the Arbitral Tribunal considers it appropriate. If a hearing is held, the Arbitral Tribunal, taking into account the wishes of the parties, shall determine the time for the hearing, its duration and how it is to be organised, including the manner in which evidence is to be presented. (2) If an arbitrator is replaced in the course of the proceedings, the newly composed Arbitral Tribunal shall decide whether and to what extent a previously held oral hearing is to be repeated.

[176] ICSID AF Rules (1978), art. 22.

managing the procedure. If the tribunal is concerned not only with the parties, however, and considers other legitimacy concerns as well, whether toward the wide public or the international judicial community, efficiency and costs concerns will be undermined and the tribunal will allow more sessions to be held. Moreover, the participation of third parties or demands for open hearings may also require more sessions, in particular, in NAFTA, where public hearings are often held.

3. Method of Collecting the Data and Outcome

Counting the number of sessions did not produce any technical difficulties. The sessions are usually stated in the awards as part of the procedural part of the award, and it is an integral part of the award to show the integrity of the procedure and the fact that due process was maintained and the parties had their opportunity to express their claims. In calculating the number of the awards, no distinction was made between different kinds of sessions, whether a preliminary session, procedural session, hearing on merits/jurisdiction, or a conference call between all parties. The following table summarizes the results.

TABLE 5: NUMBER OF SESSIONS

GROUP	AVERAGE NUMBER OF SESSIONS
ICSID	3.3
NYC	2.5
NAFTA	3.67

The table shows that NAFTA arbitrations have the highest average number of sessions (3.9 sessions per arbitration), ICSID arbitrations come in second (3.2 sessions per arbitration), and the smallest average number of sessions was in the NYC Framework (2.27 sessions per award). The fact that the tribunals of the NYC Framework hold fewer sessions than those of ICSID and NAFTA appeared statistically significant.[177]

[177] The distribution of the variable could not allow the assumption of normal distribution and equal variance. Accordingly a non-parametric test was applied. The hypothesis that NAFTA and ICSID hold more sessions than the NY Convention Framework was validated using a one-tail Mann-Whitney U test: U=331.000, Pv (1-tailed) = 0.035.

4. The Impact of Arbitration Rules

The division of the groups according to arbitration rules shows that a statistically significant difference also occurs.[178] A comparison of different arbitration rules when these are applied in the same institutional context shows inconsistent results: while in the context of the NYC Framework there is no significant difference when different arbitration rules are applied,[179] and in the context of NAFTA different arbitration rules do show a significant difference.[180] When the UNCITRAL Arbitration Rules were examined in different institutional contexts, however, a significant difference was found as well: NAFTA UNCITRAL tribunals hold on average 5.16 sessions while NYC UNCITRAL holds on average 2.7 sessions.

Hence, it is the variance within NAFTA that produces inconsistent results with regard to arbitration rules. If we consider the cases in NAFTA UNCITRAL that held the highest number of sessions, we find cases such as *Methanex v. USA*, *S.D. Myers v. Canada*, or *Pope & Talbot v. Canada*, which were complicated and controversial for reasons such as amicus briefs, the production of documentation, or the FTC intervention.[181] If we consider the ICSID AF Rules, we find cases that were less controversial and proceeded more smoothly, such as *Feldman v. Mexico*, or *Archer Daniels v. Mexico*.[182] This implies that it is not the arbitration rules that cause variance, but rather the particularity of the cases combined with the small number of observations.[183] This possibility is more likely considering that different arbitration rules did

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[178] Kruskal-Wallis Test shows statistical significance: Pv = 0.006 ,χ^2 =14.279.

