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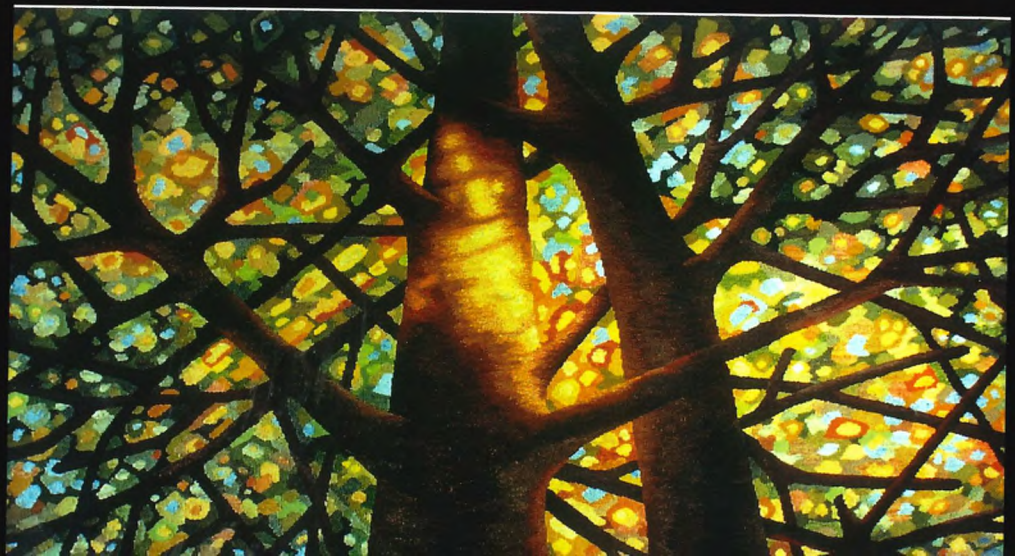
DIVERSITY IN INTERNATIONAL ARBITRATION

Why it Matters and How to Sustain It



18. Transparency in international arbitration as a catalyst to combat climate change: is it time to embrace democratised access to data in climate change related disputes?

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1. INTRODUCTION

International arbitration is often contested as a whole or in part, (in context of investor-state arbitration) for its negative and cooling-down impact on environmental (State) policies across the globe.[1] Despite the positive efforts undertaken by the international arbitration community in recent years,[2] international arbitration is still perceived by many as a tool for multinational corporations to pursue their egotistic (economic) interests while disregarding environmental and societal costs.

Yet, there are numerous indications in the corporate world that businesses have begun to understand that they have a role to play in reducing their impact on the environment and – most importantly – are willing to act on it.[3] Whilst

[1] See e.g., L. Sachs, E. Merrill and L. Johnson, "Environmental Injustice: How Treaties Undermine the Right to a Healthy Environment", 13 November 2019, Kluwer Arbitration Blog.

[2] See e.g., IBA Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption*, July 2014 ("IBA Task Force Report"); ICC Report on Resolving Climate Change Related Disputes through arbitration and ADR, November 2019 ("ICC Report"). Furthermore, see e.g., The Campaign for Greener Arbitrations <https://www.greenerarbitrations.com/greenpledge> (accessed 30 May 2022); see also, L. Greenwood and K.A.N. Duggal, "The Green Pledge: No Talk, More Action", 20 March 2020, Kluwer Arbitration Blog.

[3] See e.g., BlackRock Corporate Sustainability engagements <https://www.blackrock.com/corporate/sustainability> (accessed 14 January 2022); N. Remy, E. Speelman and S. Swartz, "Style that's sustainable: A new fast-fashion formula", 20 October 2016, McKinsey.com <https://www.ft.com/content/f776ea60-2b84-4b72

this is a good sign, the records on the exact engagement of businesses are not equivocal.[4] That is why an increased transparency of the dispute resolution mechanism is essential.

This chapter argues that transparency and permission for a third-party intervention in an international dispute resolution mechanism should therefore be a default component of corporate social responsibility (CSR) strategy of environmentally conscious companies.[5] Accepting these two developments would in turn create a knowledge bank and ideally an improved consistency in dealing with climate change related disputes.[6]

This chapter will focus on four issues related to climate change related disputes: how to define climate change related disputes (section 2); why transparency (section 3) and diversity of viewpoints by third party interventions (section 4) would enhance sustainability. Finally, this paper explains what are the tools that each stakeholder involved in the arbitral process can use to facilitate the resolution of climate change related disputes. It is concluded that when deciding on issues that are of public interest such as combating climate change, arbitral tribunals actions must be held to the same transparency standard as the national courts. The international arbitration community has a key role to play in this transition.

2. WHAT ARE CLIMATE CHANGE RELATED DISPUTES?

Before any analysis is presented, it is of course necessary to first define 'climate change related disputes'. So far, there is no unanimous position of what climate change related disputes entail.[7]

-9765-2c084bff6e32> (accessed 14 January 2022); Earth.com., *The World's 50 Most Sustainable Companies in 2022*, 2 February 2022.

