

Dreaming of Paris: Making the Paris Agreement enforceable through International Arbitration

Injy Johnstone, Bachelor of Law with Honours Candidate, Victoria University of Wellington
Injy.johnstone@hotmail.co.nz (+64) 27 318 6411

Faculty of Law
55 Lambton Quay
Wellington 6011
New Zealand

Abstract

Climate change is the most complex and urgent transnational issue that the world has faced. To match this, the Paris Agreement is the most comprehensive climate change agreement ever reached. However, it does not have an enforcement mechanism. As a result, the world risks falling victim to Paris Syndrome unless a binding dispute can be devised to support the Paris Agreement's implementation phase.¹ This research intends to show that arbitration could be a key way that the Paris Agreement is given effect to by exploring the development of the climate related arbitration and how a framework can be developed to support its use under Paris.

To do this the paper will focus on the scope of climate change and arbitration, with a view to assessing the efficacy and use of arbitral proceedings as a dispute settlement framework under the Paris Agreement. The paper begins by setting the scene of the Paris Agreement, including its ambitions and present compliance system. The paper will then move to discuss the nature of climate change disputes. As part of this, it will discuss how they have arisen in the tripartite international arbitration system, and what this might mean for their character under the Paris Agreement. The paper then moves to canvass the forerunners to the Paris Agreement including the Montreal Protocol, UNFCCC and Kyoto Protocol. It will discuss their respective dispute resolution mechanisms they employ and how the strength of them are notably linked to the overall success of them. The paper will then discuss compare and contrast available dispute settlement methods under the Paris Agreement including litigation, arbitration, conciliation and negotiation. After assessing both the opportunities and risks, this paper proposes that arbitration is the best method of enforcing the Paris Agreement due to its flexible, final nature as well as variety of contexts that it can be employed. The paper then moves to the different procedural fora and tools that can be used, as well as outlining what next steps are needed to employ arbitration at the heart of the dispute settlement provision in the Paris Agreement. Overall, this paper suggests that the value of arbitration in resolving climate change disputes has long been overlooked. Consequently, there is no better time nor Agreement in which to employ it to help bring the dream of Paris to life.

¹ A transient mental disorder exhibited by some individuals when visiting or going on vacation to Paris, as a result of extreme shock derived from their discovery that Paris is not what they had expected it to be.

1. Introduction

Climate change is the most complex transnational issue that the world faces today.² To meet this global challenge the Paris Agreement, an agreement under of the United Nations Framework Convention on Climate Change (UNFCCC), was drafted in December 2015. However, the world is at risk from Paris Syndrome³ if the Paris Agreement is not complied with. This is a key concern of the international legal community, because despite lofty ambitions being enshrined in the text, there is no enforcement mechanism.⁴ This paper intends to provide context on current state of dispute resolution under the Paris Agreement before exploring how its enforcement could be strengthened using examples from other Multilateral Environmental Agreements (MEAs). When contrasted to its judicial and conciliation cousins, this paper submits that arbitration is the best placed mechanism for enforcing the Paris Agreement. The ways in which this could work within the current international legal frameworks as well as the opportunities and barriers to employing arbitration under the Paris Agreement will also be assessed. Overall, this paper intends to demonstrate that arbitration is well-equipped to deal with climate change disputes and could offer the necessary implementation 'teeth' to bring the dream of the Paris Agreement to life.⁵

2. Dispute Resolution under Paris

2.1. Paris Agreement

2.1.1. Setting the scene

The Paris Agreement entered into force on 4 November 2016. It is considered the most ambitious global agreement on climate change as it commits states who represent well over half of global emissions⁶ to hold the increase in the global average temperature to well below 2°C.⁷ In order to reach this ambitious goal, the Paris Agreement commits countries to progressively phase down their emissions as well as facilitate a technological and adaptation response to climatic change already inevitable.⁸ Despite the world fast approaching the implementation phase of the Paris Agreement, there are concerns over the effectiveness of it given a lack of binding enforcement mechanism. Commentators during the drafting called for the Paris Agreement to have necessary enforcement teeth.⁹ However, it is now recognised that this did not eventuate with a non-punitive, facilitative approach being opted for instead. That being said there are still several options in which one could be developed as the Paris 'rule book' is still under negotiation.

² Hedlund, Johanna, Stephen Fick, Henrik Carlsen, and Magnus Benzie. "Quantifying transnational climate impact exposure: New perspectives on the global distribution of climate risk." *Global Environmental Change* 52 (2018): 75-85.