[179] U= 19.000, *ns*

[180] U = 9 , Pv (2-tailed) = 0.018

[181] Methanex Corp. v. USA, (UNCITRAL). This was the first case allowing the submission of amicus briefs, *see supra* note 118 and the accompanying text. The case of S.D. Myers was described by the tribunal as a "hard fought" case (S.D. Myers v. Canada, Final Award, UNCITRAL ¶20, (UNCITRAL Dec. 30, 2002), and involved intensive deliberation over procedural issues such as the exploration and production of documents (S.D. Myers v. Canada, Partial Award, at ¶35, ¶37,¶45 (UNCITRAL Nov. 13, 2000)); the case of Pope & Talbot v. Canada, (UNCITRAL) involved a confrontation between the NAFTA FTC and the tribunal on the definition and interpretation of the FET standard (*see supra* notes 100–01 and the accompanying text).

[182] *See* Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1 (Dec. 16, 2002); Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB (AF)/04/5, Award, (Nov. 21, 2007).

[183] It is indeed possible that arbitration rules in the context of NAFTA are defined according to the particularity of the cases, a possibility that cannot be addressed here, and it is, in the context of NAFTA, irrelevant to the institutional dimension, as the institution as such is not determined according to the particularity of the case.

not produce a significant difference in the context of the NYC Framework and that tribunals applying the UNCITRAL Arbitration Rules vary significantly when the institutional context changes (according to a comparison of the NAFTA and NYC Frameworks). The impact of the particularity of cases, however, decreases when the number of observations increases and are, hence, less expected to cause statistical significance.

E. USE OF CITATIONS IN ARBITRATION AWARDS

An international court's decision is usually limited in scope to the dispute at hand. De facto norms of stare decisions and practices of following case law, however, exist in the practice of the judges and arbitrators of those courts.[184] The motivation for the use of citation differs from one case to another and is naturally affected by the legal characteristics of the case. Yet, studies also show that strategic behavior has an impact on the use of precedent in both national and international courts.[185] Specifically, it is often claimed that the use of precedent is instrumentalized to legitimize the decision with external audiences.[186]

Investment treaty arbitration is no exception. While lacking the hierarchy of precedent as it exists in the national legal systems, studies show that such tribunals are increasingly referring to and citing previous awards. In a study of citation patterns, Jeffery Commission showed that as the number of investment treaty precedents has grown over time, so has the practice of considering and oftentimes relying on prior decisions and awards.[187] He confirmed "that international investment law now

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[184] Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413, 416 (2012); MOHAMMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT (1996); LUZIUS WILDHABER, PRECEDENT IN THE EUROPEAN COURT OF HUMAN RIGHTS (2000); Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007).

[185] *See, e.g.*, Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 J. LEGAL STUD. 151 (2013).

[186] Lupu and Voeten show through the use of citations that international courts, while not isolated from political pressure, address also domestic legal actors, Lupu & Voeten, *supra* note 184, at 417; *see also* John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954); THOMAS G. HANSFORD AND JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006); Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 LAW & SOC'Y REV. 817 (2006).

[187] Jeffery P. Commission, *An Analysis of a Developing Jurisprudence in International Investment Law - What Investment Treaty Tribunals Are Saying and Doing (Presentation)*, 6(1)

increasingly develops through this mounting case-law, which effectively now requires tribunals, as a matter of practice, to engage and consider prior decisions and awards."[188] The study hence implied that citation is becoming an informal binding practice for tribunals rather than a voluntary one.[189] Moreover, a suggestion that a de facto system of precedent exists in investment treaty arbitration has been raised by both commentators and arbitrators.[190]

The reference to case law in investment treaty arbitration indicates a process of judicialization. Tribunals that refer to case law may do so to present a commitment to investment treaty arbitration case law, to avoid inconsistency, or simply as a helpful method for interpretation, as lawyers are trained to do.[191] Naturally, a tribunal that presents a high level of commitment to investment treaty arbitration case law is more likely to present a judicial approach than a contractual one. Commitment to case law is an indicator of the continuity of investment treaty arbitration, and the perception of investment awards as all shaping the evolving field of international investment law together. [192]

Accordingly, I examine reference and citation as an indication of the process of judicialization, regardless of the motivations tribunals have for citing and referring to case law. Specifically, I examine whether a variance in judicial behavior is expected to appear between different institutional backgrounds. In this methodology, I examine only references to investment treaty arbitration awards.

