THE UNCITRAL ARBITRATION RULES: A COMMENTARY

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presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone. (P. 58)

We can, of course, adopt such a presumption, but nowhere does Clapham provide a persuasive reason for us to do so. Instead, we are called upon to expand human rights law at the same time that we continue to face enormous problems in implementing even the limited, state-centered version of human rights that Clapham criticizes. A holistic view of society may be appropriate in trying to discern how best to ensure that modernization and social change lead in a positive direction rather than a destructive one, but international human rights law is only one part of this holistic view; asking it to do too much is likely to ensure its failure.

Clapham himself realizes that the approach that he espouses cannot be implemented globally: “we have to accept that human rights obligations may attach to non-state actors in some jurisdictions and not in others” (p. 57). But why should we undermine the universality of what is admittedly a rather limited and imperfectly implemented human rights regime by calling for an even greater and less consistent intrusion into “the moral universe of different cultures and peoples” (p. 547)? There are many different conceptions of dignity and democratic participation, and the task of international human rights law—as Clapham himself advocates—is to ensure that there is “protection for dissident voices and arguments” (p. 548). It is this universal protection for dissidents that enables societies to adopt new views on, inter alia, the role of women, the distribution of wealth, the value of human life, and the place of religion in society. It is not the role of human rights law to determine in detail the substance of those new views or to impose equivalent legal obligations on every nonstate actor.

*Human Rights Obligations of Non-state Actors* represents a strand of human rights thinking that very much deserves to be heard, even if it may not ultimately be persuasive. It also represents a greater belief in the power and legitimacy of international pronouncements to change behavior than has yet been evidenced, and in so doing it risks deflecting attention away from the much more important work of changing attitudes at the national level in order to make human rights a reality.

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*The UNCITRAL Arbitration Rules: A Commentary.*  

The surge of treaty-based arbitration has led to a surge in arbitration under the 1976 UN Commission on International Trade Law (UNCITRAL) Arbitration Rules. As of November 2005, investors had initiated sixty-five treaty-based arbitrations pursuant to those rules.¹ The UNCITRAL Rules’ popularity for treaty-based arbitrations is prima facie paradoxical as the rules were designed for commercial cases and are being revised in part because they are imperfectly suited for treaty-based cases.² The Iran-U.S. Claims Tribunal nonetheless demonstrated how the UNCITRAL Rules could be used, successfully, for claims by private parties against sovereign states. Today, the rules are used for nonadministered commercial cases (that is, arbitrations not administered by institutions such as the International Chamber of Commerce or the London Court of International Arbitration), as well as for many arbitrations under the 2,400 bilateral or multilateral investment treaties and 200 preferential trade and investment agreements.³

For states, arbitration under the UNCITRAL Rules is preferable to arbitration before, for example, the International Chamber of Commerce because UNCITRAL has the UN imprimatur and because submission to UNCITRAL arbitration is


³ See UNCTAD Report, supra note 1, at 3.
not seen as submission to commercial arbitration. UNCITRAL arbitration is acceptable to private parties because it offers the flexibility of ad hoc arbitration coupled with the safeguard of an established, tested set of procedural rules. As compared to arbitration before the International Centre for Settlement of Investment Disputes (ICSID), UNCITRAL arbitration can be attractive both to states and to private parties because UNCITRAL arbitration is typically more confidential and less public, and because ICSID arbitration, unlike UNCITRAL arbitration, is subject to strict jurisdictional requirements.4

The increase in treaty-based arbitration and the continued use of the UNCITRAL Rules in commercial cases create a need for authoritative guidance about the rules from those who have conducted and decided cases under them. A new treatise, The UNCITRAL Arbitration Rules: A Commentary, by David Caron, Lee Caplan, and Matti Pellonpää, well satisfies that need.

This treatise offers insights based on the authors’ extensive experience of UNCITRAL Rules arbitration, plus a trove of previously unpublished decisions by arbitral tribunals interpreting and applying those rules. Although previous works have analyzed the UNCITRAL Rules,5 none has done so as comprehensively as this new treatise, and none has taken into account recent arbitral decisions by tribunals acting under investment treaties.