³ A transient mental disorder exhibited by some individuals when visiting or going on vacation to Paris, as a result of extreme shock derived from their discovery that Paris is not what they had expected it to be.

⁴ International Bar Association. *Achieving Justice and Human Rights in an Era of Climate Disruption-Climate Change Justice and Human Rights Task Force Report*. London: International Bar Association, 2014. Accessed May 24, 2018.

<https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>

⁵ de Paor, Risteard. "Climate Change and Arbitration: Annex Time before there won't be A Next Time." *Journal of International Dispute Settlement* 8, no. 1 (2017): 179-215.

⁶ UNFCCC. "Status of Ratification". UNFCCC.int. <https://unfccc.int/process/the-paris-agreement/status-of-ratification>

⁷ Paris Agreement (Signed 22 April 2016, entered into force 4 November 2016) C.N.63.2016, Art 2. Hereafter abbreviated Paris Agreement.

⁸ *ibid.*

⁹ Werksmen, 9, *YbIEL* (1998), 48, 100.

2.1.2. Obligations

The Paris Agreement is largely considered a feat of diplomacy due to its carefully negotiated text.¹⁰ Because of this, the precise wording becomes essential in understanding the legal nature of the Agreement. There is evidence to suggest binding obligations are anticipated from it. An example being that the world 'shall' being used 108 times in the text.¹¹ Given this, and the wide-ranging consequences from the 2°C goal itself, it is highly likely there will be attempts to bring legal claims from it.¹² To resolve such claims Article 15 establishes a 'mechanism to facilitate implementation of and promote compliance' but it remains an explicitly non-punitive compliance mechanism. There is however recourse to other dispute resolution mechanisms as the provisions established in Article 14 of the UNFCCC apply *mutatis mutandis* to the Paris Agreement under Article 24. Article 14 introduces the option of negotiation, or recourse to any other peaceful means of dispute settlement including binding forms of Arbitration and the International Court of Justice.¹³ Each of these options will be assessed in turn.

2.2. Nature

It is first necessary to categorise the anticipated nature of climate related disputes under the Paris Agreement. Climate change disputes are increasingly recognised as a legal challenge because both the cause and effect of them tend not to conform to classical international law boundaries.¹⁴ It is anticipated that there will be an increase in the effects of climate change as well as regulation that seeks to mitigate and adapt to them. As such, it is predicted that climate related disputes will in turn increase in both volume and complexity.¹⁵ Disputes likely under the Paris Agreement can be broadly categorised into two main types: environmental and commercial. Environmental ones centre on effects on the physical environment. Examples of this include sea level in *Bay of Bengal Maritime Boundary Arbitration*¹⁶ or forests in *Santa Elena v Costa Rica*.¹⁷ By way of contrast, commercially based climate change disputes centre on breach of contract between private companies which nine were heard by the Permanent Court of Arbitration (PCA) before 2009 in relation to the Kyoto Protocol.¹⁸

2.3. Use

2.3.1. International Arbitration

2.3.1.1. Inter-state

¹⁰ Rajamani, Lavanya. "Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics." *International & Comparative Law Quarterly* 65, no. 2 (2016): 493-514.

¹¹ Paris Agreement Text

¹² Bodansky, Daniel. "The legal character of the Paris Agreement." *Review of European, Comparative & International Environmental Law* 25, no. 2 (2016): 142-150.

¹³ United Nations Framework Convention on Climate Change (Signed May 9 1992, entered into force 21 March 1994) 1771 U.N.T.S. 107 at Art. 24. Hereafter abbreviated UNFCCC Text.

¹⁴ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 180.

¹⁵ United Nations Convention on Trade and Development "2015 World Investment Report" (2015) at 30.

¹⁶ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Bangladesh v India, Final Award, ICGJ 479.

¹⁷ *Santa Elena v Costa Rica*, ICSID Case No ARB/96/1.

¹⁸ Choudhury, Akhlaq and Moyeed, Khaled. "Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change" (Kluwer Arbitration Blog, 26 January 2016).

International arbitration has already been employed by states to resolve numerous climate related disputes. Instances of this include changes to the low flows of the Indus Waters in the *Kishenganga Arbitration*¹⁹ and coastal boundaries in *Bangladesh v India*.²⁰ Arbitration is also the default mechanism for inter-state disputes as part of the compulsory dispute settlement system under the International Convention for the Law of the Sea.²¹ Benefits of using arbitration in these instances are primarily that it can cater for the technical nature of disputes, as well as that the process is expeditious and non-political in nature.