[4] See e.g., T. Fancy, "The Secret Diary of a 'Sustainable Investor'– Part 1", 20 August 2021, Medium.com; K.P. Pucker, "The Myth of Sustainable Fashion", 13 January 2022, Harvard Business Review.

[5] By "Environmentally conscious companies" one should understand the companies that (voluntarily) makes the effort to mitigate its impact on climate – sustainability and transparency are intertwined, see e.g., R. Arratia, "True sustainability needs transparency", 17 March 2011, The Guardian; G. Steele, "Green Business Is Good Business: Why Transparency Is Key For Corporate Sustainability", 11 February 2011, Forbes.

[6] Cf with a similar initiative related to the climate change litigations at <http://climatecasechart.com/> (accessed 14 January 2022). More recently, the database also includes information on investment treaty arbitrations.

[7] See e.g., Columbia Law School, which created a database tracking developments in litigation and administrative proceedings related to climate change (http://climatecasechart.com/) and the distinction of the climate change related disputes therein. See also ICC Report (n 2) 2.1 and the definition chosen by the Permanent Court

The definition of climate change related disputes should encompass disputes arising out of attempts at preventing climate change and enhancing sustainability. This is the approach taken in a recent report by the Stockholm Chamber of Commerce (SCC) on Green Technology Disputes in Stockholm which defines climate change related disputes as: "cases [...] that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts".[8]

These types of disputes will likely be resolved before arbitral tribunals,[9] since they indeed mostly emerge in sectors which are familiar with arbitration,[10] inter alia because they often involve highly technical issues.[11]

While defining climate-change related disputes is challenging, it should not hinder enhancing transparency. This chapter refers to climate change related arbitration, but its recommendations arguably apply to any dispute affecting climate even if it falls outside the scope of the definition outlined above.

3. A CALL FOR TRANSPARENCY IN CLIMATE CHANGE RELATED DISPUTES

In a modern data-driven society, information is power. For many years, confidentiality was presented as one of the main advantages of arbitration proceedings,[12] motivated by the need to protect business plans, financial results

of Arbitration at <https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/> (accessed 15 January 2022).

[8] S.D. Andrina, "SCC on Green Technology Disputes in Stockholm", August 2019, p.4. Further research on the definition of climate change related dispute is necessary, however.

[9] J. Levine, "Adopting and Adapting Arbitration for Climate Change-Related Disputes" in W. Miles (ed.), *Dispute Resolution and Climate Change: The Paris Agreement and Beyond* (ICC, 2017), Ch.3, p.25; S. Field and H. Laufer, "Climate Change, the Environment and Commercial Arbitration", 9 March 2020, Kluwer Arbitration Blog.

[10] ICC Report (n 2), 3.2. See also Andrina (n 9), pp.7–8.

[11] Andrina (n 9), p.12.

[12] G. Born, *International Commercial Arbitration* (3rd edn 2021), p.3003; B. Hanotiau, "International Arbitration in A Global Economy: The Challenges of the Future" (2011) 28(2) J. Int'l Arb. 90: "arbitration has been stimulated by [...] its intrinsic qualities: [...] its privacy and confidentiality".

and essential security interests.[13] As a matter of principle, it is for the parties to agree to the level of confidentiality they want to assign to their arbitration.[14]

However, there has been a policy shift in both investment and commercial arbitration towards more transparency (section 3.1). Considering the evident public interest implications of climate change related disputes, different stakeholders involved in the arbitral process (including environmentally conscious companies) should consider making transparency a default rule for climate change related arbitrations (section 3.2).

3.1 Gradual Evolution Towards Transparency in Both Commercial and Investment Arbitrations

Commercial and investment arbitrations are quite different fields of practice due to the nature of the claim and the parties they involve. While commercial arbitration deals with disputes between private actors arising out of commercial contractual obligations, investment arbitration involves disputes between companies and States arising under investment treaties. The continued vitality of both fields of practice fundamentally depends on public and political belief in the integrity of the process.[15] After being the subject of criticism in the past years (albeit mostly related to investment arbitration),[16] solutions have emerged embracing transparency to regain the public's trust in the arbitral system and a considerable shift has been made away from the principle of confidentiality.

One of the first steps towards transparency was taken in investment arbitration where it is generally accepted that arbitrations involving States or State entities are "more or less public, or semi-public".[17] Already in 2006, the International Centre for the Settlement of Investment Disputes (ICSID) amended its Rules of Procedure for Arbitration Proceedings (ICSID

[13] E.U. Moneke, "The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?" (2020) 86(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 157.

[14] L. Mistelis, "Confidentiality and Third Party Participation" (2005) 21(2) Arb. Intl. 219.

[15] D. Caron, "Light and Dark in International Arbitration: The Virtues, Risks and Limits of Transparency" in N. Kaplan, *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum* (2018), pp.215–216.

