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## Managing Multiplicity: Consolidating Parallel Arbitration Proceedings for Renewal Energy Disputes

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# MANAGING MULTIPLICITY: CONSOLIDATING PARALLEL ARBITRATION PROCEEDINGS FOR RENEWABLE ENERGY DISPUTES

Francesca Pinto

## I. INTRODUCTION

Climate change is a pressing concern.<sup>1</sup> Policies addressing climate change have transformed the energy industry across the globe, spurring massive investment in renewable energy projects.<sup>2</sup> However, this has also led to a surge of new disputes involving various parties in international arbitration tribunals, including companies involved in a project's development and operation, investors financing the project, and the sovereign state of the project's location.<sup>3</sup>

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<sup>1</sup> *Climate Change*, U.N. TR. FUND FOR HUM. SEC., <https://www.un.org/humansecurity/climate-change/> (last visited Nov. 24, 2021).

<sup>2</sup> Glob. Comm'n on the Geopolitics of Energy Transformation & Int'l Renewable Energy Agency, *A New World: The Geopolitics of the Energy Transformation* 8 (2019), [https://www.irena.org/-/media/files/irena/agency/publication/2019/jan/global\\_commission\\_geopolitics\\_new\\_world\\_2019.pdf](https://www.irena.org/-/media/files/irena/agency/publication/2019/jan/global_commission_geopolitics_new_world_2019.pdf); see Int'l Renewable Energy Agency, Int'l Energy Agency & Renewable Energy Pol'y Network for the 21st Century, *Renewable Energy Policies in a Time of Transition* 11 (2018). In 2015, international climate objectives were set forth in the "Paris Agreement on Climate Change" to limit global warming to below two degrees Celsius. *Id.* at 15.

<sup>3</sup> EMMA JOHNSON, LUCY MCKENZIE & MATTHEW SAUNDERS, *INTERNATIONAL ARBITRATION OF RENEWABLE ENERGY DISPUTES* 8 (2021).

While arbitration has been the “preferred forum for disputes arising out of international energy and construction projects,” those involved in renewables who do not have a background in the traditional oil and gas sector may not be familiar with addressing energy disputes through arbitration.<sup>4</sup> Moreover, those who are relatively new to the energy space might not be accustomed to available protections afforded under contract and international investment agreements (IIAs), which serve a crucial role in mitigating and managing the risk of disputes that might arise from building and operating a renewable energy project.<sup>5</sup> Given that stakeholders may become involved in legal proceedings related to various laws, regulations, businesses, and governments, it is critical that international arbitration be utilized to encourage effective and efficient resolution.<sup>6</sup>

Along with the surge in investment, development, and operation of complex energy projects, there has also been a rise in disputes with related “legal and factual elements,” which will likely increase the use of parallel arbitral proceedings.<sup>7</sup> While consolidating related disputes into a single arbitration is possible under certain circumstances, obtaining consent from all related parties has been a major obstacle—particularly for disputes involving capital-intensive projects with multiple parties and contracts.<sup>8</sup>

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, considered the “most widely used set of *ad hoc* rules in international arbitration,” do not contain any provisions on consolidating parallel proceedings.<sup>9</sup> Considering the

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Considering the significant amount of upfront capital required for the development and operation of a renewable energy project, it is imperative that stakeholders understand protections available under IIAs because of the “dependence of renewables projects on local laws for their successful operation and profitability—particularly where subsidies or other forms of government aid are involved . . . .” *Id.* at 17.

<sup>6</sup> *Id.* at 8–9.

<sup>7</sup> Vasilis Pappas, Romeo Rojas & Gita Keshava, *When Consolidation Fails: The Challenges of Parallel Arbitral Proceedings*, in *THE GUIDE TO ENERGY ARBITRATIONS* 217–19, 232 (4th ed. 2020).

<sup>8</sup> *Id.* at 219. The authors note that projects in the energy industry are “[t]he most frequently encountered examples of parallel proceedings in commercial arbitration . . . .” *Id.* This is because projects in the energy sector often involve various parties and multiple agreements operating under the same project. *Id.*

<sup>9</sup> *Id.* at 224. While a number of arbitral institutions have recently attempted to introduce consolidation procedures, many institutions (such as UNCITRAL) have yet to implement any procedure for consolidation either with or without the consent of all parties related to the dispute. *Id.*

complex, multiparty, and multiple-contract nature of renewable energy investment and development, the UNCITRAL Arbitration Rules should implement consolidation provisions that explicitly address consolidation for related arbitration proceedings and—in some circumstances—enforce consolidation regardless of whether all parties consent.

Part II of this article provides an overview of transactions related to the investment, development, and operation of renewable energy projects. Part III identifies the risks of parallel proceedings and challenges to consolidation, while Part IV suggests a consolidation procedure framework for the UNCITRAL Arbitration Rules. Part V concludes by discussing the benefits of consolidating parallel arbitral proceedings for renewable energy disputes.

## II. BACKGROUND

Understanding key technologies and relationships, as well as international law and investment treaties governing renewable energy disputes, is important because of the complex and multiple nature of the parties involved.

### A. MAIN TECHNOLOGIES

Renewable energy, or “clean energy,” is derived from “natural sources or processes that are constantly replenished.”<sup>10</sup> Over the past two decades, growth in renewable energy generation increased 3.4 times across the globe, while the costs of renewable technologies have steadily declined.<sup>11</sup> Key renewable generation technologies that have achieved relative commercial maturity include wind, solar, and biomass.<sup>12</sup>

Wind can be used to generate electricity both on land (onshore) and over open water (offshore).<sup>13</sup> Onshore wind projects

<sup>10</sup> Lora Shinn, *Renewable Energy: The Clean Facts*, NAT. RES. DEF. COUNS. (June 15, 2018), <https://www.nrdc.org/stories/renewable-energy-clean-facts>. In contrast to nonrenewable “dirty” sources of energy (such as oil, gas, and coal), renewable energy harnesses natural sources for energy production, such as sunlight and wind. *Id.*

<sup>11</sup> Int’l Renewable Energy Agency, *Renewable Power Generation Costs in 2019* 19–44 (2020), [https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Jun/IRENA\\_Power\\_Generation\\_Costs\\_2019.pdf](https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Jun/IRENA_Power_Generation_Costs_2019.pdf).