2.3.1.2. Investor-state

Climate related disputes have also arisen in the investor-state context. There have been claims made by investors of too much climate friendly regulation, as well as the winding back of measures on the basis that it breaches the investor's legitimate expectations. An instance of the former arose in *Vattenfall v Germany* where a proposal for a coal-fired power plant did not go ahead because of new clean air regulations implemented by a municipal authority. The converse occurred in *Charanne and Construction Investments v. Spain* where the Spanish Government was taken to arbitration on the basis of removing its solar energy subsidies as part of their austerity programme.

2.3.1.3. Commercial

Commercial parties also submit climate related disputes to international arbitration. For private parties, arbitration is seen as a particularly attractive method of dispute resolution due to the ease of enforcement under the *New York Convention*.²² The best example of such a climate related dispute being brought to arbitration being the nine contractual disputes related to carbon trading under the Kyoto Protocol being brought before the PCA.²³ There is also an increasing legislative measures being taken worldwide stipulating requirements to disclose climate risk to private investors. With estimated losses from climate risk of 4.2 trillion USD there is also a high likelihood of these disputes being brought to arbitration.²⁴

2.3.2. Paris Agreement

Disputes under the Paris Agreement are equally likely to relate to measures to combat climate change, as they are a lack thereof—a fact which reinforces the likelihood that such disputes will proliferate in future.²⁵ Given this, the Paris Agreement can be used as both a sword and shield:

2.3.2.1. Sword

The potential use of the Paris Agreement as a weapon to thwart inaction on climate change can be seen in multiple ways. Disputes may arise against states specifically in relation to

¹⁹ *Indus Waters Kishenganga Arbitration*, Pakistan v. India, Final Award, PCA 2011-01.

²⁰ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Bangladesh v India, Final Award, ICGJ 479.

²¹ United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 398, Art 293.

²² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) 330 UNTS 38. Hereafter abbreviated to New York Convention.

²³ Choudhury, *Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change*.

²⁴ Brian Gardner "The cost of inaction" (The Economist Intelligence Unit, July 24 2015).

²⁵ de Paor, *Climate Change and Arbitration: Annex Time before there won't be A Next Time*, 181.

their Intended National Determined Contributions (INDCs) from a failure to report them as agreed in Article 3 of the Paris Agreement.²⁶ Disputes may also arise if a party alleges a country is not being sufficiently progressive as per its commitment to phase down emissions.²⁷ Commercial investors in the investor-state context could use the Paris Agreement as a weapon in instances where they face regressive climate change measure.²⁸ Companies themselves could also be a target of using Paris Agreement as a weapon if 'reverse umbrella' clauses are employed which place an obligation on investors to comply with all environmental legislation.²⁹

2.3.2.2. Shield

If implemented in a binding fashion the Paris Agreement could also be used as a shield by parties to defend climate change friendly state regulation against other states and commercial parties.³⁰ A good example of the importance of this is found in the *Vattenfall AB and others v. Federal Republic of Germany* arbitration whereby an investor sued the German Government for its planning laws which restricted a proposed coal mine.³¹ In this instance the German Government could point to its obligations under the Paris Agreement as forming part of the legitimate expectations of investment such as was seen in the *Urbaser* arbitration.³² The private sector itself could also seek to gain security and certainty in their climate investment risk by incorporating the Paris Agreement, as a way of shielding shareholders for unforeseen climate risk.

3. Assessment of the differing enforcement approaches in Multilateral Environmental Agreements

In order to assess both the options and context for enforcing the Paris Agreement it is necessary to look at the functional character and spirit of other multilateral environmental agreements (MEAs).

3.1. Montreal Protocol

The Montreal Protocol, entered into force in 1989 with a mandate to phase out gases harmful to the Ozone layer. The Protocol is widely accepted as being the most successful MEA to date.³³ A fact which is predominantly attributed to its successful dispute resolution mechanism.³⁴ The procedures for dispute settlement under the Montreal Protocol are set out in Article 11 of the Vienna Convention for the Protection of the Ozone Layer (VCPOL).³⁵ The Protocol has a functional compliance and dispute settlement mechanism whereby complaints may be brought before an Implementation Committee by the Secretariat. This Committee can then make recommendations to the Committee of the Parties, including ordering trade and technology sanctions to ensure party compliance. This resulted in a well enforced phase out of HFCs and CFCs and subsequent partial recovery of the Ozone hole.