The authors are respected practitioners of international law, with an impressively varied background. Caron is the C. William Maxeiner Distinguished Professor of Law at University of California, Berkeley. Caplan is attorney-advisor at the Office of the Legal Adviser, Office of International Claims and Investment Disputes, U.S. Department of State. Pellonpää is a judge on the European Court of Human Rights.

The treatise is innovatively structured to reflect the arbitral process, rather than to track the numerical order of the UNCITRAL Rules. After an initial discussion of general provisions and place of arbitration, the book moves to applicable law; procedures for the selection and conduct of arbitrators; the initiation of the arbitration and the identification of issues; the presentation of the case by evidence and hearings; default and waiver; and the award. Each section sets out the text of the pertinent UNCITRAL Rule, followed by the authors’ commentary on that text and its drafting history,6 and then by extracts from decisions of arbitral tribunals.

The treatise is long (1066 pages of text, plus a 20-page table of contents, a 12-page table of cases and other practice, and an 18-page index).7 The length of the book is attributable in significant part to the inclusion of extracts of decisions of the Iran-U.S. Claims Tribunal and other arbitral tribunals. Some of these sources would otherwise be difficult, if not impossible, to obtain, and many of the

4 See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, Art. 25 (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”).


6 The travaux préparatoires for the UNCITRAL Rules are also available through the UNCITRAL Web site, which contains links to documents from various UNCITRAL Commission session discussions. See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules_travaux.html>.

7 It is to be hoped that the authors will enter into an agreement with an online publishing company to enable the treatise to be accessed electronically. Kluwer arbitration.com, for example, has the full text of several leading arbitration treaties, including YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION (2d ed. 2005), and FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds., 1999).
extracts in this treatise are published here for the first time.

The jurisprudence of the Iran-U.S. Claims Tribunal is at the heart of this book, and the authors—each of whom served with this Tribunal—are well placed to present and analyze that jurisprudence. As the Iran-U.S. Claims Tribunal’s Rules were based on the UNCTARAL Rules, the Tribunal’s practice in applying its rules “represents the most extensive body of practice concerning the UNCTARAL Rules because the Tribunal’s docket was so large and most importantly because the practice of the Tribunal is public” (p. 7).

The Iran-U.S. Claims Tribunal was established in 1981 to decide claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, arising out of the U.S. embassy hostage crisis of 1979–81 (along with the asset freeze by the United States during that same period). The Tribunal has issued more than eight hundred awards and decisions in the course of resolving some four thousand cases. A recent study found that 32% of ICSID awards cite precedents of the Iran-U.S. Claims Tribunal. Such reliance on the Tribunal’s jurisprudence is unavoidable as decisions by tribunals acting under investment treaties have only recently begun to emerge. Although the four most cited awards of the Iran-U.S. Claims Tribunal relate to expropriation, rather than to procedural issues arising under the UNCTARAL Rules as modified for use by the Tribunal, its jurisprudence is valuable for issues of process as well as substance. Caron, Caplan, and Pelkonpää’s analysis of the Tribunal’s jurisprudence, along with the inclusion of extracts from that jurisprudence, is a significant and welcome addition to the literature on arbitration under the UNCTARAL Rules.

With the revision of the UNCTARAL Rules, expected to be completed in 2008, the special value of this book may diminish, insofar as UNCTARAL arbitrations will be conducted under substantially revised rules. The current UNCTARAL Rules do not specify which version will apply to an arbitration filed after the rules are revised. The model UNCTARAL arbitration clause appended to Article 1 of the rules refers to the UNCTARAL Rules “as at present in force.” To the extent that contracts have adopted this model clause, the existing UNCTARAL Rules will continue to apply even after the rules are revised, and this treatise will retain its value. Contracts that postdate the revisions would be subject to the revised rules unless they specify the older rules. Most investment treaties reference either arbitration under the UNCTARAL Rules “then in force” (meaning at the time the arbitration is commenced rather than at the time the treaty is ratified) or simply refer to the UNCTARAL Rules without specifying which version of those rules will apply. The UNCTARAL Working Group is considering the question of which set of rules will apply once the existing rules are revised, and it is foreseeable that the existing rules will be amended to provide that the version to apply will be the one in force at the time that the arbitration

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10 Id. at 539.