<sup>12</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 11–12.

<sup>13</sup> John McCloy, *Onshore vs Offshore Wind: What Are the Differences and Facts?*, GREENCOAST (Sept. 17, 2019), <https://greencoast.org/onshore-vs-offshore-wind/>; *see also* Int’l Renewable Energy Agency, *supra* note 11, at 21 (discussing that between 2010 and 2019, both onshore and offshore wind experienced a year-over-year cost decrease of nine percent).

can be seen from a distance, which can be particularly controversial at the planning stage.<sup>14</sup> Additional disputes might arise because onshore wind projects are considered “noisy” and can potentially disturb bird migration and nesting.<sup>15</sup> With respect to offshore wind, widespread disputes have arisen in response to impacts on marine environments where projects are installed (for example, from damage associated with corrosion and overall impact on surrounding marine habitats).<sup>16</sup>

Solar photovoltaic (PV) projects generate electricity by converting solar radiation.<sup>17</sup> However, solar PV projects typically require large tracts of land, which can cause land-related disputes regarding the project’s impact on neighboring properties or on other land rights.<sup>18</sup> Concentrated solar power (a less prevalent method of energy generation than solar PV) produces energy by concentrating sunlight.<sup>19</sup> This method of energy generation uses various technologies—including some that are not matured—leading to disputes regarding the technology’s operation.<sup>20</sup>

Finally, biomass projects are a form of renewable energy that generates electricity by burning biomass fuels to release heat.<sup>21</sup> However, these projects are highly dependent on the availability and quality of fuel supply, which has led to numerous disputes regarding the technology’s ability to “cater for the mixed quality of fuel.”<sup>22</sup>

## B. IMPORTANT PLAYERS

The development and operation of renewable energy projects involve key contractual relationships among multiple

<sup>14</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 11.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 11–12.

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Id.* For an example of land rights potentially affected by PV projects, see generally *Photovoltaic Solar Plant PPP Risk Allocation Matrix*, GLOB. INFRASTRUCTURE HUB (2019), <https://content.gihub.org/live/media/1602/photovoltaic-solar-plant-matrix.pdf> [hereinafter *Matrix*]. See *Matrix*, *supra* note 18, at 25 for a perspective on the social risks of solar PV projects that might specifically relate to indigenous land rights.

<sup>19</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 12.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Biomass is fuel created from organic materials, including “grasses, woodchips[,] or crop waste products.” *Id.*

<sup>22</sup> *Id.*

different parties.<sup>23</sup> These parties might include private-sector entities, as well as and regional and national governmental entities.<sup>24</sup>

As the worldwide commitment to addressing climate change has increased, many countries over the past decade have introduced government subsidies and other support initiatives that encourage investment in renewable energy projects.<sup>25</sup> However, these projects involve “significant upfront investment, valuable intellectual property, and complex regulatory issues—the perfect ingredients for cross-border disputes.”<sup>26</sup> As private-sector entities have adapted to new investment incentives, unanticipated changes in policies designed to encourage investment have subsequently led to investor–state disputes.<sup>27</sup> While policy changes certainly pose a risk for private entity investors, international arbitration tribunals have offered a critical, predictable path for investment protection.<sup>28</sup>

### C. KEY CONTRACTUAL RELATIONSHIPS

Generally, a “project company” or “owner” is central to a renewable energy project’s contractual structure.<sup>29</sup> The project company, often formed as a “special purpose vehicle,” is typically incorporated under the domestic law of the project’s location state.<sup>30</sup> However, rather than incorporating the project company as a special

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<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Id.* Private sector entities involved in renewable energy projects often operate “outside their ‘home’ jurisdiction.” *Id.*

<sup>25</sup> Igor V. Timofeyev, Joseph R. Profaizer & Adam J. Weiss, *Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty*, in *THE GUIDE TO ENERGY ARB.* 45–46 (4th ed. 2020). Examples of investment policies designed to encourage long-term investment in alternative energy sources include feed-in tariffs (FITs) and other special rates. *Id.* FITs have greatly increased investor confidence in renewable energy deployment by introducing policy elements such as guaranteeing “a fixed per kWh price for electricity, an electricity purchase guarantee, guaranteed interconnection, and standard power purchase contracts.” See *Feed-In Tariffs*, CLEAN ENERGY MINISTERIAL, <https://www.cleanenergyministerial.org/policy-brief-cesc/feed-in-tariffs/> (last visited Dec. 2, 2021).

<sup>26</sup> Wiley Rein, *Guest Blog: Renewable Energy Disputes—Answers in Arbitration*, INT’L CHAMBER OF COM. (Sept. 23, 2021), <https://iccwbo.org/media-wall/news-speeches/guest-blog-renewable-energy-disputes-answers-in-arbitration/>.

<sup>27</sup> *Id.* For example, Spain faced over forty investor claims when the country revoked its renewable energy incentives following the 2008 Global Financial Crisis. *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 13.