3.2. United Nations Framework Convention on Climate Change

²⁶ Paris Agreement, Art 3.

²⁷ Analogous to *Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015) Hague District Court.

²⁸ *Charanne and Construction Investments v. Spain* (SCC Case No. 062/2012).

²⁹ de Paor, *Climate Change and Arbitration: Annex Time before there won't be A Next Time*, 189.

³⁰ *Ibid.* at 184.

³¹ *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.

³² *Urbaser v The Argentine Republic* (Final Award) ICSID ARB/07/26 8 December 2016.

³³ Sandler, Todd. "Environmental cooperation: contrasting international environmental agreements." *Oxford Economic Papers* 69, no. 2 (2017): 345-364.

³⁴ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 138.

³⁵ Vienna Convention for the Protection of the Ozone Layer I-26164 (Signed on 22 March 1985, entered into force 22 September 1988).

The UNFCCC, entered into in force in 1994 with a mandate to provide the global architecture for a multilateral response to climate change. While legal action on the text as it stands is not explicitly excluded, the generality of language used means that it is difficult to distill binding obligations from it.³⁶ This leaves questions as to how obligations entered by states can be enforced.³⁷ One potential answer comes from Article 14.³⁸ In Article 14 the Framework adopts the dispute resolution options which include: negotiation, conciliation, submission of the dispute to the International Court of Justice (ICJ) and arbitration 'in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration'.³⁹ However, this annex on arbitration has not been drafted. In absence of this, the strength of the Framework comes from the detail within the agreements reached under it, of which Kyoto was the first and Paris the second.

3.2.1. Kyoto Protocol

The Kyoto Protocol is a key example for how dispute settlement may operate under the Paris Agreement as it also cites the UNFCCC dispute settlement provision.⁴⁰ The Protocol includes a degree of coercive compliance and introduces arbitration, compulsory ipso facto.⁴¹ Kyoto Protocol non-compliance procedure included a compliance committee, which could be seized either by states or an 'expert review team' established under Article 8 of the Protocol.⁴² Dispute settlement under Kyoto has been largely successful with nine instances of contractual disputes being heard before the PCA since 2009.⁴³

4. Pathways for dispute resolution under the UNFCCC

The International Bar Association (IBA) states "the law as it stands was not created with the challenge of climate change in mind and is not always well suited to address it".⁴⁴ Through the operation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) agreements under the UNFCCC are deemed customary international law.⁴⁵ Consequently, the Paris Agreement would have the same legal value as treaty law.⁴⁶ It is therefore important to examine the features of the different dispute resolution pathways offered under the UNFCCC and what they might mean for implementing the Paris Agreement:

4.1. Judicial

³⁶ Boom, Keely. "The Rising Tide of International Climate Litigation: An Illustrative Hypothetical of Tuvalu v Australia." *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Cheltenham, UK and Northampton, MA: Edward Elgar (2013): 409-438.

³⁷ Sands, Philippe QC, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (public lecture at the UK Supreme Court, 17 September 2015) at 13.

³⁸ UNFCCC text, Art 14.

³⁹ *ibid.*

⁴⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Signed 11 December 1997, entered into force 16 February 2005) U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22, Art 19.

⁴¹ *ibid.*

⁴² International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 138.

⁴³ Bodansky, *The legal character of the Paris Agreement*.

⁴⁴ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*.

⁴⁵ Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 25 ILM 543, Art. 31(3)(c).

⁴⁶ Hirsch, Moshe. "Interactions between investment and non-investment obligations in international investment law." *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008) at 154.

The Courtroom is increasingly being engaged as a forum for climate change disputes worldwide.⁴⁷ Litigation can be an effective way of affected groups or citizens holding parties to account. The *Urgenda* case being a prime example of this within a national context.⁴⁸ The benefits of a judicial solution include that it is a binding outcome conducted in a public and relatively accessible forum. However, there are several weaknesses to judicial action such as the average length of proceedings as well as what parties have standing in relation to any given matter. In terms of enforcing disputes relevant to the Paris Agreement there are additional concerns including a lack of expertise on behalf of the judiciary regarding the technical science⁴⁹ as well as cross boundary jurisdictional and enforcement issues.⁵⁰ An example being that recourse to the International Court of Justice, as outlined in Chapter II of its statute can only be undertaken by states and jurisdiction depends on party consent.⁵¹ Similarly, because of this other parties such as NGOs, companies or individuals would likely not have standing.

