

UNCITRAL Colloquium on the Law of International Trade for a Greener Future

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Developing Notes on Climate Change-Related Disputes

1. Which gaps in the existing UNCITRAL instruments ?
2. Why Notes?
3. What would the Notes embrace?

1. Which gaps in existing UNCITRAL instruments ?

1.1 Transparency

1.2 Participation of third parties (*amicus* briefs)

1.3 Involvement of experts

1. Which gaps in existing UNCITRAL instruments ? -

1.1 Transparency

Article 3 : Publication of documents of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

1. Subject to article 7 , the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written sub- missions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

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1. Which gaps in existing UNCITRAL instruments ? -

1.1 Transparency

Resolution adopted by the General Assembly on 16 December 2013

The General Assembly:

- *Believing* that rules on transparency in treaty-based investor-State arbitration would contribute **significantly** to the establishment of a **harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance**
- Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the **public interest involved in such arbitrations**
(emphasis added)

1. Which gaps in existing UNCITRAL instruments ? -

1.1 Transparency

- **Key impact of UNCITRAL Transparency Rules:**
 - Exemplarity
 - Harmonisation of the legal field
 - Consistency
- **No such provision outside of investment disputes**

1. Which gaps in existing UNCITRAL instruments ? -

1.2 Public participation – *amicus* briefs

Article 4(1) of UNCITRAL Transparency Rules:

After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (“third person(s)”), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

1. Which gaps in existing UNCITRAL instruments ? -

1.2 Public participation – *amicus* briefs

Article 4 (3) of UNCITRAL Transparency Rules:

In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

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No such provision outside of investment disputes

1. Which gaps in existing UNCITRAL instruments ? -

1.3 Participation of technical experts

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

2. Why Notes?

General argument with respect to Notes as a normative mechanism

- Flexibility
- Efficiency

2. Why notes?

Rationale specific to climate change related disputes

- Emergency
- Globality
- Transcending the fragmentation

3. What would the Notes embrace?

3.1 Definition of climate-change disputes

3.2 Acknowledgment of public interest

3.3 Flexibility as to Applicable Law

3.4 Specialization of arbitrators (?)

3.5 Dispute Boards

3. What would the Notes embrace?

3.1 A definition

- **Regardless of possible categorization of disputes, a broad definition of climate-change dispute including both subject-matter of disputes and impact of dispute on public change litigation**

3. What would the Notes embrace?

3.2 Public interest

- Acknowledge and emphasize the unique and the global public interest of the climate-change disputes
- Acknowledge consequences (like with the UNCITRAL Transparency Rules) of the public interest on the legal regime of various aspects of climate-change disputes

3. What would the Notes embrace?

3.3 Applicable Law

3.3.1 Applicable law to the merits

3.3.2 Applicable law to the procedure

3. What would the Notes embrace?

3.3 Applicable Law

3.3.1 Applicable law to the merits

Article 28(1) Model Law :

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

3. What would the Notes embrace?

3.3 Applicable Law

3.3.1 Applicable law to the merits

Emphasize flexibility in climate-change considerations as to the applicable law to increase *ex officio powers* of arbitral tribunals

- If the applicable law or the imperative provisions of the seat of arbitration do not address the question which is in dispute
- If application of the applicable law or of the imperative provisions of the seat of arbitration leads to consequences detrimental to the climate change mitigation

3. What would the Notes embrace?

3.3 Applicable Law

3.3.1 Applicable law to the procedure

Article 19 of Model Law. Determination of rules of procedure

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

3. What would the Notes embrace?

3.3 Applicable Law

3.3.1 Applicable law to the procedure

Paragraph 79 of the UNCITRAL Notes on Organizing Arbitral Proceedings provides with respect to evidence obtained by the arbitral tribunal from third parties:

Where necessary and permitted by applicable arbitration law and arbitration rules, the arbitral tribunal may itself take appropriate steps to obtain evidence from a third party after consulting the parties

To go beyond applicable arbitration law and arbitration rules?

3. What would the Notes embrace?

3.4 Appointment of Specialized Arbitrators (?)

- Not necessarily to emphasize specialization as criterion of appointment
- To embed possibility of accelerated appointment of arbitrators

3. What would the Notes embrace?

3.5 Dispute Boards

- In Procurement disputes
- In Energy transition disputes