<sup>30</sup> *Id.*

purpose vehicle, investors may instead elect to work together as a consortium, which is generally governed by a joint venture agreement.<sup>31</sup>

Typically, a project company hires a contractor (or multiple contractors) to design and build the project.<sup>32</sup> In certain circumstances, the project company may decide to hire a single contractor to take responsibility for the project's implementation in its entirety.<sup>33</sup> In such a scenario, a contractor might in turn hire subcontractors, prompting the project company to maintain a direct contractual relationship through some form of security, such as a bank guarantee or direct agreement.<sup>34</sup>

Additionally, a project company or owner may decide to outsource responsibility for the project's operation and maintenance to a third party.<sup>35</sup> Due to the unpredictability of a project's operation over time—especially when a project's technology is not yet fully mature—operation and maintenance agreements can potentially become a source of multilayered disputes.<sup>36</sup>

Renewable energy projects typically involve a buyer, or “offtaker,” who contracts for the long-term purchase of the project's electricity.<sup>37</sup> The offtaker may be a private entity or a state-owned utility.<sup>38</sup> The contract governing the sale of electricity, commonly referred to as a power purchase agreement (PPA), generally includes terms such as the minimum amount of electricity to be supplied by the project, along with any applicable tariffs.<sup>39</sup>

## 1. INTERNATIONAL INVESTMENT PROTECTION

A significant amount of upfront capital is required for renewable energy projects.<sup>40</sup> Given that the successful operation and profitability of a project is highly dependent on the local laws

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<sup>31</sup> *Id.* at 14. Disputes between consortium members commonly arise with respect to each member's compliance with their obligations. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The terms governing the relationship between a project company and the contractor engaged to take full responsibility for the project's implementation are typically set forth in an “Engineering, Procurement and Construction” (“EPC”) contract, which charges the contractor with the performance of all tasks necessary “such that when the contract is completed the project company has only to ‘turn the key’ to start a fully functioning and operational power plant.” *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 15.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 17.

and regulations of the state where the project is located,<sup>41</sup> familiarity with available international law protection under IIAs is critical.

IIAs typically take one of two forms: bilateral investment treaties (BITs) or multilateral investment treaties (MITs).<sup>42</sup> BITs—which are agreements between two states—afford foreign investors certain minimum standards of protection.<sup>43</sup> Providing similar protection, MIT treaties involve more than two states.<sup>44</sup> Notable MITs that are particularly important for renewable energy investments include the North American Free Trade Agreement (NAFTA)<sup>45</sup> (replaced by the United States-Mexico-Canada Agreement (USMCA)),<sup>46</sup> the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),<sup>47</sup> and the Energy Charter Treaty (ECT).<sup>48</sup>

The ECT is the most significant global MIT for renewable energy investments, as it was created with the purpose of stimulating energy trade and investment<sup>49</sup> while also protecting “‘investments’ of ‘investors’ in the energy sector (which includes renewable

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* In an effort to protect their nationals’ investments abroad, European countries adopted modern bilateral investment treaties in the 1960s. *See* Doak Bishop, Eldy Quintanilla Roche & Sara McBrearty, *The Breadth and Complexity of the International Energy Industry*, in *THE GUIDE TO ENERGY ARB.* 1, 12 (J. William Rowley QC, Doak Bishop & Gordon E. Kaiser eds., 4th ed. 2020) (citing RUDOLF DOLZER & CHRISTOPHER SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 6–7 (2d ed. 2012)).

<sup>44</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 18.

<sup>45</sup> *Id.*; *see* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

<sup>46</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 17; *see generally* Agreement Between the United States of America, the United Mexican States, and Canada 7/1/20 Text (Nov. 30, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

<sup>47</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 17; *see generally* Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Mar. 8, 2018), <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>.

<sup>48</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 17; *see generally* Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95 (entered into force Apr. 16, 1998) [hereinafter ECT].

<sup>49</sup> *See* ECT, *supra* note 48, 2080 U.N.T.S. at 103. The ECT “establishes a legal framework in order to promote long-term co-operation in the energy field . . . .” *Id.*



energy).”<sup>50</sup> Regulatory changes—along with their subsequent “effects on foreign investors’ investments”—have triggered several investor–state arbitration claims under the ECT.<sup>51</sup>

The ECT contains three options for arbitration: (1) the International Centre for Settlement of Investment Disputes (ICSID);<sup>52</sup> (2) Stockholm Chamber of Commerce Arbitration (SCC);<sup>53</sup> and ad hoc arbitration under UNCITRAL.<sup>54</sup> Among these three arbitral tribunals, the UNCITRAL Arbitration Rules are regarded as “the most widely used set of *ad hoc* rules in international arbitration.”<sup>55</sup>

#### D. UNIQUE FEATURES OF RENEWABLE PROJECTS REQUIRING SPECIAL CONSIDERATION FOR THE MANAGEMENT & MITIGATION OF DISPUTES

Given the number of parties and agreements specific to a renewable energy project, it is important to address competing interests and motivations that might underly a dispute.<sup>56</sup> As previously mentioned, the “contractual chain” for a renewable energy project may involve several different parties and agreements.<sup>57</sup> For example, this could take the form of a direct agreement between the project company and a subcontractor, or an agreement between a contractor and an operation and maintenance provider.<sup>58</sup> Thus, for purposes of arbitration, the consolidation of related disputes where there are multiple parties to a renewable energy project may be preferable in certain circumstances.<sup>59</sup>

Notwithstanding the “relatively immature” regulatory framework governing renewable energy projects, new and emerging technologies may have unforeseeable consequences during a project’s construction or operation.<sup>60</sup> For instance, technical issues might arise when new technologies are incorporated into existing,

<sup>50</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 18–19. There are greater than fifty contracting parties to the ECT as of March 2021. *Id.*

<sup>51</sup> Timofeyev, Profaizer & Weiss, *supra* note 25, at 46. For example, a number of investors brought arbitration claims against Spain, one of the “largest markets for investments in ‘green energy,’” under the ECT after the Spanish government began reducing its investment incentives for new renewable power generation in 2008. *Id.* at 47.

<sup>52</sup> See ECT, *supra* note 48, 2080 U.N.T.S. at 121–22.

<sup>53</sup> See *id.* at 122.

<sup>54</sup> See *id.*

<sup>55</sup> Pappas, Rojas & Keshava, *supra* note 7, at 224 (emphasis in original).

<sup>56</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 25.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 25–26.