TRANSNAT'L DISPUTE MGMT. (2009), *available at* http://www.transnational-dispute-management.com/journal-browse-issues.asp.

[188] *Id.* at 10.

[189] Commission considers whether deciding against consistent case law could be considered a basis for annulment. *Id.* at 15.

[190] Christoph Schreuer & Matthew Weiniger*, Conversations Across Cases - Is there a Doctrine of Precedent in Investment Arbitration?*, 5 TRANSNAT'L DISPUTE MGMT. (2008)*, available at* http://www.transnational-dispute-management.com/journal-browse-issues.asp; Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration,* 30 FORDHAM INT'L L.J. 1014, 1016 (2006); Lucy Reed, *The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management*, 25 ICSID REV. 95 (2010).

[191] Harlan Grant Cohen, *Lawyers and Precedent*, 46 VAND. J. TRANSNAT'L L. 1025, 1031–32 (2013).

[192] Stone Sweet, *supra* note 102, at 60. Stone Sweet defined the process of building jurisprudence as "a judge-made, precedent-grounded, law of investment arbitration, created in order to stabilize (potentially explosive) strategic environments, to entrench specific frameworks of argumentation, and to legitimize their own lawmaking." Accordingly Stone Sweet considers the use of case law as an indicator of a judicialization process.

1. The Hypothesis: ICSID and NAFTA Arbitration Awards Refer to Investment Treaty Arbitration Case Law More than NYC Framework Awards

In Part II, this Article explains that tribunals under the NYC Framework face national courts that are assumed to be concerned primarily—and perhaps only—with the fairness and integrity of the procedure, as the New York Convention demands. Thus, the concerns of national courts when rectifying or enforcing such awards focus on the scope of the arbitration agreement, jurisdiction, competent court, conduct of the proceedings, and other considerations that reflect the fairness of the procedure. It is rare that national courts examine the judicial reasoning of awards applying to the merits, specifically the protection standards. Thus, tribunals, while addressing merits, will primarily address the parties who are mainly concerned with the factual findings relevant to the merits, rather than the legal instruments and methods that are used to interpret protection standards, or to the tribunals' commitment to case law. Hence, the motivation to refer to former awards when applying protection standards will be relatively low. Hence, the reference can be expected to be *selective* and applied as one method among others of assisting the tribunals to apply protection standards.

ICSID is a regime that goes beyond the specific BIT or current dispute. As explained in Part III, the legitimacy concerns of ICSID become more complex as more audiences are addressed. As legitimacy concerns become more complex, the process of judicialization is expected to occur. Specifically, in an annulment procedure, ICSID tribunals may face international law experts who are believed to be concerned in the legitimacy of the investment arbitration field as a whole and not only in the integrity and fairness of the process.[193] Hence, ICSID tribunals are expected to adhere to former arbitration awards to demonstrate conformity with and commitment to the legal body of investment arbitration supporting the legitimacy of their awards.

Finally, NAFTA tribunals face active courts and an involved public, as well as concerned policy makers in the signatory states. As in ICSID, NAFTA tribunals have complex legitimacy concerns and address several audiences in their awards. While the formal institutional settings regarding the review mechanism fall within the provisions of the New York Convention, the complex set of legitimacy concerns also indicate a

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[193] *See supra* notes 85–91 and the accompanying text.

process of judicialization reflected in reference to case law. For this reason, NAFTA awards can be expected to rely more frequently on investment treaty awards than do awards falling within the NYC Framework, while no significant difference is to be observed as compared to ICSID awards.

