

**2024 Int'l Conference on WHO Pandemic Treaty Negotiation**

**Missed Opportunity under the New  
Framework? Exploring Untapped Potentials  
under the Dispute Settlement Mechanism of  
the WHO Pandemic Agreement**

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# Structure

- **WHO Pandemic Agreement Draft: Text on Dispute Settlement**
- **“Time” as a Crucial Issue**
- **Dispute Board: Introduction**
- **Possible Application of Dispute Board? Preliminary Analysis**

# WHO Pandemic Agreement Draft: Text on Dispute Settlement

- **Legal Text (Progress as of 19 September 2024):**

1. In the event of a dispute between two or more Parties concerning the interpretation or application of the WHO Pandemic Agreement, the Parties concerned shall seek through diplomatic channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation, or conciliation. In case of failure to reach a solution by the methods mentioned above, the Parties, if they so agree in writing, may resort to arbitration in accordance with the Permanent Court of Arbitration Rules 2012 or its successor rules unless the disputing Parties agree otherwise.
2. The provisions of this Article shall apply with respect to any protocol adopted under Article [31] within the scope of this Agreement as between the Parties to the protocol, unless otherwise provided therein.

# WHO Pandemic Agreement Draft: Text on Dispute Settlement

- **Legal Text:**

- The current text first appeared in the 77th WHA (27 May 2024), as part of the draft in the report by the Director General.

=> Unless there is some extraordinary development, its design and prescribed mechanism is likely to stay.

- **The current text prescribes the following mechanisms for dispute settlement:**

- ✓ **Settlement through diplomatic channel:** Classical diplomatic negotiation.

- ✓ **Good Offices, Mediation, Conciliation:** Mechanisms that can be utilized to support diplomatic negotiation.

- ✓ **Arbitration** by PCA based on the 2012 Rule, **BUT must be based on consent of the parties in writing.**

# WHO Pandemic Agreement Draft: Text on Dispute Settlement

- **Legal Text: Evaluation**

- Basically, this is a classical design of primarily relying on diplomatic negotiation as the **first** and **main** mechanism for dispute settlement.

- => Note that for both parties, failure in negotiation is a precondition to trigger PCA arbitration; also there must be consent in writing.

- Whether Arbitration will be heavily relied upon will depend on further practice.

- => Considering COVID-19 experience, however, it is doubtful whether binding arbitration will be relied upon by the contracting parties.

# WHO Pandemic Agreement Draft: Text on Dispute Settlement

- **Legal Text: Evaluation**

➤ Considering that agreement on Article 25 seems to be achieved quite quickly, my guess is that the negotiators decided not to let dispute settlement become a sticking point in the negotiation process.

=> Rather than being innovative, it is better to reduce friction by utilizing diplomatic negotiation as the first instance of dispute resolution;

=> Arbitration as an option is there in case some contracting parties seek neutral third party review and further enforcement.

# “Time” as a Crucial Issue

- **Looking back at COVID-19:**

- There are significant difficulty at early stages to coordinate resources for a global response.

- Negotiation in good faith is an approach that may lead to a good outcome, but how much time will it take?

⇒ Will it lead to effective responses that are fast enough to control the situation?

- Example: WTO “Waiver From Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19”

- ✓ Negotiation took more than **2 years**.

- ✓ Waiver limited to only vaccine patent; does not cover other areas.

- ✓ Criticized for its limitations.

- **Looking back at COVID-19:**

- It can also be observed that government policies are influenced by internal factors as well, such as pressure on the government to reserve medicines for domestic use.

=> For governments, coordination to achieve the most effective global response is not possible because other factors must be addressed as a priority.

=> This will also affect the expediency of diplomatic negotiation.

- “Time” is a serious problem when it comes to formulating a coordinated response to a pandemic at the international law.

=> **Diplomatic Negotiation does not guarantee swift result!**

- **Main Question: What other alternatives will be helpful in facilitating dispute resolution under the Pandemic Agreement?**



## **Possible Proposal:**

**“Dispute Board” can be a useful model for an innovative form of dispute settlement under the WHO Pandemic Agreement.**

- **Dispute Board: What is it?**

- A dispute prevention and resolution mechanism at an early stage.
- First appeared in US large construction projects; later developments see it adopted in large construction projects, especially those involve international contractors.
- **Why large international construction projects? Because there is a need to resolve disputes swiftly, effectively, credibly**
  - ✓ Such projects may involve numerous highly technical engineering issues, which may lead to numerous disputes that can add cost and time delay.
  - ✓ High technicality also means that the parties are reluctant to submit dispute to domestic courts. This is in addition to the significant costs to address all claims.
  - ✓ Long-term relationship is involved between project owner and contractor, thus there is a need to resolve disputes quickly without disrupting the project.
  - ✓ Disputes may cause contractors to suffer severe limitation in cash flow.