<sup>60</sup> *Id.* at 26.

more established ones.<sup>61</sup> Given that renewable energy technology has continued to develop at a rapid pace, it is likely that these issues will continue to persist.<sup>62</sup>

Unlike more established industries that have established a body of guidance as to how contracts should be interpreted—such as the oil and gas sector—the renewable energy industry has yet to develop an international standardized set of contracts.<sup>63</sup> This lack of precedent has led to an industry-wide practice of forming agreements based upon heavily amended “proforma contracts,” which are used in the construction industry.<sup>64</sup> As a consequence, renewable energy contracts appear structurally similar on their face, but “vary greatly in terms of detail,” providing a greater opportunity for dispute and less certainty as to their interpretation in a court or tribunal.<sup>65</sup>

Finally, renewable energy projects often involve an “investment contract” between a foreign investor and a state.<sup>66</sup> However, as previously mentioned, investment agreements with a government entity as a counterparty may be susceptible to political risks, which could be potentially detrimental to a project’s success.<sup>67</sup> For example, investment contracts may contain government initiatives to support the investment, such as subsidies or tariffs.<sup>68</sup> Any subsequent change in these policies could render the project an unattractive investment.<sup>69</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 27; *see also* Craig Tevendale & Samantha Bakstad, *Upstream Oil and Gas Disputes*, in *INTERNATIONAL ARBITRATION IN THE ENERGY SECTOR* 25, ¶2.17 (Maxi Scherer ed., 1st ed. 2018) (discussing how having established set of contracts can provide guidance as to their interpretation, which can in turn help avoid disputes).

<sup>64</sup> JOHNSON, MCKENZIE & SAUNDERS, *supra* note 3, at 27. Relevant construction “proforma contracts” include those developed by the International Federation of Consulting Engineers (FIDIC). *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 29. One form of an investment contract is a PPA. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; *see* Timofeyev, Profaizer & Weiss, *supra* note 25, at 47.

<sup>69</sup> *Id.* It may be possible to reduce political risks where an investment contract involves government counterparty by including a “stabilization clause.” *Quickguides: International Investment Protection*, ASHURST LLP (Feb. 2020), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide-international-investment-protection/>.

### III. RISKS OF PARALLEL ARBITRAL PROCEEDINGS & CHALLENGES OF CONSOLIDATION

As the number of parties involved in complex, renewable energy projects have increased, the number of overlapping disputes within a given transaction has resulted in a growing number of parallel proceedings.<sup>70</sup> The energy sector has been described as one of the “most frequently encountered examples of parallel proceedings in commercial arbitration” due to the number of distinct parties and contracts that may contain different arbitration provisions—or no arbitration provision at all—in a project’s chain of agreements.<sup>71</sup> In certain circumstances, it may be possible—and preferable—to consolidate these parallel proceedings into a single arbitration.<sup>72</sup>

There are several risks associated with parallel proceedings.<sup>73</sup> First, parallel proceedings increase the risk of contradictory interpretations and inconsistent outcomes.<sup>74</sup> Second, multiple proceedings of the same or related disputes in different arbitral tribunals constitute a waste of resources.<sup>75</sup> Finally, parallel proceedings increase the risk of windfalls and double—or possibly triple or quadruple—recovery.<sup>76</sup> However, consent among all

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<sup>70</sup> Pappas, Rojas & Keshava, *supra* note 7, at 219. Parallel proceedings occur when “two or more disputes involving the same or overlapping parties, contractual agreements[,] or issues in dispute are adjudicated in more than one forum.” *Id.* at 217 (citing Jamie Shookman, *Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis* 27(4) J. INT’L ARB. 361, 361 (2010)).

<sup>71</sup> *Id.* at 217–19. Parallel proceedings are common in the energy sector because “[i]n such projects, owners will often negotiate multiple contracts with contractors, who in turn negotiate subcontracts with various subcontracts to carry out discrete aspects of the work.” *Id.*

<sup>72</sup> *Id.* at 219.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*; see also Gabrielle Kauffmann-Kohler, *Multiple Proceedings—New Challenges for the Settlement of Investment Disputes*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 6 (2013). For example, a situation could arise where two arbitral tribunals arrive at different interpretations of the same agreement. Pappas, Rojas & Keshava, *supra* note 7, at 219–20. Similarly, a situation could occur in which one tribunal awards damages for a claim, while another tribunal determines that the same claim does not have merit. *Id.*

<sup>75</sup> Pappas, Rojas & Keshava, *supra* note 7, at 219–20; see also Kauffman-Kohler, *supra* note 74, at 6.

<sup>76</sup> Pappas, Rojas & Keshava, *supra* note 7, at 220. For example, in a potential scenario involving a project owner entering into an agreement with a contractor—who in turn hires a subcontractor—if the owner delays the project, the subcontractor might seek to recover damages by initiating

parties to any similar or related disputes is a general prerequisite to consolidating proceedings, which poses a difficulty for complex, capital-intensive projects with multiple parties and contracts.<sup>77</sup> Consequently, it is not uncommon for consolidation efforts to fail in the energy sector due to lack of consent among parties.<sup>78</sup>

Under the UNCITRAL Model Law, courts are instructed to avoid parallel proceedings between parties to the same arbitration agreement by referring the parties to arbitration.<sup>79</sup> However, no direction is given for instances where there are parallel proceedings—with similar facts and issues—arising out of separate agreements.<sup>80</sup> The issue is obvious: How can parallel proceedings be avoided for disputes related to renewable energy projects, which often contain multiple parties operating under several separate agreements?

The following subsections address how various domestic legal systems, investment treaties, international investment laws, and investor–state tribunals have addressed parallel proceedings, along with their approaches to consolidation. Consideration is also given to dispute resolution provisions, which can be utilized to address the risks of parallel proceedings.<sup>81</sup>

### A. DOMESTIC LEGAL SYSTEMS

With respect to addressing parallel proceedings between parties to the same arbitration agreement, most countries follow a relatively uniform approach as a result of the UNCITRAL Model

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an arbitration against the contractor, who might also commence an arbitration against the project owner for damages. *Id.* Here, it is possible that the contractor wins the action against the owner and recovers damages, while the subcontractor is unsuccessful in its own claim. *Id.* This would result in a windfall for the contractor. *Id.*

<sup>77</sup> *Id.* at 219.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 221. There is an important distinction between the UNCITRAL Model Law and the UNCITRAL Arbitration Rules: While the Arbitration Rules are directed at parties involved in a dispute, the Model Law is provided as an example that “national governments can adopt as part of their domestic legislation on arbitration.” *See Frequently Asked Questions—Arbitration*, U.N. COMM’N ON INT’L TRADE L. (UNCITRAL), [https://uncitral.un.org/en/texts/arbitration/faq#:~:text=The%20UNCITRAL%20Model%20Law%20provides,their%20domestic%20legislation%20on%20arbitration.&text=Put%20simply%2C%20the%20Model%20Law,actual\)%20parties%20to%20a%20dispute](https://uncitral.un.org/en/texts/arbitration/faq#:~:text=The%20UNCITRAL%20Model%20Law%20provides,their%20domestic%20legislation%20on%20arbitration.&text=Put%20simply%2C%20the%20Model%20Law,actual)%20parties%20to%20a%20dispute) (last visited Feb. 27, 2023).