4.2. Arbitration

Arbitration is the settling of disputes between two parties by an impartial third party, whose decision the contending parties agree to be bound by. Arbitration has already been employed in a number of climate change related disputes as outlined above.⁵² Benefits of arbitration include that it has highly flexible procedure due to being bespoke and party focused. Unlike the judicial route, experts can readily be employed and incorporated into the decision-making function through party choice of arbitrator. Arbitral awards are also generally well compiled well.⁵³ Arbitration as a process is useful in that it can be tailored for the full range of potential climate change disputes without difficulty. The Permanent Court of Arbitration (PCA) has hosted inter-state, investor-state and commercial disputes alike. That being said, when dealing with matters of public importance, such as climate change undoubtedly is, transparency can be of concern.⁵⁴

4.3. Conciliation

Conciliation is a facilitation style of dispute resolution and is referenced in Article 15 of the Paris Agreement as well as in the UNFCCC itself. Conciliation aims to establish common ground between the parties and is particularly useful for when the relationship is intended to remain intact despite a dispute. However, conciliation requires parties to come to agreement, something which is non-binding and largely dependent on the existence of an already amicable relationship.

4.4. Negotiation

⁴⁷ Nachmany, Michal. and Joana Setzer "Policy brief Global trends in climate change legislation and litigation: 2018 snapshot." (Grantham Research Institute on Climate Change and the Environment, London, 2018).

⁴⁸ *Urgenda Case*.

⁴⁹ *Case concerning Pulp Mills in the River Uruguay (Argentina v Uruguay)*, ICJ Judgment, 20 April 2010, General List No 135 at para 2: 'the Court has evaluated the scientific evidence brought before it by the Parties in ways that we consider flawed methodologically'.

⁵⁰ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*.

⁵¹ Statute of the International Court of Justice, Art 34(1).

⁵² Levine, J. "Adopting and Adapting Arbitration for Climate Change-Related Disputes-The Experience of the Permanent Court of Arbitration." *Transnational Dispute Management (TDM)* 15, no. 1 (2018).

⁵³ van den Berg, Albert Jan. "50 Years of the New York Convention" (ICCA Congress Series No 14, 2009).

⁵⁴ Hailes, Oliver, Rhys Jones, David Menkes, Joshua Freeman, and Erik Monasterio. "Climate change, human health and the CPTPP." *The New Zealand Medical Journal (Online)* 131, no. 1471 (2018): 7-12, at 11.

Negotiation means discussions at different levels of authority with a view to achieving common understanding or agreement.⁵⁵ It is traditionally the first tool employed in the dispute resolution toolkit; it depends very much on party will. In the context of the Paris Agreement it is also likely such negotiations would be protracted and cumbersome if a claim is brought against one state on behalf of a grouping of the Conference of Parties.

5. Arbitration as preferable means

At present the Paris Agreement provides a forum for conciliatory dispute resolution. It is however clear that based on the experience of both the Montreal and Kyoto Protocol, a binding mechanism is the best way to ensure compliance. In contrasting the two binding routes of litigation and arbitration options for giving teeth to the Paris Agreement it is submitted that arbitration appears preferable. That being said there are both opportunities and risks in using arbitration as an enforcement mechanism, each of which will be explored in turn:

5.1. Opportunities

The use of arbitration to resolve disputes under the Paris Agreement, is principally recommended because it can best meet the unique needs of climate change disputes. As such it is proposed that arbitration is preferable to the judicial route because it is both efficacious and appropriate. Firstly, arbitration offers the use of expertise necessary to deal with complex and technical cases.⁵⁶ This being particularly key given that most disputes are likely to be novel. Secondly, disputes can be dealt with in a quicker manner than in litigation. This is because arbitration also avoids both the delay and the political risks associated with a longer route through the ICJ. Therefore, both the flexibility and efficiency of arbitration means it offers the best pathway for resolving disputes in the often time-sensitive and technical disputes likely to arise under the Paris Agreement. Thirdly, arbitration is no stranger to the careful balance of public and private rights given the variety of contexts that it has and continues to be employed.⁵⁷ Given that climate change disputes will inextricably involve striking a balancing of the public and private interests, it makes sense to adopt a dispute resolution method that can cater equally for disparate interests. As such, the use of arbitration in interstate, investor-state and commercial disputes is a major asset.⁵⁸ Arbitration also has an advantage over litigation due to generally superior recognition and enforceability rights that stem from the *New York Convention* and the International Centre for Settlement of Investment Disputes (ICSID) rules.^{59 60}