# Dispute Board: Introduction

- **Dispute Board: Common Key Features**

- Usually is a **standing body** (can be *ad hoc*, but a comparatively rare sight) that operates alongside the construction project.

- **Why is a standing body the more common?**

- ✓ A standing Dispute Board is able to constantly work with the parties throughout the project, ensure familiarity with the project details.

=> This is considered to be the principal benefit of a Dispute Board!

- ✓ Only a standing Dispute Board is able to take action for the purpose of early dispute avoidance.

# Dispute Board: Introduction

- **Dispute Board: Common Key Features**

- Usually consists of 3 experts, but can be 1 expert or more than 3 experts.
- Experts are mainly engineering or construction experts, but can also include lawyers familiar with the construction disputes.
- The Dispute Board can also conduct regular **site visits** and **hold meeting with the parties**.

=> Familiarity with the project and the build-up of credibility through this process is what allows Dispute Board to provide unique dispute avoidance and resolution services to the parties.

# Dispute Board: Introduction

- **Dispute Settlement Board: Possible Roles**

- Note that Dispute Board is not Arbitration!

- ⇒ This is positioned as a mechanism that operates before any arbitration or adjudication process.

- ⇒ Its enforcement cannot be based on arbitration enforcement procedures.

- **Two possible roles (non-exclusive):**

- ✓ Early informal assistance aiming to avoid dispute.

- ✓ Formal dispute adjudication through binding decisions or non-binding recommendations.

# Dispute Board: Introduction

- **Dispute Board: Types**

- **Dispute Review Board:** Offer non-binding recommendations.

- **Dispute Adjudication Board:** Offer interim, binding decisions.

- **Combined Dispute Board:** Offer a hybrid service, where it can provide non-binding recommendations or binding decisions, based on the discretion given to the Board.

# Possible Application of Dispute Board?

## Preliminary Analysis

- **Preliminary Clarification:**

- This is not a call to full copy-and-paste dispute board design into the Pandemic Agreement.
- The consideration is whether there are certain features that would make Dispute Board a plausible reference model for dispute settlement that can enhance time efficiency regarding dispute settlement.
- Even if Dispute Board can provide some kind of guidance on enhancing dispute settlement efficiency, further thinking must be done on what kind of procedural design is acceptable to the contracting parties.

# Possible Application of Dispute Board?

## Preliminary Analysis

- **Why Dispute Board can serve as a reference:**

- The complexity of pandemic risk management and emergency response means that relevant issues are highly technical, warranting the involvement of special experts.
  - The effective operation of the Pandemic Agreement will rely on long-term, good faith coordination between the contracting parties.
- => While long-term treaty relationship is common, the design of the Agreement may involve further complexities that is not seen in past health-related treaties.
- Maintaining a body of experts that is familiar with operations under the Pandemic Agreement and is considered credible by the contracting parties can assist not only in dispute settlement, but also provide expert view on possible sources of dispute and call for early response.



# Possible Application of Dispute Board?

## Preliminary Analysis

- **Why Dispute Board can serve as a reference:**

- **Pandemic Agreement as a “Project”:** Two possible options

- ✓ **Permanent Body under the Agreement:** Constant observation of global pandemic risk, prevention and response capacity building, resource management, etc. Close interaction with the contracting parties ensure that it is able to assist dispute settlement at all stages

- ✓ **Establish the Board during a pandemic emergency:** to facilitate coordination and dispute settlement until the end of the emergency.

- **It can be inserted as a pre-arbitration mechanism.**

=> As for negotiation, it can be pre-negotiation or work jointly with negotiation (in the latter, its service will be similar to mediation).

- **Possible Issues that can affect viability or design:**

- How many experts? How to determine the expert composition? How should the contracting parties be involved in the expert appointment process?
- Standing body is the better option, but should it be established when the Pandemic Agreement comes into force or soon after? Or should it be established when there is a pandemic emergency?
- Is it possible to have “binding decisions”? Or will it be limited to non-binding recommendations?
- **Details of its operation:** information gathering, holding meetings with contracting parties or other actors, how to notify suggestions, etc.
- **Funding.**

**Thank you for your attention!**

**I welcome any comment or question on the topic**