

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

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# Taxonomy of Climate Change-Related Disputes

## 1. Diverse and fragmented normative landscape of climate change-related disputes

1.1 Which elements are helpful to categorize climate change-related disputes?

1.2 How would the categorization contribute to a better resolution of climate change-related disputes? Which elements are relevant to an efficient categorization of climate change-related disputes?

# Taxonomy of Climate Change-Related Disputes

## 1.1 Which elements are helpful to categorize climate change-related disputes?

- Climate change considerations are raised because they are the subject matter of disputes
- Climate change considerations are raised indirectly/incidentally to the subject matter of disputes

# Taxonomy of Climate Change-Related Disputes

## 1.1.1 Climate change considerations are raised because they are the subject matter of disputes

- Examples of such claims in investor-State arbitrations where investors challenge State's measure to decarbonise its energy systems, such as:
    - Introducing a scheme to phase out coal
    - Revoking a certain shale gas exploration licence
    - Implement scheme to prohibit the use of coal for electricity generation
    - Roll-back of incentives for renewable energy and clean energy technologies
- Also, future claims for
- Failure to implement adequate measures for decarbonisation

# Taxonomy of Climate Change-Related Disputes

## 1.1.1 Climate change considerations are raised because they are the subject matter of disputes

- Examples of such claims in commercial arbitration:

Misuse of emission allowances: In case of emission allowances, claim over breach of obligation to invest the proceeds from the sale of emission allowances in carbon reduction emissions.

*SCC, No. 2016/183, UAB Vilniaus Energija and Veolia Environnement S.A. v. Lithuania*

# Taxonomy of Climate Change-Related Disputes

## 1.1.2 Claims that have a climate change component, however climate change does not constitute the basis of the cause of action

- Examples :

- Dispute over infrastructure construction project

- Shareholders' claim for failure to disclose some business activities including ones having a climate change impact

# Taxonomy of Climate Change-Related Disputes

ICC Commission on Arbitration and ADR in their Report “Resolving Climate Change Related Disputes through Arbitration and ADR” suggests a similar categorization arising out of:

- (i) contracts relation to the implementation of energy or other systems transition, mitigation or adaptation (here the subject matter of the dispute is climate change mitigation);
- (ii) contracts without any specific climate-related purpose or subject-matter but where a dispute involves or gives rise to a climate related issue;
- (iii) other specific agreements entered into to resolve existing climate change or related environmental disputes, potentially involving impacted groups or populations.

# Taxonomy of Climate Change-Related Disputes

## 1.2 How would categorization of climate change related disputes contribute to a better resolution of the latter?

- Acknowledgement of the unique challenge where resolution of a dispute, maybe a purely private dispute, has an impact on a global problem, climate change.
- Efficient categorization to construe a specific legal regime for climate change-related disputes



# Taxonomy of Climate Change-Related Disputes

## 2.Challenges and UNCITRAL's possible input

### 2.1 Source of difficulties

- Increasing relevance of climate change considerations impacting various if not all sectors of economic activity
- Multiplication of national norms
- Ways the norms are established: national policies, impacting
- Intertwined nature between substance and form

# Taxonomy of Climate Change-Related Disputes

## 2.2 UNCITRAL's input

- To categorize with a focus on the subject matter of dispute but also on the impact of the adjudicated matters as being climate-change related

# Taxonomy of Climate Change-Related Disputes

## 2.2 UNCITRAL's input

### 2.2.1 Definition of internationality : renewal?

Article 1(1) of the MAL: The Law applies to international commercial arbitration.

Article 1(3) of the MAL: An arbitration is international if

*(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*

*(b) one of the following places is situated outside the State in which the parties have their places of business:*

*i. the place of arbitration if determined in, or pursuant to, the arbitration agreement*

*ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*

*(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.*

# Taxonomy of Climate Change-Related Disputes

## 2.2 UNCITRAL's input

### 2.2.1 Definition of internationality

*Quid* purely domestic arbitrations with a climate change impact?

Renewal of internationality criteria to encompass any arbitration related (directly or indirectly) to climate change: "Climatic internationality"

# Taxonomy of Climate Change-Related Disputes

## 2.2 UNCITRAL's input

### 2.2.2 Derogatory procedural regime : harmonizing substance with procedural tools

The purpose is to build a **derogatory legal regime** (*e.g.* transparency, applicable law, third party participation, arbitral appointed expert and discretionary decision on costs entailed by such experts, to be discussed later)

# Taxonomy of Climate Change-Related Disputes

## 2.2 UNCITRAL's input

### 2.2.3 Public policy

Setting Aside (Article 34 of the Model Law); Recognition and Enforcement (Article 36 of the Model Law)

*"the award is in conflict with the public policy of this State"*

In light of the "climatic internationality", in climate-change disputes, to overcome the nexus to the State.

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## 2.2 UNCITRAL's input

### 2.2.3 Public policy

- Legislation on climate change issues is far from being harmonized but continues to play a crucial role as Paris Agreement is between state parties and the commitments thereunder apply to state parties and not to non-state parties unless they have been incorporated into domestic regulation (no direct effect)

Example: French Council of State (Supreme Administrative Court), *Affaire de Grande Synthe*:

*“Si les stipulations de la CCNUCC et de l’Accord de Paris sont dépourvues de l’effet direct, elles doivent néanmoins être prises en compte dans l’interprétation du droit positif”.*

# Taxonomy of Climate Change-Related Disputes

## 2.2 UNCITRAL's input

### 2.2.3 Public policy

- To include climate change into the notion of transnational public policy: *principles and rules that are so vitally important to the world community that any contravention of them by unilateral action or agreement cannot have legal force*
- How not to undermine legal certainty in arbitration?