5.2. Risks

In assessing the usefulness of arbitration as a dispute resolution mechanism under the Paris Agreement it is also necessary to also consider the risks. When compared to its judicial cousin, the voluntary nature of arbitral procedure, transparency and costs concerns remain paramount. Firstly, similar to litigation under the ICJ, there has to be party consent in order for a tribunal to have jurisdiction. The challenges in relation to Paris Agreement relate to the fact that at present only Tuvalu, Solomon Islands and the Netherlands have agreed to arbitration under the UNFCCC. Similarly, the annex on arbitration mentioned in the UNFCCC remains undrafted for unknown reasons. Secondly, as concerns over the Trans Pacific Partnership have shown, there is hesitancy in regards to the transparency of arbitral

⁵⁵ A transient mental disorder exhibited by some individuals when visiting or going on vacation to Paris, as a result of extreme shock derived from their discovery that Paris is not what they had expected it to be.

⁵⁶ See 6.1.2.1 for discussion on PCA.

⁵⁷ *Climate Change Justice and Human Rights Task Force Report* at 182.

⁵⁸ As discussed in 2.3.

⁵⁹ New York Convention

⁶⁰ Schneiderman, David. *Constitutionalizing economic globalization: Investment rules and democracy's promise*. Cambridge University Press, 2008.

procedures. That being said there has been significant improvements to transparency over the years.⁶¹ Thirdly, unlike access to Court's which aside from lawyer costs are generally publicly funded, in arbitrations costs are borne entirely by the parties. However, given the potential length of and delay in judicial proceedings it is likely that arbitration could, if used appropriately, result in lower costs instead.

6. Options for implementation

If adopting arbitration as the dispute resolution method of choice, there are both procedural and forum options for developing it, each of which will be explored in turn:

6.1. Procedural implementation

6.1.1. Tools

6.1.1.1. Annex

Drafting an annex on arbitration under the UNFCCC would provide confidence to the Conference of the Parties of arbitration as a dispute settlement tool. Such an annex could be based on Annex VIII of the United Nations Convention on the Law of the Sea (UNCLOS) as well as the PCA Environmental rules.⁶² As such, it would include procedural rules including a depository of qualified and expert climate change arbitrators. In drafting the annex consideration could also be given to ensure the language is broad enough to enable claims to be brought by renewable energy investors, affected communities and international organisations with an interest in the dispute.⁶³

6.1.1.2. Model Statute for Legal Remedies for Climate Change

A model statute is another procedural tool recommended by the IBA. Based on the International Law Association's 2014 Draft Articles on Legal Principles Relating to Climate Change⁶⁴ a model statute would address, inter alia, actionable rights affected by climate change; standing; the relevance of foreseeability of harm to liability or judicial relief; methods of awarding remedies and competing claims between States, communities and investors.⁶⁵ The goal of it ultimately to provide clarity and consistency of procedure to resolve climate disputes no matter which dispute resolution tool is employed.

6.1.1.3. PCA Environmental Rules

The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment ('PCA Optional Rules') were developed in 2001, to allow for robust environmental arbitration. The rules include a list of expert arbitrators, technical and scientific experts.⁶⁶ Additional features include expedition procedures and condensed timelines, given the irreversible harm that can be done in environmental disputes.⁶⁷ The rules also detail mediation and conciliation capabilities.⁶⁸ It appears little modification of these rules would be needed to create a bespoke Paris Agreement arbitration annex.

6.1.2. Forums

⁶¹ Rogers, Catherine A. *Ethics in International Arbitration*. Oxford University Press, 2014.

⁶² International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 20.

⁶³ de Paor, *Climate Change and Arbitration: Annex Time before there won't be A Next Time*, 199.

⁶⁴ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 128.

⁶⁵ de Paor, *Climate Change and Arbitration: Annex Time before there won't be A Next Time*, 207.

⁶⁶ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 141.

⁶⁷ *ibid.*

⁶⁸ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 142.

There are two main choices of fora for dispute resolution, these being the Permanent Court of Arbitration in the short-medium term and the creation of an International Court of Environment Tribunal in the longer term.