[16] See e.g., Moneke (n 14), Introduction and p.168.

[17] Mistelis (n 15), p.219.

Arbitration Rules) to include transparency measures such as allowing third parties to attend hearings and to make *amicus curiae* submissions.[18]

The ICSID initiative was followed by the United Nations Commission on International Trade Law (UNCITRAL), which introduced the Rules on Transparency in Treaty-based Investor-State Arbitration in 2013 establishing public disclosure of witness statements, orders and awards and enabled open hearing and third-party participation through *amicus curiae* briefs.[19] These rules are now part of the UNCITRAL Arbitration Rules,[20] and thanks to the 2014 Mauritius Convention,[21] are also applicable to investor-state arbitral proceedings, regardless of the applicability of the UNCITRAL Arbitration Rules to the arbitration.[22] The Rules on Transparency were qualified as "the most recent successful results of a multilateral endeavor to reform investment arbitration".[23]

Even though the trend towards greater transparency in investment arbitration has encouraged suggestions for similar approaches in commercial arbitration, the shift towards transparency is still limited. As highlighted by Born, the treatment of confidentiality is currently unsatisfactory and national laws or arbitral institutions did little to clarify either the existence or scope of confidentiality obligations in international arbitration.[24]

Nonetheless, one step of particular importance is perhaps an initiative taken two years ago by the International Chamber of Commerce (ICC) which decided to automatically publish all awards and dissenting opinion made as of 1 January 2019, no less than two years after notification of the award to the parties, absent objection by one or more party.[25] The ICC therefore transformed what was the exception, i.e., the publication of awards, into the new normal.

[18] See Rules 32 and 37(2) of the 2006 ICSID Arbitration Rules. The ICSID Arbitration Additional Facility Rules were also amended to enhance transparency in arbitral proceedings, see Article 39(2). Also, T. Ishikawa, "Third party participation in Investment Treaty Arbitration" (2010) 59 ICQL 384. Same holds true in the 2022 version of the ICSID Rules. See e.g., Rule 67 of the ICSID 2022 Rules.

[19] Moneke (n 14), p.172.

[20] In 2013, the UNCITRAL revised its Rules and included Article 1(4), which reads: "For investor-state arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('Rules on Transparency'), subject to Article 1 of the Rules on Transparency".

[21] See The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 10 December 2014.

[22] Moneke (n 14), p.179.

[23] Ibid, p.171.

[24] Born (n 13), p.3043.

[25] Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1 January 2019, 41–43.

However, if the parties do not object to the publication, they can still decide to keep all sensitive information protected by redacting the award. There are reasons to believe that parties will employ this possibility since confidentiality remains one of the key reasons why parties decide to refer their disputes to arbitration.[26]

Thus, while there is an increasing shift towards transparency as a general principle in international arbitration, confidentiality has simultaneously been preserved.[27] The parties' consent is still the underlining requirement for any publication.[28]

There seems to be no real explanation why commercial and investment arbitration should follow different rules when it comes to confidentiality since, just like investment arbitrations, commercial arbitrations involving either States or private parties can also affect multiple public issues.[29] The role of the private sector in global environmental governance has moved "from marginal to central",[30] and even more so when climate change related disputes are concerned. In such circumstances, transparency should become the new normal in both investment and commercial arbitrations.

3.2 Relevance of Transparency in Light of the Public Implications of Climate Change Related Disputes

As already addressed, climate change related disputes are a textbook example of cases with public implications and interests.[31] In view of the criticism that arbitration is already confronted with for being "unduly secretive",[32] one can fairly expect more transparency when the outcome of the proceedings may affect the climate.

[26] Born (n 13), p.3044.

[27] Born (n 13), p.3049.

[28] The parties can object to the publication of awards according to the ICC Rules. Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1 January 2019, 41–43.

[29] Born (n 13), p.3060.

[30] A. Magnusson, *New Arbitration Frontiers: Climate Change*, ICCA Congress Series, Volume 20, 2019, p.1027.

[31] ICC Report (n 2), 5.69; W. Miles and M. Lawry-White, "Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ISCID" (2019) 34(1) ICSID Review 28.

[32] *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amicus Curiae, 15 January 2011, 49.

More transparency may positively improve climate change related arbitrations legitimacy, which is clearly under scrutiny nowadays.[33] In this context, one can only echo the ICC Commission, which, in its report, concluded that: "[i]ncreasing transparency of arbitral proceedings could assist in enhancing the perception of legitimacy of those proceedings with broader stakeholders"[34] and recommended that proceedings be opened to the public and that arbitral awards be published.[35]

Furthermore, transparency has traditionally been the main incentive to achieve compliance in international environmental law[36] and is therefore key to ensuring the compliance by States and companies with environmental laws and regulations.