<sup>80</sup> Pappas, Rojas & Keshava, *supra* note 7, at 221.

<sup>81</sup> *Id.* at 218–19.

Law<sup>82</sup> and the New York Convention.<sup>83</sup> However, jurisdictions vary in their approach to consolidation.<sup>84</sup> For example, a number of jurisdictions require unanimous consent from all parties to each of the related proceedings in order to consolidate the disputes.<sup>85</sup> On the other hand, other jurisdictions (such as the Netherlands, Hong Kong, and Colombia) permit courts to order the consolidation of arbitration proceedings without party consent.<sup>86</sup> The predominant trend for consolidating parallel proceedings, however, includes a consent requirement from all related parties.<sup>87</sup>

## B. ARBITRATION PROCEDURES

Numerous arbitration institutions have recently introduced procedures to address the challenges of consolidating parallel

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<sup>82</sup> *Id.* at 221 (citing UNCITRAL Model Law on International Commercial Arbitration art. 8(1), UNCITRAL (2006), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf) [hereinafter UNCITRAL Model Law]). UNCITRAL Model Law article 8(1) reads as follows:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative[,] or incapable of being performed.

UNCITRAL Model Law art. 8(1).

<sup>83</sup> Pappas, Rojas & Keshava, *supra* note 7, at 221 (citing New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), 330 U.N.T.S. 3, 40 (June 10, 1958) [hereinafter New York Convention]). New York Convention article II(3) reads as follows:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

New York Convention, 330 U.N.T.S. at 40. While both the UNCITRAL Model Law, *supra* note 82, and the New York Convention instruct parallel proceedings between the same parties (under the same agreement) to be referred to arbitration, “both are silent on what courts are directed to do in circumstances when there are parallel court and arbitration proceedings relating to the same facts, law and issues arising under separate agreements.” Pappas, Rojas & Keshava, *supra* note 7, at 221.

<sup>84</sup> Pappas, Rojas & Keshava, *supra* note 7, at 222.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 224.

arbitration proceedings.<sup>88</sup> However, consent—or lack thereof—remains an outstanding issue that many arbitration rules have yet to address.<sup>89</sup> For example, the UNCITRAL Arbitration Rules do not address the consolidation of parallel proceedings—regardless of whether parties consented.<sup>90</sup> Similarly, the American Arbitration Association (AAA) Commercial Arbitration Rules do not include any procedures for consolidating multiple proceedings into one arbitration.<sup>91</sup> Therefore, absent the unanimous consent of all related parties, any attempt to consolidate renewable energy proceedings under these current rules would be challenging.<sup>92</sup>

In contrast to the UNCITRAL and AAA Arbitration Rules, the London Court of International Arbitration (LCIA) Arbitration Rules permit the consolidation of multiple proceedings not only where all parties to the related proceedings consent, but also in circumstances where there is lack of consent so long as: (1) the arbitrations are consolidated under the same, or compatible, arbitration agreements; (2) the arbitrations are between the same disputing parties; and (3) no tribunals have already been formed for

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* While a number of arbitration rules have attempted to address the issue of consent with respect to consolidation, many have “developed imperfect procedures that may not be effective in many actual circumstances.” *Id.*

<sup>90</sup> *Id.* Although article 17 of the UNCITRAL Arbitration Rules allows additional parties of the same arbitration agreement to be added to an existing arbitration, there is no procedure explicitly permitting the consolidation of two or more related claims—particularly where the related claims involve parties with separate agreements:

The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties . . . .

UNCITRAL Arbitration Rules art. 17(5), UNCITRAL, at 15 (2014), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> [hereinafter UNCITRAL Arbitration Rules].

<sup>91</sup> Pappas, Rojas & Keshava, *supra* note 7, at 224. While the AAA’s Commercial Arbitration Rules allow for the “consideration” of consolidating claims during preliminary hearings, there are no procedures with set criteria “to effect such a consolidation.” *Id.*; see Commercial Arbitration Rules and Mediation Procedures P.2(a)(vi)(c), AM. ARB. ASS’N, at 32 (2013), <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf>.

<sup>92</sup> Pappas, Rojas & Keshava, *supra* note 7, at 224.

the arbitrations.<sup>93</sup> However, consolidation for arbitration proceedings under the LCIA would likely not apply to most renewable energy projects given the number of different parties operating under separate agreements.<sup>94</sup>

The International Chamber of Commerce (ICC) Arbitration Rules apply similar consolidation procedures for parallel proceedings.<sup>95</sup> Multiple arbitrations may be consolidated under the ICC Rules if all parties consent to consolidation, or if all the claims are made under the same arbitration agreement.<sup>96</sup> However, the ICC Rules also permit consolidation in circumstances where claims involve multiple arbitration agreements so long as “the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the ICC Court finds the arbitration agreements to be compatible.”<sup>97</sup> However, these rules would likely not be useful in multi-contract transactions where there is a lack of consent among all parties to consolidate; in such cases, the ICC Rules would only permit consolidation where arbitration agreements are “compatible” and involve the same parties.<sup>98</sup>

### C. ADDRESSING PARALLEL PROCEEDINGS IN THE INVESTOR–STATE CONTEXT

Given the challenges associated with consolidation, many investment treaties have adopted specific procedures to address and mitigate the likelihood of parallel proceedings.<sup>99</sup> A number of investment treaties, for example, have imposed a waiver requirement on a claimant’s right to initiate or advance an

<sup>93</sup> *Id.* at 224–25 (citing LCIA Rules of Arbitration art. 22.1, LONDON CT. OF INT’L ARB. (2014), [https://www.lcia.org/dispute\\_resolution\\_services/lcia-arbitration-rules-2014.aspx#Article%2022](https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx#Article%2022)).