11 Id. The four most cited Iran-U.S. Claims Tribunal awards are Amoco International Finance, Phillips Petroleum, Starrett Housing, and Tippett.

12 See, for example, the UK/Ukraine bilateral investment treaty (BIT), Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, Feb. 10, 1993, Art. 8 (referring both to the UNCTARAL Arbitration Rules and to the UNCTARAL Arbitration Rules “as then in force”), and the Egypt/Greece BIT, Agreement Between the Hellenic Republic and the Arab Republic of Egypt for the Promotion and Reciprocal Protection of Investments, July 16, 1993, Art. 10 (referring to the UNCTARAL Arbitration Rules “as then in force”). A full-text compilation of these and other BITs is available at <http://www.unctadsi.org/templates/DocSearch___779.aspx>.

is commenced, unless otherwise agreed by the parties. A future edition of this book could address the revisions, and the work done for this treatise would serve as a solid basis for assessing the revised rules.

A future edition could also incorporate more references to, and extracts of, decisions and awards in treaty-based arbitrations, in addition to the focus on the Iran-U.S. Claims Tribunal jurisprudence. The work of the Tribunal, which was established in 1981, is almost over, whereas the work of treaty-based tribunals is just beginning. One subject where additional discussion of treaty-based arbitrations is merited is the applicable law where the relevant treaty does not specify that law. The UNCITRAL Rules do not address this issue, as they were drafted before the explosion of bilateral investment treaties (BITs) in the 1990s and were designed to deal with contract-based arbitrations. Thus, the existing UNCITRAL Rules refer to conflict-of-law rules, the terms of the contract, and usages of the trade applicable to the transaction in determining the applicable law (Art. 33, discussed in chapter 3). In particular, the rules do not discuss the applicability of the relevant bilateral or multilateral investment treaty, interpreted in accordance with the Vienna Convention on the Law of Treaties, which is the starting point for any claim commenced under an investment treaty. Caron, Caplan, and Pellanpää do not discuss this issue of applicable law in treaty cases, beyond including one extract from the decision of a North American Free Trade Agreement (NAFTA) tribunal—a lacuna that could be remedied in the next edition. More discussion of treaty-based arbitration is also merited in the context of the treatise’s part III ("The Initiation of the Arbitration and the Identification and Clarification of Issues Presented"), which includes chapters 12 ("Plea as to the Jurisdiction of the Arbitral Tribunal") and 15 ("The Question of Interim Measures").

The authors might also in a future edition discuss and provide extracts of high-profile, non-UNCITRAL decisions that would be persuasive in the UNCITRAL context, such as decisions of the International Court of Justice (ICJ) and decisions by ICSID tribunals. For example, in the discussion of failure to act as an arbitrator (pp. 285–87), the authors could refer to Victor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), where the respondent state has moved to disqualify the tribunal in light of the alleged "glacial pace" of the proceedings. References to ICJ and ICSID decisions would also be useful and relevant in the discussions of jurisdictional issues (chapter 12) and interim or provisional measures (chapter 15).

The book’s approach and value can be appreciated by briefly considering its treatment of (1) challenges to arbitrators, (2) confidentiality, third-party access, and the use of amicus curiae submissions, and (3) costs and fees.