Additionally, and even if one does not accept that arbitral awards should constitute precedent for subsequent arbitrations, more transparency in climate change related arbitrations would at least provide guidance for future tribunals deciding cases and for parties by predicting the possible outcome of the dispute.[37]

In other fields of law where the public's interest is similarly significant, such as human rights related cases, transparency has already become a staple. The Hague Rules on Business and Human Rights Arbitration ("Hague Rules") include an entire section on transparency which follows the UNCITRAL Rules on Transparency and provides inter alia for the publication of the parties' submissions and the orders, decisions and awards of the arbitral tribunal – subject to reservations.[38] Even though the Hague Rules are still nascent, and despite some criticism, they set a great example for other fields of law involving public matters.

Transparency has further been recognised as a driving force by the recent policy recommendations. the International Bar Association Climate Change Justice and Human Rights Tasks Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption* ("IBA Task Force Report") encourages "all arbitral institutions to take appropriate steps to develop rules and/or exper-

[33] While "legitimacy crisis" focuses currently on investment arbitration, similar narratives of critics may be used against commercial arbitration, when climate change related issues that affect societies are being decided behind closed doors.

[34] ICC Report (n 2), 5.69.

[35] Ibid, 5.70.

[36] Magnusson (n 31), pp.1029–1030.

[37] Born (n 13), pp.3049–3050.

[38] The Hague Rules on Business and Human Rights Arbitration, Section IV Transparency. Regrettably, the 2001 PCA Rules on Environmental Disputes did not include any provision on matters related to transparency or third-party participation.

tise specific to the resolution of environmental disputes, including procedures to assist consideration of community perspectives".[39]

This call is not limited to investment arbitration but is also addressed to the commercial arbitration community, especially when it involves States or State-owned entities or (environmentally responsible) corporations.[40] Keeping transparency alive in commercial arbitration might be particularly relevant following a major overhaul of investment arbitration, which could result in parties wishing to escape a new untested system (e.g. multilateral investment court) and benefit from contract-based arbitration.

4. A CALL FOR INCLUSIVENESS OF *AMICUS CURIAE* IN CLIMATE CHANGE RELATED DISPUTES

In order to enhance transparency in arbitral proceedings involving climate change related disputes, third parties should more easily be granted access to the proceedings, notably in the form of *amicus curiae* (section 4.1), which is tailored for these particular disputes (section 4.2) and, as such, should be used more frequently in both investment and commercial arbitration (section 4.3).

4.1 *Amicus Curiae* Already Put Into Practical Use by Tribunals in Climate Change Related Disputes

NGOs, corporations, individuals or any other organisation (public or private) with a perspective or an interest in interjecting to a certain degree in the proceedings, and from which the tribunal might benefit, can be allowed to participate in the arbitral proceedings without formally joining the case as a party. Most often this is arranged through *amicus curiae*, which is Latin for "friend of the court".[41] Non-disputing party's participation mostly takes place through written submissions, but the tribunal can also allow participation at the hearing, or grant access to certain documents. As previously mentioned, due to higher demand for transparency in arbitration, *amicus curiae* has become

[39] IBA Task Force Report (n 2), p.14.

[40] ICC Report (n 2), 5.68; Born (n 13), p.3060; Magnusson (n 31), p.1027.

[41] S. Lamb, D. Harrison and J Hew, "Recent Developments in The Law and Practice of Amicus Briefs in Investor-State Arbitration" (2017) 5(2) Indian J. of Arb. Law.

increasingly popular and is now available in most arbitration rules including ICSID,[42] UNCITRAL,[43] SCC,[44] and ICC.[45]

Amicus curiae has already been put into practical use in arbitral proceedings with environmental problematics involved. In the *Biwater* arbitration, for instance,[46] which concerned Tanzania's privatisation of its water supply and sewage services, five NGOs representing human rights and sustainable development concerns filed a petition for *amicus curiae* status. The NGOs claimed that the dispute involved issues of great concern to the local community in Tanzania from the perspective of sustainable development. The tribunal allowed non-disputing party participation which was "an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself".[47] A similar decision was rendered by the tribunal in *Aguas Argentinas* where the tribunal accepted *amicus* submissions as the dispute (also related to water distribution and sewage) involved matter of significant public interest.[48] In some cases, third-party participation has been expanded beyond NGOs. In *Glamis Gold Ltd v United States of*

[42] Rule 37(2) of the 2006 ICSID Arbitration Rules empower tribunals to allow *amicus* briefs regarding a matter within the scope of the dispute. See also Rule 67 of the 2022 ICSID Arbitration Rules.

[43] The UNCITRAL Rules contain express *amicus* provisions because of their incorporation of the UNCITRAL Transparency Rules in 2013.

[44] Article 3(3) of the 2017 SCC Rules applicable to Investment Treaty Disputes allows for potential *amici* application for permission to submit a brief.

[45] Article 25(2) and (3) of the 2021 ICC Rules allow the arbitral tribunal to decide to hear "any other person" in establishing the facts of the case.

[46] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22.

[47] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Procedural Order No. 5, 50.