6.1.2.1. *Permanent Court of Arbitration*

It is the proposal of the IBA that in the short-medium term, the PCA is utilised for arbitration needs under the Paris Agreement.⁶⁹ This is because as demonstrated by its use under the Kyoto Protocol, it is an effective forum to resolve disputes. Firstly, States, NGOs, corporations and investors are all able to bring claims to the PCA, provided the parties have consented to do so. The PCA model arbitration clauses also make the task of giving consent to arbitration straightforward.⁷⁰ Moreover, of particular applicability to climate change disputes, so long as there is agreement between the parties, multi-party disputes can be accommodated.⁷¹ The PCA is also a trusted and established system which would add certainty to arbitration procedure in the implementation of the Paris Agreement. This is in addition to procedural accessibility of the PCA, from efficient administration, comparatively lower costs and the offer of financial assistance to developing states.

6.1.2.2. *International Court of Environment Tribunal*

The IBA also propose the creation of an ad hoc body—an International Court of Environment Tribunal (ICE); with the view that the ICE would crystallise into a permanent formal judicial institution in future.⁷² The purpose of an ICE would be to “more efficiently and effectively address the pronounced challenges of climate change litigation”.⁷³ In particular, the IBA view an ICE as being the best place to determine the environmental legal obligations of governments and businesses, harmonise conflicting between legislative and judicial systems as well as provide access to justice to a broad range of actors through through customised open standing rules.⁷⁴

6.2. *Potential barriers to implementation*

There are potential barriers with the above procedural tools and fora being used to develop arbitration under the Paris Agreement. These primarily concern the will in establishing the the procedure as well as consequent use of it once established:

6.2.1. Will

As of yet, it appears the will to enact the procedural steps necessary to develop arbitration as a compliance mechanism is lacking. Whether or not this is a deliberate rejection of arbitration as a means of enforcing climate change disputes is not clear. This could be the case given that only Tuvalu, Solomon Islands and the Netherlands have agreed to arbitration under the UNFCCC. However, it is equally likely that there has simply not been the political will to draft and adopt one at a Conference of Parties (COP). This may change as climate related disputes grow and states want certainty as to how they can legally respond to them.

6.2.2. Use

⁶⁹ *ibid.*

⁷⁰ International Bar Association, *Climate Change Justice and Human Rights Task Force Report*, 144.

⁷¹ *ibid.* at 140.

⁷² *ibid.* at 28.

⁷³ *ibid.* at 145.

⁷⁴ *ibid.*

Another concern in using international arbitration as key way of enforcing the Paris Agreement is the use of the procedure itself. Firstly, due to the nature of arbitration states and other organisations to need to consent through domestic legislation and international commitments.⁷⁵ Secondly, moves towards a bespoke ICE will be met with hesitancy on the basis of the institutional memory of the ICJ's Chamber for Environmental Matters. A chamber which was abolished in 2006, having never had a dispute referred to it by any State in all its 13 years of existence.⁷⁶ That being said there is a growing caseload pressure at similar institutions⁷⁷ therefore it is entirely possible that in the post-Paris world of ever-increasing climate disputes that development and use of arbitration procedure would not be an issue.

7. Next Steps

Given there is both significant opportunities and barriers to adopting arbitration as the mainstay of the dispute resolution framework under Paris, it is necessary to consider the likelihood of its implementation. Negotiations of the Implementing Guidelines of the Paris Agreement are due to be concluded in December 2018. The guidelines include procedural rules relating to NIDCs as well as an opportunity to draft and adopt an arbitration annex under the UNFCCC. If an annex was not agreed to in this time frame there is also the suggestion that the Paris Agreement should develop its own punitive compliance system, 'à la Montreal Protocol'.⁷⁸ However, as it is an already highly contested multilateral treaty, it is likely that either action will take time to draft given the extensive time taken to negotiate Agreements and Amendments under the UNFCCC thus far.

8. Conclusion

The world could be victims to Paris Syndrome come implementation phase of the Paris Agreement if an effective dispute resolution system cannot be developed in time. Arbitration offers many advantages to the settlement of environmental and contractual based climate change disputes. Opportunities stem from its flexibility to fit complex and novel situations as well as its binding and final nature. However, there are barriers to the use of arbitration in implementing the Paris Agreement. Procedural barriers include drafting an annex on arbitration, as well as more systemic questions such as whether arbitration is the most effective method of resolving climate change disputes. Despite this, if arbitration is utilised more effectively by the COP it could provide the necessary 'teeth' to make the Paris Agreement have 'bite'. As a result, it could be one of the main ways of turning the dream of Paris into reality.

9. Reference List

⁷⁵ So far only Tuvalu, Solomon Islands and the Netherlands have agreed to arbitration under the UNFCCC.

⁷⁶ International Court of Justice 'Chambers and Committees' <http://www.icj-cij.org/en/chambers-and-committees>.