2. Method of Collecting the Data

When collecting the data, this study set rules that were as strict, applicable, and consistent as possible to avoid possible bias. The rules are as follows;

- Distinguish between the three contexts in which tribunals use reference to former investment treaty awards: in discussing jurisdictional objections and admissibility, in applying protection standards in the relevant investment treaty, and other contexts that do not fall into the two former categories, such as applicable law, attribution, damages, and necessity doctrine.[194]
- In the process of collecting the data, the institutional context in which the cited award was rendered was coded.
- Any engagement on behalf of the tribunals in case law was considered and coded. Hence, category citations, references in the text, references in a footnote, references to support a finding, and references dismissed as irrelevant were all combined. The purpose of this rule was to simplify the process and set rules that are easy to follow.
- The treatment of references to awards that appear more than once in the same award proved more complex. In this context, there were three options to follow. The first was to count the award only once, even if mentioned several times. This option was abandoned since it undermines the intensive use of references some tribunals may exercise in basing their awards, in particular, the early awards having a very limited case law to which to refer. The second option was to code every time an award is cited, even when mentioned several times in the same context. This option also does not

[194] The Umbrella Clause and the Most Favored Nation standard, although they raise jurisdictional issues, were treated as a protection standard and hence considered as merits, unless the tribunal addressed their application in the discussion of jurisdiction.

accurately represent the use of reference, since when an award is discussed in relation to a specific issue it is likely to be mentioned more than once in that same continuous discussion, but that does not mean that it was referred to twice or three times, or more. Eventually, the third option was chosen, in which the context of the reference was considered. References for *each protection standard* were considered separately; thus, when an award is cited more than once in a discussion of the same protection standard, it is counted only once, but when an award is cited twice in the discussion of two different protection standards, it is counted twice. Thus, the intensiveness of the use of case law was captured while avoiding meaningless repetition.

- Finally, the fourth rule was to consider references made by the tribunal and not those attributed to the parties. In cases where the tribunal attributes a reference made by one of the parties in order to examine its relevance, it was considered as a reference made by the tribunal, as the tribunal considered it to be sufficiently significant to warrant discussion. In some other cases the tribunals included the awards to which the parties' referred while presenting parties' contentions, and did not later find them sufficiently significant to include in their own reasoning. In such cases, the citation is not considered.

3. The Findings

The following table shows the distribution of the number of references within the groups (the highlighted cells indicate where most awards fall in term of the number of citations).

TABLE 6: DISTRIBUTION OF CASES ACCORDING TO REFERENCE PATTERNS

GROUP / NUMBER OF CITATIONS	NY	ICSID	NAFTA
0	26%	8%	0
1–5	26%	19%	40%
6–10	11%	21%	27%

11–25	21%	41%	33%
>25	16%	11%	0

According to this table, 26 percent of awards in the NYC group did not include any reference to investment treaty arbitration awards, while the same percentage referred to fewer than five awards. This indicates that about a half of the tribunals in the NYC group make a selective use of reference to investment treaty arbitration case law, or no use at all. The majority of ICSID arbitrations, however, (73 percent) referred to six awards or more, which indicates a clear tendency to refer to former awards and present a commitment to former case law. Finally, in NAFTA awards we can see that the reference to former case law is less distributed than in the other two groups, as all awards include 5–25 citations, and the majority of NAFTA awards (57 percent) referred to more than six former awards.

The following table shows the overall average number of citations after the omission of outliers.[195]

TABLE 7: AVERAGE NUMBER OF REFERENCES

DATA / GROUP	NUMBER OF CASES	MEAN	STD. ERROR
ICSID	33	9.97	1.20
NY	17	5.29	1.33
NAFTA	16	9.25	1.65

The hypothesis that ICSID and NAFTA refer more to case law is statistically significant.[196] The statistical analysis is consistent with the suggestion that ICSID and NAFTA are more judicialized than the third group, which is still dominated by the contractual framework. In addition, the following table illustrates the distribution of awards referred to.

[195] For the treatment of outliers, *see infra* sec. 4.

[196] T(63)= 2.318, Pv=0.012. P refers to a one-tail test. Applying ANOVA Test also proves significant: Df=2, F=3.012, p=0.050. Equal variance assumed based on Levin Test of Homogeneity.