[48] *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, 19. For more examples see also *Lone Pine Resources Inc. v Canada*, ICSID Case No. UNCT/15/2, Procedural Order on Amici Applications for leave to file non-disputing party submissions, 10 September 2017, where the arbitral tribunal accepted the participation of the Centre Québécois du droit de l'environnement in the proceedings which arose out of the revocation by the Government of Quebec of claimants' permits for petroleum and natural gas exploration in the Utica shale gas basin; *Infinito Gold Ltd v Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2, para 37, where the tribunal also allowed an *amicus curiae* submission by a Costa-Rican NGO for the promotion of the environment in proceedings brought by a Canadian investor after the government's revocation of its concession for a gold mining project; *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 5, 21 July 2016, where the tribunal accepted the participation as *amicus curiae* of the Peruvian Association of Human Rights and Environment in the proceedings which arose between a Canadian company and Peru over the shutting down of a silver mine.

America, the dispute concerned reclamation requirements for open pit mining and the tribunal accepted *amicus* briefs from an Indian tribe, which argued that the government should preserve sacred lands where the mines were located.[49]

These examples show that arbitral tribunals have already understood that additional input from non-disputing parties is necessary to ensure the systemic confidence in arbitral process when the award is thoroughly reviewed considering its impact on local citizens' health, their well-being and on surrounding eco-systems.[50]

4.2 Advantages of *Amicus Curiae* in Climate Change Related Disputes

The benefits of non-disputing party participation are well-accepted among authors and practitioners.[51] By adding an extra layer of expertise on issues specific to the dispute, *amicus curiae* is useful to climate change related disputes, which are complex and often require arbitral tribunals to scrutinise environmental technical assessments.[52] Analysis by third-party participants with the right expertise will be particularly valuable to tribunals,[53] without burdening the parties with further costs since third-parties are not remunerated for their services – unlike experts.[54]

By providing expert analysis while not being bound by any contractual relationship to the parties,[55] non-disputing party participation improves the quality of the award.[56]

[49] *Glamis Gold v United States of America*, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, 10–15.

[50] E. Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation* (2011) 29(1) *Berkeley Journal of International Law* 206; *Biwater Gauff v Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 50, 54. See also *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amicus curiae, 15 January 2011, 49.

[51] Levine (n 51); Ishikawa (n 19); Miles and Lawry-White (n 32).

[52] Andrina (n 9), p.12.

[53] Ishikawa (n 19), p.403.

[54] Mistelis (n 15), p.231.

[55] C.L. Beharry and M.E. Kuritzky, "Going Green: Managing the Environment Through International Investment Arbitration" (2015) 30(3) *American University International Law Review* 416. See also Mistelis (n 15), p.231.

[56] Levine (n 51), p.217; see also Beharry and Kuritzky (n 56), pp.383–429: "increased participation of non-disputing parties could contribute to the tribunal's

In some cases, third-party submissions brought awareness on environmental issues not raised by the parties, thereby supplying the tribunal with a wider range of grounds for its decision and pushing it to deepen its analysis.[57]

Generally, allowing third-party participation will limit the risk of multiple proceedings by providing a one-stop and efficient forum.[58] As suggested by the ICC Report, parties may incorporate in their arbitration clause the possibility for third-party participation along with a waiver for those third parties to initiate further proceedings, to prevent parallel proceedings in other fora.[59]

4.3 Enhancing Third-Party Participation in Commercial Arbitration

Considering the above, third-party participation seems to be a valuable solution to satisfy the public's urge for more transparency in climate change related arbitrations. More recently, institutional rules have been drafted specifically to regulate *amicus* briefs. That is notably the case for the ICSID Rules,[60] the UNCITRAL Rules on Transparency in Treaty based Investor-State Arbitration[61] and the UN Convention on Transparency in Treaty-based Investor-State Arbitration.

Although tribunals have allowed *amicus curiae* in cases concerning matters of public interest "not merely because one of the Disputing Parties is a State",[62] it is uncommon to accept its use in international commercial arbitration.[63] The SIAC and SCC seem to have limited participations to the proceedings to non-participating parties only for investment arbitration,[64] but the ICC Rules allows the tribunal to hear not only witnesses and experts but also "any other

understanding of the wider interests at stake and assuage criticisms regarding the democratic deficit in investment arbitration".

57 *Methanex Corp v United States of America*, Submission of Non-Disputing Parties Bluewater Network, Communities for a Better Environment and Center for International Environmental Law. See also Beharry and Kuritzky (n 56), p.415.

58 ICC Report (n 2), 5.82.

59 See section 5; see also ICC Report (n 2), 5.81.

60 Rule 67 of the 2022 ICSID Arbitration Rules; see also Rule 37 of the 2006 ICSID Arbitration Rules.

61 Article 4 of the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

62 *Methanex Corp. v United States of America*, Decision of the Tribunal on Petitions from Third Person to Intervene as "Amicus Curiae", 15 January 2001, 49; Levine (n 51), p.210.