<sup>94</sup> Pappas, Rojas & Keshava, *supra* note 7, at 225. LCIA consolidation procedures only apply in a “very narrow set of circumstances” and would likely not be applicable in multi-party, multi-contract situations where not all parties consent to consolidate disputes. *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see Arbitration Rules art. 10, INT’L CHAMBER OF COM., at 21 (Jan. 1, 2021), <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> [hereinafter ICC Arbitration Rules].

<sup>97</sup> Pappas, Rojas & Keshava, *supra* note 7, at 225; see ICC Arbitration Rules, *supra* note 96, art. 10, at 21.

<sup>98</sup> Pappas, Rojas & Keshava, *supra* note 7, at 225.

<sup>99</sup> *Id.* at 226. Investment treaties can reduce the risks associated with parallel proceedings not only via the consolidation of multiple claims, but also by “striking or staying parallel proceedings.” *Id.*

investment treaty claim before other tribunals and courts.<sup>100</sup> Chapter 11 of NAFTA, for instance, provides that in order to submit a claim to arbitration, “a claimant must waive its right ‘to initiate or continue before any administrative tribunal or court . . . any proceedings with respect to the measure of the disputing Party that is alleged to be a breach.’”<sup>101</sup>

Consolidation is another method to avoid parallel investor–state arbitrations.<sup>102</sup> In circumstances where an investment treaty contains specific provisions for the consolidation of related disputes, parallel proceedings may be consolidated accordingly.<sup>103</sup> However, absent any consolidation procedure, the applicable consolidation rules will be determined either by the arbitration rules chosen by the parties or by “the law of the seat of arbitration.”<sup>104</sup> In either instance, obtaining consent from all related parties to consolidate proceedings remains a general requirement.<sup>105</sup>

Another approach to avoid parallel arbitral proceedings involves “staying” related arbitral proceedings, which involves a tribunal temporarily suspending the arbitration.<sup>106</sup> Typically, an arbitral tribunal will stay proceedings if other arbitral or court proceedings might be relevant to settle the dispute.<sup>107</sup> The tribunal in *SGS v. Pakistan*, for example, suggested a “parallel arbitration between the parties be stayed ‘until such time, if any, as [the] Tribunal . . . issued an award declining jurisdiction over the . . .

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<sup>100</sup> *Id.*; see, e.g., *Detroit Int’l Bridge Co. v. Gov’t of Can.*, PCA Case No. 2012-25 (holding investor must comply with NAFTA waiver requirement for tribunal to hear claim).

<sup>101</sup> Pappas, Rojas & Keshava, *supra* note 7, at 226 (citing NAFTA, *supra* note 45, ch. 11, art. 1121).

<sup>102</sup> *Id.* at 227.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* For example, multiple arbitral proceedings were not consolidated in the *CME* or *Lauder* case, where the Czech Republic refused claimants’ proposal to consolidate proceedings. *Id.* at 227–28; see *CME Czech Republic B.V. (The Netherlands) v. Czech Republic (Partial Award dated Sept. 2001)*; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic (Final Award dated Sept. 2001)*; *Lauder v. Czech Republic (Final Award dated Sept. 2001)*.

<sup>106</sup> Pappas, Rojas & Keshava, *supra* note 7, at 228; see Alessandra Maria Corona Henriques, *Stay of Proceedings*, JUS MUNDI, <https://jusmundi.com/en/document/publication/en-stay-of-proceedings> (Feb. 22, 2023).

<sup>107</sup> Corona Henriques, *supra* note 106 (noting international arbitration rules, including those of ICSID, UNCITRAL, and ICC, recognize arbitrators’ power to stay proceedings within tribunal’s jurisdiction).



dispute, and that award is no longer capable of being interpreted, revised or annulled [under] the ICSID Convention.”<sup>108</sup>

When parallel proceedings are unavoidable, tribunals have occasionally considered decisions and awards from other tribunals and the potential for those awards to prevent double recovery.<sup>109</sup>

#### D. DISPUTE RESOLUTION PROVISIONS

Transactional lawyers can draft dispute resolution provisions to reduce the risks and challenges associated with parallel proceedings.<sup>110</sup> In instances where parties negotiate a number of contracts for the same project, the drafter should ensure that all of the arbitration clauses in each contract are “identical in all respects.”<sup>111</sup> Uniformity among arbitration clauses is essential to preserve the ability to consolidate future disputes.<sup>112</sup> In more complex commercial transactions—for purposes of efficiency—contracts may use summary language to reference separate dispute resolution procedures in other contracts related to the project.<sup>113</sup>

To preserve the option to consolidate potential future disputes from related contracts, each contract’s arbitration clause must expressly consent to consolidation.<sup>114</sup> In addition to obtaining consent to consolidate, parties should also agree to specific

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<sup>108</sup> Pappas, Rojas & Keshava, *supra* note 7, at 228 (quoting *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Proc. Ord. No. 2, at 13); *see generally* *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Proc. Ord. No. 2 (Oct. 16, 2002) (Jus Mundi), [https://jsumundi.com/en/document/decision/en-sgs-societe-generale-de-surveillance-s-a-v-islamic-republic-of-pakistan-procedural-order-no-2-provisional-measures-wednesday-16th-october-2002#decision\\_5528](https://jsumundi.com/en/document/decision/en-sgs-societe-generale-de-surveillance-s-a-v-islamic-republic-of-pakistan-procedural-order-no-2-provisional-measures-wednesday-16th-october-2002#decision_5528).