TABLE 8: DISTRIBUTION OF REFERENCES

DISTRIBUTION OF REFERENCE	REFERENCE TO ICSID CASE LAW	REFERENCE TO NYC CASE LAW	REFERENCE TO NAFTA CASE LAW
ICSID	63%	14%	23%
NY	59%	20%	21%
NAFTA	9%	2%	89%

This table clearly suggests that NAFTA awards are more likely to refer to other former NAFTA awards, and rarely consider awards rendered in other institutional contexts. Accordingly, NAFTA case law is much more cohesive than that of the other two groups. It supports the suggestion that NAFTA tribunals do have specific concerns of legitimacy addressing regional considerations rather than global considerations. As for ICSID and NYC groups, the table shows that the distribution of citation awards is similar, approximately, to the distribution of the whole population, while some preference for awards of the same group is seen.

4. The Treatment of Outliers

Special consideration needed to be given to outliers because of the small number of observations and the relatively high variance within the whole group and within each group separately.[197] Hence, a two-stage detection of outliers was followed by considering both the whole group together and each group separately. In the first stage, all three groups were considered one group, consistent with the null hypothesis.[198] Accordingly, cases that differed by twice the standard deviation or more from the general mean were detected and removed. In the second stage, each group was considered separately to preserve the significance if it existed. Accordingly, cases that differed by twice the standard deviation or more from the mean in the same group were detected and removed. Eventually, seven observations were removed, four belonging to the ICSID group,[199] and three to the NYC Framework.[200] The percentage of

[197] Before removing outliers, the standard of deviation in the whole group was 10.8077, while the mean was 11.260.

[198] The null hypothesis in this case is that there is no significant difference among these groups and they all constitute one group.

[199] El Paso Energy Int'l Co. v. Argentina, ICSID Case No. ARB/03/15, Award, (Oct. 27, 2011) (citing 48 ITA cases); Sanayi v. Pakistan, ICSID Case No. ARB/03/29, Award (Aug. 24, 2009)

outliers detected is less than 10 percent. A lower standard of error was obtained as a result of the removal of those observations, which allowed equal variance to be assumed based on a Levine Homogeny test.[201]

An examination of the outliers reveals two noteworthy observations. First, four out of seven observations were cases that followed the Argentine economic crisis in 2000–2001.[202] The Argentine cases presented exceptional challenges for the investment treaty regime and its legitimacy, and hence, intensive reference to case law is indeed expected to appear and is consistent with studies that showed that courts strategically use citations to legitimize their decisions.[203] Indeed, if we examine references in all awards concerning the Argentine cases, we realize they refer to case law much more than other awards, which indicates that strategic behavior legitimizing the decisions is not absent.[204] In addition, the cases reveal that the particularity of cases still plays a role in determining the practices of references, while institutional influence remains in the background of such particularity. Thus, it is expected that the larger the group of awards that is examined, the more apparent is the institutional impact, while particularity of cases would have less impact.

Second, all outliers in the NYC Framework are observations collected from UNCITRAL arbitration awards. As a result, UNCITRAL arbitrations show a higher deviation error than SCC arbitration awards.[205] This observation alone does not allow us to make statements about the differences between SCC and UNCITRAL arbitration because of the low number of observations. As mentioned above, however, UNCITRAL arbitration rules on transparency were recently drafted and are expected

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(citing 37 ITA cases); Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, (Dec. 27, 2010) (citing 35 ITA cases); Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008) (citing 31 ITA cases).

[200] Frontier Petroleum Services Ltd. v. The Czech Republic, Award, (UNCITRAL Nov. 11, 2010) (citing 51 ITA cases); BG Group v. Argentina, Final Award, (UNCITRAL Dec. 24, 2007) (citing 28 ITA cases); National Grid v. Argentina, Award, (UNCITRAL Nov. 3, 2008) (citing 25 ITA cases).

[201] $F(2,63)=0.628$, $Pv=0.537$.