63 Mistelis (n 15), p.218.

64 Article 29(2) of the 2017 SIAC Investment Arbitration Rules. See also Article 3(3) of the 2017 SCC Rules applicable to Investment Treaty Disputes.

person" to establish the facts of the case.[65] The majority of the other institutional rules are silent on the topic.[66] However, one could consider this an open door to *amicus curiae* because they generally grant tribunals wide discretion to adopt measures they might consider appropriate for the conduct of the proceedings.[67]

To say the least, there is no uniform approach to *amicus curiae* in international commercial arbitration. One should consider that there is a merit to design a tailored solution related to climate change related disputes. Some questions remain, however. For example, who should take the initiative to invite the *amicus curiae*? The parties? The tribunal? The *amicus* itself, as has been done in recent cases administered by the Permanent Court of Arbitration (PCA) under the UNCITRAL Rules?[68] Must the parties' consent continue to be required in proceedings involving climate change related disputes? Arbitral rules applicable to commercial arbitrations thus need some improvements to fill the gaps and clarify what role non-parties can play in the proceedings.

When promoting *amicus curiae*, it is important to ensure that the proceedings will not be unduly burdened. This mission lies with the arbitral tribunal according to most arbitration rules,[69] and case law has demonstrated that tribunals take their tasks seriously. In *Foresti v South Africa*,[70] for instance, which concerned mining exploitation rights by South Africa to protect the environment and the communities living in the surroundings of the mining operations, four NGOs were allowed to file written submissions. At the same time, the tribunal also gave the parties the right to file pre-hearing submissions in response to the NGOs' submission, thereby ensuring that the parties' interests would be protected.[71]

Under such conditions and when the public implications are undeniable, third-party participation appears to be a sensible consensus in climate change related cases to provide the public with the necessary transparency it expects, while at the same time, ensuring that such a mechanism does not overburden the commercial or investment arbitral proceedings.

65 Article 25(2) and (3) of the 2021 ICC Rules.

66 That is the case notably of the 2014 LCIA Rules and the 2017 SCC Rules.

67 Articles 14.2 and 14.4iii of the 2014 LCIA Rules; Article 23(1) of the 2017 SCC Rules.

68 Levine (n 10), p.29.

69 Article 3(9) of the 2017 SCC Rules applicable to Investment Treaty Disputes; Article 4(5) of the UNCITRAL Transparency Rules.

70 *Piero Foresti and others v South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010.

71 Miles and Lawry-White (n 32), p.30.

5. EXISTING AND PROPOSED TOOLBOX TO PROMOTE "GREEN KNOWLEDGE"

Each stakeholder involved in an arbitral process is equipped with different mechanisms that could endorse the sharing of knowledge of climate change related disputes. Arguably, arbitral institutions are the ones who may (and already do) take a leading role in initiating these changes (section 5.1). Answering the call for transparency may also require embracing the broader procedural powers of the tribunal (section 5.2), using the parties' autonomy with the public interest in mind (section 5.3) and encouraging States to also also step forward in the transition towards transparency (section 5.4).

5.1 The Leading Role of Arbitral Institutions

International arbitration has greatly evolved over the years. While it continues to be based on the principle of party autonomy, international arbitration is a sophisticated system where arbitral institutions play an important role in determining its shape and as such are instrumental in adapting arbitration to climate change related disputes. Arbitral institutions may consider number actions to this end including but not limited to: (i) creating a universal cross-institutional knowledge bank, (ii) facilitating the use of experts by providing rosters of environmental experts, (iii) educating arbitrators and parties on the potential impact their dispute might have on the environment, and even (iv) creating incentives for companies that agree to resolve their disputes in a transparent manner.

First, more transparency in climate change related disputes would not only be beneficial to the general public but also to scholars and practitioners. The first step towards a green arbitration database is the publication of arbitral awards. This serves several purposes, perhaps most importantly, by providing specialists the possibility to scrutinise the tribunals' reasoning, thereby contributing to the development of arbitration, which is still relatively novel when applied to climate change related disputes.[72]

Additionally, as already mentioned,[73] ensuring that awards from climate change related arbitrations are published will allow future tribunals to have the benefit of earlier decisions, which will be particularly useful for developing principles of international environmental law, to understand how complex scientific issues may be dealt with and how specific provisions are being

[72] Mistelis (n 15), p.231.
[73] See section 3.2.

interpreted by arbitral tribunals.[74] More transparency will therefore strengthen the legitimacy of international arbitration as a tool to combat climate change, while at the same time reinforcing legal certainty within the arbitral practice.

Importantly, this endeavour should be a joint institutional effort, ideally creating a universal knowledge bank on climate change related disputes. Arbitral institutions together will play a significant role in gathering such data to build a "Green Database".

For more efficiency, climate change related arbitration cases should be gathered together on one single platform – instead of appearing on multiple arbitral institutions' websites – to ensure general and easy access to these cases.[75]

Second, as previously mentioned, specialised expertise is often necessary in climate change related disputes. To facilitate the parties' access to the arbitrators and experts, lists of specialists in climate change related disputes could also be gathered on the same platform to ensure that it is easily accessed by the parties.