With respect to challenges to arbitrators, the UNCITRAL Rules regulate the duty to disclose; the grounds for challenge; the initiation of, and the potential for agreement to, the challenge; and the resolution of the challenge (Articles 9–12). The authors address each aspect of the challenge process, with practical illustrations of successful and unsuccessful challenges, including ten challenge incidents from the Iran-U.S. Claims Tribunal—most dramatically, the situation of an assault by two arbitrators upon a fellow arbitrator (chapter 5). The authors give detailed real and hypothetical examples relating to an arbitrator’s relationships with a witness and with the parent corporation of a company, the arbitrator’s handling of the proceedings, an arbitrator’s breach of confidentiality of deliberations, and previous advocacy on behalf of a country formerly adverse to a sovereign party. This chapter provides insight into the rarely

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15 One proposed revision of the relevant UNCITRAL rule relating to applicable law, Article 33, recognizes that not all arbitrations under the rules are commenced on the basis of a contract. The current provision, Article 33(3), requires the tribunal to decide the dispute "in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." The proposed revision requires the tribunal to decide the dispute "in accordance with the terms of the parties' contract, if any, and the usages of the trade applicable to the transaction." Paulsson & Petrochilos, supra note 2, at 138–39 (emphasis added).
exposed world of arbitrator challenges (and also suggests that most challenges are dismissed). The authors conclude, inter alia, that, while not expressly stated in the UNCITRAL Rules, the rules should be considered to impose a continuing duty on arbitrators to disclose circumstances likely to give rise to justifiable doubts as to impartiality or independence, when those circumstances arise or become known to them after their appointment.

In relation to confidentiality, third-party access, and the rise of amicus curiae submissions, the assumption in 1976, when the UNCITRAL Rules were issued, was that arbitration proceedings were confidential, with the consequence that the rules are largely silent on the issues of confidentiality and privacy. That assumption is no longer valid, however, and many modern institutional arbitration rules expressly address the issue of confidentiality. Accordingly, the authors recommend that, where the parties to an UNCITRAL arbitration wish the proceedings to be confidential, a confidentiality agreement or a procedural order should be created to overcome this gap in the UNCITRAL Rules. In relation to amicus briefs, the authors review relevant Iran-U.S. Claims Tribunal and NAFTA decisions, and conclude that, while amicus submissions are permissible under the UNCITRAL Rules, tribunals should restrict their scope and length. The authors further find that “amicus submissions are unlikely to be utilized in most arbitration” (p. 38). As the authors recognize, different considerations arise in disputes involving sovereign states or state entities. In light of the pressures on sovereign states to be transparent in their dealings with foreign investors and in the resolution of disputes involving the public interest (and the public purse), such disputes are less likely to be confidential and are more likely to involve amicus submissions.

As to costs and fees of arbitration (chapter 25), the treatise helpfully unites in a single section the disparate provisions of the UNCITRAL Rules, which address costs in four different provisions, relating to the costs of the arbitration, arbitrators’ fees, apportionment of costs, and deposit of costs (Articles 38–41). In relation to the award of costs, the treatise includes extracts from NAFTA and ad hoc tribunals illustrating the early reluctance of tribunals in treaty-based cases to award costs to the prevailing party, partly in light of the novelty of such investment arbitrations. In recent years, tribunals in treaty cases have been increasingly willing to award costs against an unsuccessful party. This trend is likely to continue, particularly where the unsuccessful party has presented its case in an inefficient or obstructive manner.¹⁶

A weakness of the book is the layout. The table of contents is difficult to follow, as there is no clear typesetting differentiation between the parts and the chapters. More problematic is the layout of the extracts from the Iran-U.S. Claims Tribunal and from other tribunals. The demarcation between extract and footnote is often not clear, and the confusion is compounded by inclusion of the source reference for the extract after the extract itself, leaving readers unsure what they are reading. The inclusion of the original paragraph numbers in the extract adds to the problem, as do the lengthy footnotes on most pages, confronting readers with a myriad of numbers and oddly spaced text, which discourages lingering on the extracts.

Despite this aesthetic flaw, the treatise admirably achieves its objectives of “reach[ing] past the secrecy so often met in arbitration,” explaining “clearly and fully the workings of the” UNCITRAL Rules, and “illuminat[ing] the shape [that] UNCITRAL Rules take in practice” (from the dust jacket). The treatise will also be an important reference in the present revision process of the UNCITRAL Rules. Suggested revisions to those rules include requiring both parties to file opening submissions before the constitution of the arbitral tribunal, providing for multiparty arbitration, adding rules to deal with obstruction by an arbitrator, addressing confidentiality, and refining the rules.