[202] These awards are El Paso Energy International Company v. The Argentine Republic, Award, ICSID Case No. ARB/03/15 (Oct. 31, 2011); Total S.A., ICSID Case No. ARB/04/01; BG Group, Final Award, (UNCITRAL Dec. 24, 2007); National Grid, Award, (UNCITRAL Nov. 3, 2008).

[203] *See* ICSID Arbitration Rules, *supra* note 170.

[204] The average number of citations in all Argentine cases is 21.6, compared to 9.5 in all other awards.

[205] The standard error for UNCITRAL awards is 3.61 as compared to 2.87 for SCC awards.

to enhance a process of judicialization. Accordingly, the variance between the practices of the UNCITRAL and the SCC tribunals will likely increase as the SCC tribunals are less expected to go through a process of judicialization.

F. THE OUTCOME OF PROCEEDINGS

Empirical data about the outcome of proceedings was collected by Franck in an empirical study that included most of the published concluded claims. According to her study, 39 percent of claims concluded by the merits were dismissed, while 48.8 percent were partially accepted, and only 12 percent were accepted on all of the allegations that were claimed.[206] In addition, ICSID publishes annual reports about ICSID claims, which include the rates of the accepting investors' claim. According to these reports, for example, 25 percent of cases that were decided by the tribunals during the year 2011 were declined jurisdiction, 25 percent were dismissed based on their merits, and 50 percent were accepted in part or in full.[207] In the year 2010, the outcomes were 23 percent, 31 percent, and 45 percent respectively.[208]

1. Hypothesis: No Significant Difference Will Be Observed in the Outcome

Some cases are "clear" cases and do not raise any difficulties in terms of deciding their outcome. In these cases, the outcome is expected to be similar in every institutional context. Such cases, for example, are where the actions of the state constitute direct expropriation of property.[209] Institutional arrangements may influence the outcome of proceedings only in "difficult" cases where there is no clear judicial rule to guide the tribunal, such as the cases of regulatory taking that are based on case by case analysis.[210] In this context, an examination of the outcome, without any consideration of the judicial reasoning or the

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[206] *Franck*, *supra* note 130, at 53.

[207] *See* THE ICSID CASELOAD – STATISTICS 13 (2012).

[208] *Id.*

[209] *See, e.g.*, Ron Fuchs v. The Republic of Georgia, ICSID Case No. ARB/07/15, Award (Mar. 3, 2010); ADC Affiliate Ltd. v. Hungary, ICSID Case No. ARB/03/16, Award (June 2, 2006).

[210] *See, e.g.*, Saluka v. The Czech Republic, Partial Award, (UNCITRAL Mar. 17, 2006); Occidental Exploration and Prod. Co. v. Ecuador, Final Award, (UNCITRAL July 7, 2004); Parkerings-Compagniet AS v. Ukraine, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007).

amount of compensation ordered, provides only a limited scope of institutional behavior. When one considers that the personal and individual approaches of repeat arbitrators may obscure the institutional impact even more, it seems less likely that significance would appear in the behavior of institutions. Hence, I expect that no significant difference between institutions will be observed in this study.

2. Method of Collecting the Data

When collecting the data on the outcome, only two observations were made: acceptance or dismissal of claims. A claim was considered to be dismissed only if *all* of the investor's claims were dismissed, while a claim was considered to be accepted if at least one of the investor's arguments was accepted and the state was found in breach of the treaty.

3. Findings and Analysis

TABLE 9: OUTCOME OF PROCEEDINGS

GROUP	SUCCESS	FAILURE	TOTAL CASES
ICSID	24	13	37
	64.9%	35.1%	100%
NYC	17	3	20
	85%	15%	100%
NAFTA	5	11	16
	37%	63%	100%

As Table 9 shows, NAFTA tribunals tend to dismiss cases more frequently than tribunals in other institutional contexts, while tribunals in the NYC group tend to accept cases more frequently. Applying Pearson Chi-Square to the data reveals that a strong statistical dependence exists between the outcome and the institutional context.[211] While this still does not prove a causal relation, it nevertheless implies that behavior within institutions varies even with the outcome. Accordingly, the hypothesis

[211] X^2=11.129, P_V=.004.

that outcome is not dependent on the institutional context was not validated. The fact that the outcome of the proceedings is dependent on the institutional framework on which tribunals operate reasserts the suggestion in this paper that normative assessments and critiques on investment treaty arbitration should take due consideration of the variance among those institutions and the distinct practices that are developed.