<sup>109</sup> Pappas, Rojas & Keshava, *supra* note 7, at 220, 228 (referencing *Ambiente Ufficio SpA and others v. Argentine Republic*, where the tribunal highlighted the importance of deciding the claim “on its own needs and merits” while also emphasizing the need to acknowledge the decisions of its “sister tribunal”); *see generally* *Ambiente Ufficio SpA and others v. Argentine Republic*, ICSID Case No. ARB/08/09.

<sup>110</sup> Pappas, Rojas & Keshava, *supra* note 7, at 218–19.

<sup>111</sup> *Id.* at 229.

<sup>112</sup> *Id.* Uniformity among arbitration clauses is critical given that “[d]ifferences in the applicable arbitration rules, the number of arbitrators and the method of appointing them, and the seat of arbitration can be fatal to future consolidation.” *Id.*

<sup>113</sup> *Id.* For example, contracts can include an “umbrella arbitration” agreement that would apply to each of the various contracts related to a single project. *Id.*

<sup>114</sup> *Id.*

consolidation procedures.<sup>115</sup> When it is unclear if a party has engaged the services of a subcontractor, parties can mitigate the risk of parallel proceedings by providing in the “head contract” that the parties may not enter into any subcontract without an identical arbitration clause and express consent to consolidation.<sup>116</sup>

Finally, drafters of dispute resolution provisions should also consider how to manage risks if related disputes cannot be successfully consolidated.<sup>117</sup> Given that arbitral awards are binding solely on the parties to the arbitration, opt-in or opt-out provisions may be used to give parties the option to participate in arbitration.<sup>118</sup> Regardless of the party’s decision to participate, the party that opts out nonetheless agrees to be bound by the decision of the tribunal.<sup>119</sup> This provision can lower the risk of the same issue or dispute “being re-argued by multiple parties, with potentially different results.”<sup>120</sup>

#### IV. PROPOSED AMENDMENTS TO THE UNCITRAL ARBITRATION RULES TO ADDRESS CONSOLIDATION

As previously described in Part II of this article, the UNCITRAL Arbitration Rules currently do not contain any consolidation provisions for parallel arbitral proceedings.<sup>121</sup> Considering the complex, multi-party, and multi-contract nature of renewable energy projects—along with the risks associated with parallel proceedings—the UNCITRAL Arbitration Rules should implement consolidation provisions that expressly permit the consolidation of parallel arbitration proceedings. Additionally, the Rules should—under certain circumstances—permit the consolidation of proceedings regardless of whether all parties consent.

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (alluding to numerous scenarios where consolidation might fail, such as lack of party consent to consolidate or incompatible arbitration agreements).

<sup>118</sup> *Id.* at 230.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (stating in situations where parallel proceedings involve numerous agreements governed by different legislation, each agreement could expressly provide that in event consolidation is legally unattainable, arbitrations will instead be heard before same tribunal concurrently, effectively consolidating proceedings “for all practical purposes”).

<sup>121</sup> See Pappas, Rojas, & Keshava, *supra* note 7, at 224.

**A. CONSOLIDATION OF PARALLEL ARBITRATION  
PROCEEDINGS SHOULD BE PERMITTED WHERE ALL  
PARTIES CONSENT TO CONSOLIDATION**

The UNCITRAL Arbitration Rules should include a provision permitting the consolidation of parallel arbitral proceedings in which all related parties consent. A consent requirement has become a common prerequisite for consolidation within domestic legal systems.<sup>122</sup> Additionally, a number of arbitration institutions—including the LCIA and ICC—allow for consolidation of multiple proceedings when all parties consent.<sup>123</sup>

Although a growing number of legal systems and arbitration tribunals permit consolidation, some critics have doubted the “workability” of a consolidation provision.<sup>124</sup> In particular, a complex issue may arise when consolidation subjects parties to arbitration proceedings that differ from the terms in their original arbitration agreement, resulting in potentially “unfair solutions.”<sup>125</sup>

However, notwithstanding a party who already consented to consolidate, the risks associated with parallel proceedings outweigh a scenario where arbitration subjects a party to different terms from the party’s original arbitration agreement. Parallel proceedings not only create procedural inefficiencies for the arbitration tribunal, but also increase the risk of contradictory interpretations and inconsistent outcomes, thereby creating unfair solutions to related issues.<sup>126</sup> Furthermore, parallel proceedings increase the risk of windfalls and double—or even triple or quadruple—recovery by a single party.<sup>127</sup> To prevent and mitigate these risks, UNCITRAL

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<sup>122</sup> *Id.* at 224.

<sup>123</sup> *Id.*

<sup>124</sup> BORZU SABAHI, NOAH RUBINS & DON WALLACE JR., *INVESTOR–STATE ARBITRATION* 277 (2d ed. 2019).

<sup>125</sup> Comm’n on Int’l Trade L., Rep. of the Working Grp. on Arb. and Conciliation on the Work of Its Forty-Eighth Session, U.N. Doc. A/CN.9/619, ¶¶ 119–20, at 23–24 (Feb. 5–7, 2008). The UNCITRAL Rules were revised by UNCITRAL in 2007, when the Working Group considered consolidation provisions that were ultimately excluded from the revised 2010 version. SABAHI, RUBINS & WALLACE JR., *supra* note 124, at 277.

<sup>126</sup> See Kauffman-Kohler, *supra* note 74, at 6–7.