What follows is the idea of a roster of environmental/climate change experts, which is not novel.[76] In fact, the PCA already provides such a roster.[77] At the same time, since the list of experts is rather short, it may be of a limited relevance.[78] Additionally, similarly to the knowledge bank, this list may be a universal one and not fragmented with a separate list of each institution.

Third, another element where arbitral institutions may excel is their educational role.[79] The ICC Report is an excellent example of how institutions may provide parties with ready-to-use solutions and inspire them to make use of arbitration in a conscious way to further advance climate law. Arguably, institutions may consider educating both arbitrators and parties on the potential impact their dispute might have on the environment once the arbitration is initiated. For example, they may suggest that the parties consider publishing the award (if publishing of the award is not a default option already) or strengthening the tribunal's adjudicative power on environmental considerations. This may not immediately seem beneficial to companies. However, companies

[74] IBA Task Force Report (n 2), p.145.
[75] See also <http://climatecasechart.com/> as explained above in fn 8.
[76] See ICC Report (n 2), pp.19–26.
[77] See <https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/> (accessed 29 November 2021).
[78] Cf. the list of 200 experts provided by P.R.I.M.E. Finance, which was established to resolve complex financial disputes.
[79] See also the White & Case 2021 International Arbitration Survey: Adapting arbitration to a changing world ("Many respondents would also welcome more 'green' guidance, both from tribunals and in the form of soft law").

increasingly try to look beyond their economic interests and focus on their social and environmental responsibility.

Finally, arbitral institutions may create incentives for the companies that agree to arbitrate "sustainably" and adhere to targets of the Paris Agreement. Potential parties' commitments may include following the "Green Pledge", but also enhancing transparency or complying with other "Green" guidelines of arbitral institutions. Incentives may include discounted rates for institutional services or issuing certificates that confirm the companies' sustainable commitments.

While the individual efforts of the users of international arbitration should be applauded, arguably the scale on which actions should be undertaken calls for a structured support which can be more easily provided by arbitral institutions.

5.2 Arbitral Tribunal to Look Beyond the Interests of the Parties Involved

It is a truism to say that arbitration is a matter of consent. Indeed, the arbitral tribunal will have no jurisdiction or powers to resolve the dispute without the parties' underlying agreement to arbitrate. Under this traditional view, the ultimate goal of the arbitral panel is to finally resolve the dispute between the parties. This, in turn, can be juxtaposed with the aim of a tenured national judge which is to render justice. These goals are related but not identical, since the latter is a broader concept that considers not only the interest of the litigants but also the interest of the society as a whole.

In the context of the climate change related arbitrations, there is an argument to be made, however, for the tribunal taking a more active role in observing what impact the underlying dispute has on the environment. This may mean stepping out of the comfort of the parties' claims and making further use of the procedural powers that are already prescribed by the arbitral institutions.

There are currently several available tribunal powers that can used by arbitrators in the context of climate change which are all related to the issues that have been discussed in sections 3 and 4, namely enhancing transparency and participation of experts.[80]

First, it is in the tribunal's power to appoint its environmental expert to have a better understanding of the environmental issues at stake. Arbitration rules will generally allow the tribunal to do this on its own motion after the parties'

[80] Even more solutions were proposed by the ICC Report (albeit mostly ICC-centric). For further reading see ICC Report (n 2), pp.19–25.

consultation.[81] The tribunal's mandate, however, can be further strengthened by reaffirming such a power in the terms of reference (if available)[82] or potentially in the tribunal's first procedural order.

Secondly, one may consider the tribunal's power to bifurcate proceedings, which may allow distilling climate change related issues and discussing them at one phase of the proceedings. While bifurcation may affect the length of the process, at the same time, it may allow the parties to lift the confidentiality veil of this particular phase/tribunal's decision and further develop the legal framework for climate protection, while preserving and protecting broader companies' business/economic interests.

Apart from using these already existing tools, one may also consider enhancing the tribunal's mandate with additional powers related to climate protection. Such powers could for example include the ability to decide on the award's publication. Arguably, this could be provided as an *ex officio* power, subject of course to mandatory consultation with parties or mandatory redaction/anonymisation of the award. Alternatively, one may consider giving the tribunal the power to recommend to the parties or to the arbitral institution that the award should be published because of its potential significance on future climate change related disputes.