G. LIMITATIONS OF THE CURRENT STUDY

Because of the limited database, the study in this section includes all the relevant cases and examines statistical significance. The tested variables are quantitative variables that demand less discretion and thus provide a higher level of certainty. The study has its own limitations as well, some of which are particular to the examined group and others are attributed to the methodology in general. In the following lines, the main limitations of this study are examined:

Limitations of Quantitative Assessments: The findings of the quantitative methodology cannot provide any actual evidence that can be directly attributed to institutional arrangements. The study, for the most part, indicates a statistically significant difference between the different tested groups that is open to different explanations and interpretations. It should be kept in mind that the aim of quantitative methods in the context of judicial behavior remains no more than to "offer highly tentative indicators of whether a set of expectations is supported by narrow aspects of system performance."[212] Therefore, the quantitative assessment in this dissertation is complemented by a qualitative assessment to provide a more conclusive understanding of the institutional impact.

The Limited Number of Available Investment Treaty Arbitration Awards: Investment treaty arbitration is a relatively recent judicial phenomenon. While investment arbitration may go back to the establishment of ICSID in 1966, or to the conclusion of the first modern BIT in 1959, it was only during the last two decades that investment treaty arbitration started to be salient in the field of international law. When the number of awards is limited, the study became more susceptible to bias caused by specific cases that produce extreme values. There are two main elements that may produce such a bias: the

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[212] Van Harten, *supra* note 130, at 880.

individuality of judges and the particularity of cases. This indeed was the case when references were tested, which demanded that special attention be paid to the outliers. The high possibility of bias indicates, however, that when a statistical significance is shown we can conclude that the relation between the institutional context and the specific tested dependent variable(s) was sufficiently strong to veil the high susceptibility to bias. In addition, the limited number of observations also limited our ability to draw further conclusions through dividing the groups into sub-groups based on the arbitration rules that were applied.

Limitations of the Specific Variables: The examined variables are limited to those variables that can be tested with very limited discretion. This limitation provides more certainty but has the disadvantage of a narrow scope. To compensate for the limitation of quantitative data, this study examined variables in more than one stage of the arbitral procedure: managing the procedure, judicial reasoning, and outcome. While other variables may have been tested, those examined here are salient features indicating the behavior of tribunals and their assessment does not present considerable practical challenges.

V. CONCLUSION: EVALUATING THE RESULTS AND NORMATIVE IMPLICATIONS

This Article conducted an empirical assessment of the behavior of tribunals to examine the feasibility of producing distinct behaviors in different institutional contexts. Four variables were examined: duration, number of sessions, number of references, and outcome. The data revealed a statistical significance for all four variables.

With regard to duration, the findings show a statistically significant variance among three institutional contexts. Specifically, the findings show that the duration of proceeding in ICSID and NAFTA is longer than that in the NYC Framework. Assuming that efficiency is more valued in a contractual framework of arbitration, these findings are consistent with the hypothesis made in Part IV that NAFTA and ICSID institutions are more judicial than the NYC Institution.

With regard to sessions, the findings show that ICSID and NAFTA tribunals hold more sessions than do tribunals in NYC institution. As holding fewer sessions is more efficient and less expensive, it is likely that tribunals following a contractual approach are less inclined to hold an excessive number of sessions than tribunals following a judicial approach. Therefore, the findings are consistent with

the suggestion made in Part III that NAFTA and ICSID institutions are more judicial than the NYC Institution.