⁷⁷ Sands, Philippe. "Litigating environmental disputes: Courts, tribunals and the progressive development of international environmental law." In *Law of the Sea, Environmental Law and Settlement of Disputes*, pp. 313-326. Brill, 2007.

⁷⁸ de Paor, *Climate Change and Arbitration: Annex Time before there won't be A Next Time*, 199.

A. Cases

Case concerning Pulp Mills in the River Uruguay (Argentina v Uruguay), ICJ Judgment, 20 April 2010, General List No 135.

Charanne v Spain, SCC Case No.062/2012.

Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Bangladesh v India, Final Award, ICGJ 479.

Santa Elena v Costa Rica, ICSID Case No ARB/96/1.

Urgenda Foundation v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (24 June 2015) Hague District Court.

Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

B. Treaties

Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed 11 December 1997, entered into force 16 February 2005) U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22,

Paris Agreement (Signed 22 April 2016, entered into force 4 November 2016) C.N.63.2016.

Vienna Convention on the Law of Treaties (Signed 23 May 1969, entered into force 27 January 1980) 25 ILM 543.

Vienna Convention for the Protection of the Ozone Layer (signed on 22 March 1985, entered into force 22 September 1988) I-26164.

United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 U.N.T.S. 107.

C. Books and chapters in books

Boom, Keely. "The Rising Tide of International Climate Litigation: An Illustrative Hypothetical of Tuvalu v Australia." *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Cheltenham, UK and Northampton, MA: Edward Elgar (2013): 409-438.

Hirsch, Moshe. "Interactions between investment and non-investment obligations in international investment law." *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008).

Rogers, Catherine A. *Ethics in International Arbitration*. Oxford University Press, 2014.

Schneiderman, David. *Constitutionalizing economic globalization: Investment rules and democracy's promise*. Cambridge University Press, 2008.

D. Journal Articles

Bodansky, Daniel. "The legal character of the Paris Agreement." *Review of European, Comparative & International Environmental Law* 25, no. 2 (2016): 142-150.

Hailes, Oliver, Rhys Jones, David Menkes, Joshua Freeman, and Erik Monasterio. "Climate change, human health and the CPTPP." *The New Zealand Medical Journal (Online)* 131, no. 1471 (2018): 7-12.

Hedlund, Johanna, Stephen Fick, Henrik Carlsen, and Magnus Benzie. "Quantifying transnational climate impact exposure: New perspectives on the global distribution of climate risk." *Global Environmental Change* 52 (2018): 75-85.

Levine, J. "Adopting and Adapting Arbitration for Climate Change-Related Disputes-The Experience of the Permanent Court of Arbitration." *Transnational Dispute Management (TDM)* 15, no. 1 (2018).

de Paor, Risteard. "Climate Change and Arbitration: Annex Time before there won't be A Next Time." *Journal of International Dispute Settlement* 8, no. 1 (2017): 179-215.

Rajamani, Lavanya. "Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics." *International & Comparative Law Quarterly* 65, no. 2 (2016): 493-514.

E. Reports

International Bar Association *Achieving Justice and Human Rights in an Era of Climate Disruption, Climate Change Justice and Human Rights Task Force Report* (July 2014).

United Nations Convention on Trade and Development *2015 World Investment Report* (2015).

F. Other

Choudhury, Akhlaq and Moyeed, Khaled. "Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change" (Kluwer Arbitration Blog, 26 January 2016).

International Court of Justice. 'Chambers and Committees'. <http://www.icj-cij.org/en/chambers-and-committees>.

Michal Nachmany and Joana Setzer "Policy brief Global trends in climate change legislation and litigation: 2018 snapshot." (Grantham Research Institute on Climate Change and the Environment, London, 2018).

Miles, Wendy. "Climate Change and Arbitration" (International Arbitration Roundtable, Victoria University, Wellington, 23 April 2018).

Sands, Philippe. "Litigating environmental disputes: Courts, tribunals and the progressive development of international environmental law." In *Law of the Sea, Environmental Law and Settlement of Disputes*, pp. 313-326. Brill, 2007.

Sands, Philippe. "Climate Change and the Rule of Law: Adjudicating the Future in International Law" (Public lecture at the UK Supreme Court, 17 September 2015).

UNFCCC. "Status of Ratification" <https://unfccc.int/process/the-paris-agreement/status-of-ratification>.

van den Berg, Albert Jan. "*50 Years of the New York Convention*" (ICCA Congress Series No 14, 2009).