All those incremental changes may eventually place more emphasis on the tribunal's active role and careful consideration for the planet.[83]

5.3 Using Party Autonomy with a Public Climate Interest in Mind

As mentioned above, parties are in the driver's seat when it comes to tailoring the arbitral process. Looking at their expressed preferences, parties still very much appreciate the confidential nature of arbitration.[84] According to the Queen Mary International Arbitration Survey of 2010, over 84 percent of respondents valued confidentiality of the arbitral process, considering it to be "very" or "quite" important.[85] The question is, however, whether this sentiment is still strong, and in particular, shared by the companies that position

[81] See e.g., Article 25(3) of the 2021 ICC Rules; Rule 26 of the 2016 SIAC Rules; Article 34 of the 2017 SCC Rules; Article 21 of the 2020 LCIA Rules. See also ICC Report (n 2), p.24. In this context, application of the Prague Rules with their strong emphasis on the tribunal's proactive role might be instrumental in the context of climate change related disputes. See Article 3.2(b) of the Prague Rules.

[82] ICC Report (n 2), p.25.

[83] Arguably, this is what should be valued by the "environmentally conscious" companies (and their stakeholders) – potential parties to the disputes.

[84] See White & Case (n 80) and Queen Mary 2010 International Arbitration Survey, p.29.

[85] See ibid, p.29.

themselves as champions of sustainability. It is for the parties to recognise arbitration for its other features and not for confidentiality alone.[86]

Arguably, companies embracing sustainability and not only economic profit should be interested in promoting transparent resolution of the disputes.[87] After all, nowadays, companies' valuation may eventually be affected by their adherence to the sustainable values.[88] Consequently, transparent methods of resolving contractual disputes should be included in companies' CSR policies.

In this context, international arbitration provides many benefits over litigation when climate change related issues are at stake (including expertise of chosen environmental decision makers or enforcement of the final award). Embracing international dispute resolution transparency increases the chances of finding a solution with a broader reach.[89]

To satisfy public expectations and contribute to the climate's protection, arbitration users could also join and comply with a series of green pledges, including inter alia, (i) a pledge to resolve all disputes transparently (for example, by including it in the company's ESG goals), (ii) the "Green Arbitration" pledge[90] and (iii) a pledge to voluntary perform an award in case the tribunal decides that swift execution of the award is essential for the protection of the environment. All in all, a transparent dispute resolution mechanism can distinguish truly environmentally engaged companies from those using PR techniques to "green wash" their day-to-day business activities.[91]

5.4 States-Created Incentives for Companies Opened to Share Knowledge

States are the last potential actors on the transparent resolution of climate change disputes through arbitration. Although most of States' involvement relates to investment arbitration, States may also have a role to play in the context of international *commercial* arbitration.[92] States' engagement is twofold: (i) as a potential contracting party to the proceedings and (ii) as the chosen seat for the arbitration.

[86] When reflecting on confidentiality, one may consider that arbitration could potentially aid the process of green washing.

[87] In fact, transparency goes hand in hand with sustainability. See e.g. Arratia (n 6).

[88] T. Koller and J. Bailey, "When sustainability becomes a factor in valuation", 23 March 2017, McKinsey.com.

[89] See sections 3.2 and 5.1.

[90] See <https://www.greenerarbitrations.com/> (accessed 17 December 2021).

[91] See e.g. Arratia (n 6).

[92] Much more discussions take place in the context of investment arbitration, which is mostly related to investment arbitration and regulatory power of a state to implement certain environmental measures.

There are many instances where States or State-related entities are engaged in contractual activities. These would generally include, e.g., public tenders or public-private partnerships where bargaining powers of the State organs is high. Consequently, States could certainly impose transparency of the dispute resolution mechanism as an essential criterion when selecting a company as its business partner.

Arguably, States, as the selected seat of the arbitral proceedings, can also influence the role given to transparency in the context of climate change related commercial disputes. This may, however, require the careful weighing of different policy considerations. On the one hand, creating a legal framework on transparency of disputes would confirm States' commitment to environmental protection. On the other hand, creating a rule that lifts a veil of confidentiality over the climate change related disputes may put its attractiveness as a seat for arbitral proceedings at risk, since companies are not yet all eager to face the exposure arising out of transparent arbitration.

6. CONCLUDING REMARKS

"Our house is on fire" asserts Greta Thunberg when calling for action on climate change.[93] This statement was addressed not only to world leaders, but also to others. Nowadays, the international commercial arbitration system cannot afford to maintain confidentiality as its feature, especially in the context of disputes where their resolution affects the climate. In those circumstances, a traditional view that an international commercial arbitration dispute remains a private affair can no longer be sustained.

While international commercial arbitration evolved from a system where an arbitral tribunal was an agent of two parties with a delegated function of resolving disputes, it significantly developed over the years, becoming a sophisticated mechanism with many actors involved (e.g. States, arbitral and professional institutions, commercial parties).

Consequently, to the degree that international commercial tribunals are involved in deciding on issues that are of public interest such as combating climate change, their actions should be held to the same transparency standard as the national courts.[94] Otherwise, international commercial arbitration will be affected by the same malaise of external legitimacy crisis that is effectively smothering investment arbitration, its younger sibling.

[93] See G. Thunberg's speech at Davos, "Our house is on fire", 25 January 2019.

[94] See also A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration* (OUP, 2017), pp.228–229.