With regard to references, this paper found that ICSID and NAFTA tribunals include more references in their awards to investment treaty arbitration case law than do tribunals in the NYC institution. Again, intensive reference to case law indicates the dominance of the judicial approach and the perception of investment treaty arbitration as a system of law, rather than an *ad hoc* dispute settlement mechanism. Therefore, the findings are also consistent with the claim that the ICSID and NAFTA contexts are dominated by a judicial approach, while the NYC institution is dominated by a contractual approach. The findings on references reveal an additional variance among institutions when we examine to which cases those tribunals refer: while awards in the NYC institution and in ICSID include references to all investment treaty case law, NAFTA tribunals clearly prefer referring almost exclusively to NAFTA case law.

Finally, even the findings on outcome reveal a statistical dependence between the institutional context and the outcome, showing that NAFTA tribunals are most likely to dismiss and tribunals in the NYC institution are more likely to accept cases.

Naturally, a quantitative empirical assessment has a rather narrow scope of institutional behavior, and it is extremely challenging when conducted on a limited number of cases. Hence, the statistical significance shown in this study indicates the strong potential for institutional perspective in explaining the behavior of tribunals in particular and the development of investment treaty arbitration in general. Such potential may be exhausted through applying different methodologies, such as interviews and qualitative analysis, or by studying other variables such as appointment patterns and amount of compensations. Yet, as this study indicates, the institutional division should not be set according to the formal settings of arbitration mechanisms alone, but should also consider informal practices that may arise, as the neo-institutional tradition in political science and sociology had already suggested. Indeed, the focus on the formal arrangements of arbitration mechanisms did not produce any noticeable observation and hence caused the institutional backgrounds of investment treaty arbitration be left out of the picture.

Investment treaty arbitration has been a subject for normative debates in the legal literature on various issues. Debates on its fragmentation and inconsistency,[213] of possible bias towards investors,[214] and of whether the arbitrators lack accountability[215] are only a partial list of those debates. Usually, the debates are discussed without due consideration to the possible variance among the different institutional backgrounds. As this study shows, an institutional analysis may reflect on those debates in many aspects; the study, for example, shows that different patterns of behavior exist with regards to the use of case law, both in quantity and in quality. This observation reflects on ongoing debates whether case law reduces inconsistency and whether it enhances a process of multilateralization in international investment law.[216] Hence, the answer for those questions may be different if we consider different institutional contexts. In addition, it is often discussed whether investment treaty tribunals are biased towards investors or against developing states.[217] The study shows that the average success of claims may differ from one institution to another. Hence, discussing each

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[213] Fragmentation and inconsistency are often discussed and indicated as causes for a legitimacy crisis. *See e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,* 73 FORDHAM L. REV. 1521, 1522–23 (2005); *see also* David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39 (2006); L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or* Caveat Investor, 19 ICSID REV. 293, 326-27 (2004). Jeffery Atik, *Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 ASPER REV. INT'L BUS. & TRADE L. 215, 216 (2003); Johanna Kalb, *Creating an ICSID Appellate Body,* 10 UCLA J. INT'L L. & FOREIGN AFF. 179, 196–201 (2005).

[214] Franck*, supra* note 130, at 6; Van Harten, *supra* note 130; Van Harten, *supra*, note 17; Nathalie Bernasconi-Osterwalder, *Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?*, 6 J. WORLD INV. & TRADE 59, 69 (2005); Sarah Anderson & Sarah Grusky, *Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties Have Unleashed a New Era of Corporate Power and What to do About It*, FOOD AND WATER WATCH, *ix* (2007), *available at* http://www.ips-dc.org/wp-content/uploads/2012/01/070430-challengingcorporateinvestorrule.pdf.

[215] *See* Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 TRANSNAT'L DISPUTE MGMT., (2004); Bernali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?,* 41 VAND. J. TRANSNAT'L L. 775, 779 (2008).

[216] Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L. J. 1083, 1095-1101 (2011); STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 24 (2009). *Alvarez & Khamsi*, *supra* note 15, at 468; *see also supra* notes 188, 191.

[217] *Supra* note 215.

institution separately and comparing among them may bring a more complex answer to the question of bias.