<sup>127</sup> *Id.* at 6; *see also* Pappas, Rojas & Keshava, *supra* note 7, at 220. For an example of how parallel proceedings can result in double recovery, consider a scenario in which a project owner procured equipment from a manufacturer pursuant to an agreement containing an arbitration clause under the ICC. *Id.* The owner then hired a contractor to install the equipment under a separate agreement, containing an LCIA arbitration clause. *Id.* Shortly after the equipment was installed, a fire destroyed the facility. *Id.* The owner commenced two separate arbitration claims: an

should join the growing number of arbitration tribunals that have permitted consolidation where all related parties consent.<sup>128</sup>

**B. CONSOLIDATION OF PARALLEL ARBITRATION PROCEEDINGS SHOULD BE PERMITTED WHERE ARBITRATIONS INVOLVE THE SAME PARTIES**

The UNCITRAL Arbitration Rules should include a provision permitting consolidation where parallel arbitral proceedings involve the same parties. The ICC Rules have already adopted this provision.<sup>129</sup> While similar doubts as to the “workability” of this consolidation provision may be argued, allowing for the consolidation of parallel proceedings involving the same parties would directly mitigate procedural inefficiencies by limiting multiple proceedings to one arbitration.<sup>130</sup> Additionally, consolidating related disputes in these circumstances would limit the risk that the tribunal will make contradictory and inconsistent decisions based on similar facts and issues.<sup>131</sup>

**C. CONSOLIDATION OF PARALLEL ARBITRATION PROCEEDINGS SHOULD BE PERMITTED WHERE ALL CLAIMS FALL UNDER THE SAME ARBITRATION AGREEMENT OR DIFFERENT ARBITRATION AGREEMENTS THAT ARE COMPATIBLE**

The UNCITRAL Arbitration Rules should permit the consolidation of parallel arbitral proceedings where the claims arise under the same arbitration agreement, or under different arbitration agreements that are compatible with one another. The ICC Arbitration Rules have adopted a similar procedure, permitting consolidation where all claims are made under the same arbitration agreement and in circumstances where the ICC determines the arbitration agreements to be “compatible.”<sup>132</sup> Broadening the opportunity for parties to consolidate related disputes under the UNCITRAL Rules would particularly mitigate the risks of parallel proceedings related to renewable energy transactions given the

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ICC arbitration claim against the manufacturer (alleging faulty equipment as the cause of the fire), along with a parallel LCIA claim (alleging improper installation as the cause of the fire). *Id.* Here, “one can see how conflicting findings of fact with respect to the cause of the fire . . . could result in the potential for double recovery. . . .” *Id.*

<sup>128</sup> See Pappas, Rojas & Keshava, *supra* note 7, at 224–25.

<sup>129</sup> *Id.*

<sup>130</sup> See Kauffman-Kohler, *supra* note 74, at 6.

<sup>131</sup> *Id.*

<sup>132</sup> Pappas, Rojas & Keshava, *supra* note 7, at 225.

number of different parties and contracts operating under a single project.<sup>133</sup>

While the UNCITRAL Arbitration Rules allow for a consolidation procedure similar to that permitted by the ICC, the viability of such a provision is subject to question—particularly given that absent party consent, the ICC narrowly limits the consolidation of multi-contract claims to circumstances where arbitration agreements are compatible and involve the same parties.<sup>134</sup> The ICC Rules, therefore, would likely not apply to transactions that involve a number of different parties and contracts, even though each arbitration agreement may appear similar on its face.<sup>135</sup>

To address this issue, the UNCITRAL Arbitration Rules should allow various parties to consolidate related disputes under different arbitration agreements, but implement a factor analysis to determine the “compatibility” of agreements. Such factors may include whether the disputes involve similar facts, legal relationships, and other relevant issues that the tribunal would weigh and analyze to determine whether the arbitration agreements are sufficiently compatible for consolidation.

#### D. CIRCUMSTANCES PERMITTING CONSOLIDATION REGARDLESS OF PARTY CONSENT

Finally, the UNCITRAL Rules should enforce consolidation—regardless of whether all parties to related proceedings consent—in circumstances where it is likely that parallel proceedings could lead to windfalls and double recovery. This issue is particular to renewable energy projects, where there are multiple parties engaged in the development and operation of a project.<sup>136</sup> For example, as previously discussed in the “Key Contractual Relationships” subsection,<sup>137</sup> a project owner may engage a contractor, who in turn engages a subcontractor.<sup>138</sup> If the project owner delays the project, then the subcontractor may initiate an arbitration claim against the contractor, who may also initiate a claim against the project owner.<sup>139</sup> Consolidating related claims in this scenario could prevent or mitigate the risk that one tribunal

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<sup>133</sup> *Id.* at 219.

<sup>134</sup> *Id.* at 225.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See discussion *supra* Section II.C.

<sup>138</sup> Pappas, Rojas & Keshava, *supra* note 7, at 220.

<sup>139</sup> *Id.*

allows the contractor to recover against the project owner while the subcontractor is unsuccessful in its own separate claim.<sup>140</sup>

This consolidation procedure might receive criticism given that consent from all parties to related arbitrations is a relatively common prerequisite for consolidation.<sup>141</sup> Additionally, parties may be forced to adhere to arbitral terms that differ from the terms originally agreed upon.<sup>142</sup> However, as previously described, consolidating related disputes in such a scenario mitigates the risk of contradictory interpretations, inconsistent outcomes, and inefficient procedures.<sup>143</sup> The tribunal should carefully exercise its discretion on a case-by-case basis, as the decision of whether to apply this provision would be highly fact-sensitive.

## V. CONCLUSION

The risks and challenges associated with parallel arbitral proceedings are particularly prominent in the energy industry.<sup>144</sup> Considering the number of different parties involved in the investment, development, and operation of a renewable energy project—along with rapid developments in technology and the overall regulatory landscape—the rise in parallel disputes with related facts and elements is unsurprising.<sup>145</sup> While a number of arbitral tribunals have attempted to mitigate the risks of parallel proceedings by introducing procedures for consolidation, the effectiveness of these procedures remains uncertain.<sup>146</sup> Ultimately, the global transformation and attitude toward the energy industry demands that international arbitration communities adapt their procedures to address this new and evolving wave of disputes.

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 224.

<sup>142</sup> See Comm'n on Int'l Trade L., *supra* note 125, ¶ 119, at 23.

<sup>143</sup> See generally Kauffman-Kohler, *supra* note 74.

<sup>144</sup> Pappas, Rojas & Keshava, *supra* note 7, at 217.

<sup>145</sup> *Id.* at 217–18.

<sup>146</sup> *Id.* at 224.