¹⁶ See, e.g., Telenor Mobile Commc’ns A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award, paras. 103–07 (Sept. 13, 2006); ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, paras. 533–39 (Oct. 2, 2006); Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award, paras. 176–78 (Oct. 27, 2006). The principles relating to the allocation of costs and fees in treaty cases are generally applicable for both UNCITRAL and ICSID arbitrations.
relating to provisional measures\textsuperscript{17}—all matters well covered by the Caron, Caplan, and Pellonpää treatise.

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A court's pronouncements may be legally persuasive and intellectually sound, but if the parties before it do not abide by the judgment, its words will carry less weight than if the parties do its bidding. Moreover, the likelihood that disputants will seek justice before the court will also diminish if after a lengthy and perhaps expensive endeavor, there is no certainty that the losing party will honor the decision. In most municipal legal systems, the sovereign government has mechanisms, such as the attachment of assets by specified state officials or potential imprisonment for contempt of court, to ensure compliance with municipal court decisions. In contrast, the formal compliance mechanism for the International Court of Justice (ICJ) is Article 94 of the UN Charter. Under Article 94(1), states undertake to comply with the Court’s judgments, and under Article 94(2), prevailing states may request the Security Council’s assistance in obtaining compliance when the losing party fails to perform. The Security Council has discretion whether or not to lend its assistance. This politically charged option has rarely been invoked.

\textsuperscript{17} Paulsson & Petrochilos, supra note 2, at 5–10; see also id. at 58 n.110, 60 n.118, 71 n.146, 100 n.200, 103 n.206, 142 n.253 (all citing the book under review). In February 2007, the working group that is revising the UNCITRAL Rules opted against a rule increasing confidentiality, partly in light of the trend toward greater transparency in proceedings involving sovereign states. The working group also delayed deciding whether the rules should treat investor-state disputes differently from ordinary commercial disputes. See documents relating to the 46th session of UNCITRAL’s Working Group II (February 5–9, 2007), at <http://www.uncitr-ar.org/uncitrar/en/commission/working_groups/2Arbitration.html>.

The Security Council has never formally exercised its Article 94(2) power to enforce a Court decision, although it has assisted in the enforcement of decisions under authority derived from other sources.\textsuperscript{1} The nonexistence of an effective, coercive compliance mechanism has prompted many to ask whether states do, in fact, comply with ICJ decisions and, if they do, why?

Constanze Schulte, an attorney with Lovells (Madrid), has undertaken to answer the former question—do states comply?—by focusing her research on state practice. The book is based on her doctoral thesis for the Faculty of Law at the University of Munich, written under the direction of Judge Bruno Simma (who was elected to the Court while the thesis was being finalized). She has excluded examination of the latter question—if states comply, why?—in her targeted inquiry on actual compliance.

In conducting her study of ICJ decisions, Schulte analyzed final decisions in contentious cases requiring some kind of implementation and also interlocutory decisions with respect to provisional measures. A case with a complex history comprising intermediate steps (such as decisions in which the Court confirmed its jurisdiction, issued a judgment on the merits, and issued a later judgment with respect to compensation) was treated as one matter. She excluded advisory decisions, decisions on interlocutory matters such as evidentiary disputes, and jurisdictional decisions in which the Court determined it did not have the authority to act. Her methodology is reasonable, given her focus. Advisory decisions are an important part of the Court’s docket, but failure to comply with what is only an advisory opinion has a different, although not unimportant, effect on the Court’s prestige and authority.\textsuperscript{2} She explains that interlocutory decisions with respect to evidentiary matters and the like can be addressed by the

\textsuperscript{1} See Karin Oellers-Frahm, Article 94 UN Charter, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 174–75 (Andreas Zimmermann, Christian Tomuschat, & Karin Oellers-Frahm eds., 2006).