



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW



Ever More Transparent?

A History of International Arbitration

Basel Winter Arbitration School

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A. Arbitration ↔ Judicial Settlement

United Nations Charter, Chapter VI: „Pacific Settlement of Disputes“

Art. 33(1):

„The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, **arbitration**, **judicial settlement**, resort to regional agencies or arrangements, or other peaceful means of their own choice. “



A. Arbitration ↔ Judicial Settlement

In the domestic realm :

Private ↔ Public?



A. Arbitration ↔ Judicial Settlement

Practical advantages of arbitration over judicial proceedings?

1. Cheaper?
2. Faster?
3. Confidential?



B. A very short history of (international) arbitration

Key events:

1794: Jay Treaty

1872: Alabama Arbitration

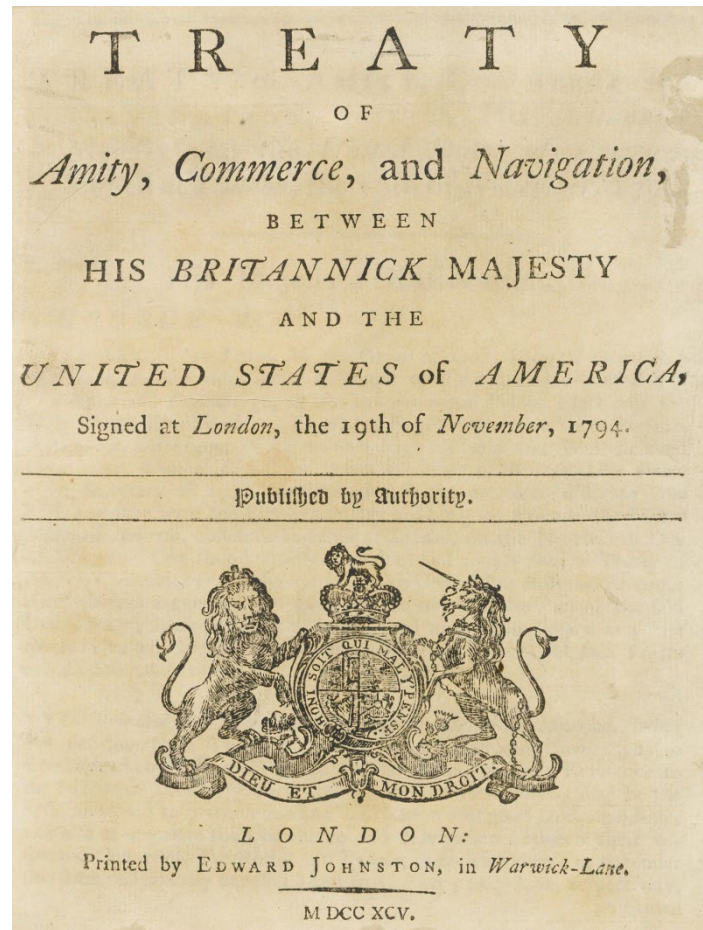
1899 and 1907: Hague Peace Conferences

1922: Permanent Court of International Justice (PCIJ)

1945: International Court of Justice (ICJ)

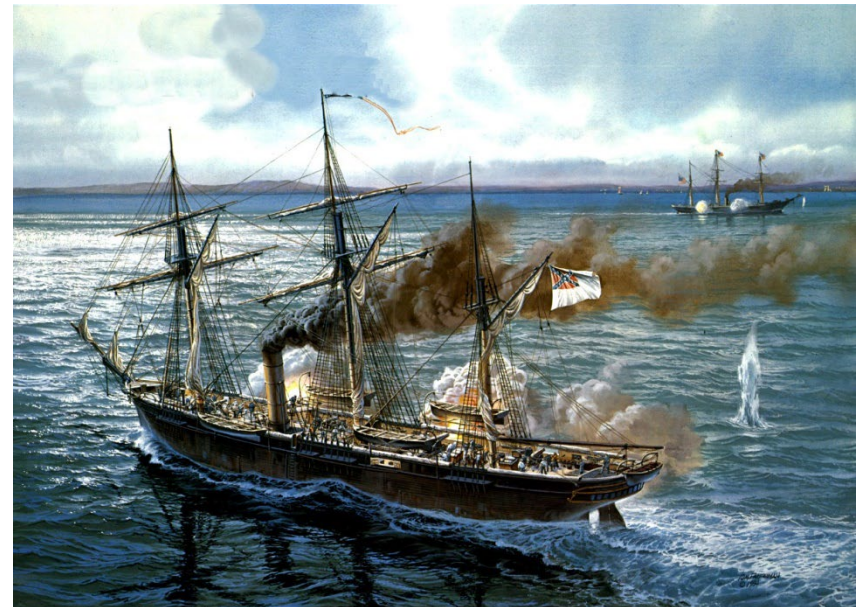


1794 Jay Treaty (US – Britain)





1872 Alabama Claims arbitration (US – UK Britain)





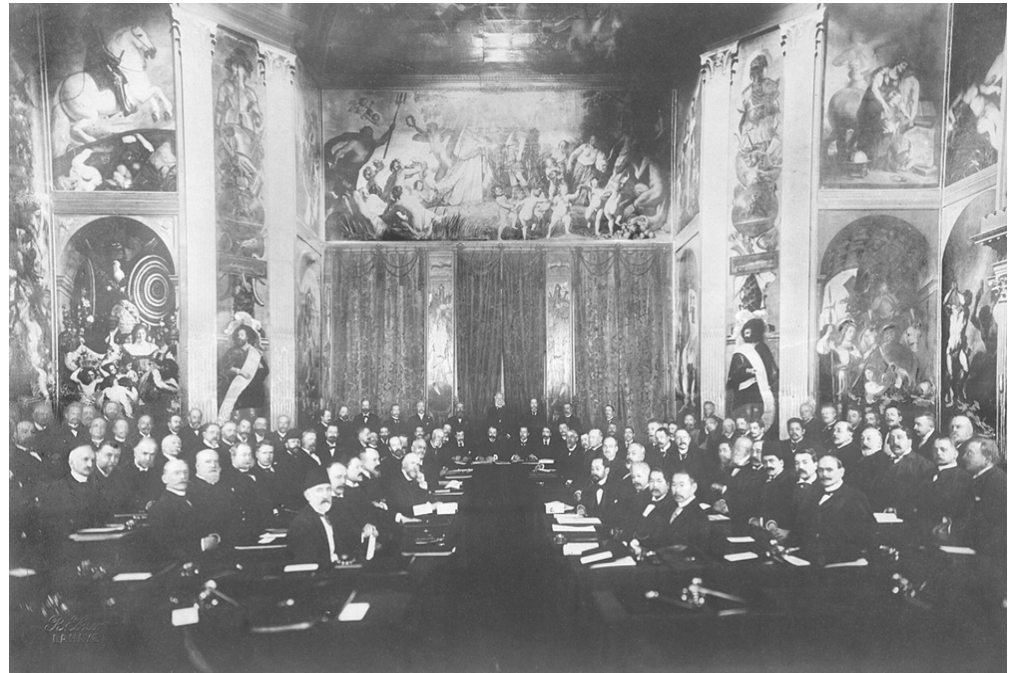
1893 Bering Sea arbitration (US – UK Britain)





B. A very short history (cont.)

- 1899 and 1907: Hague Peace Conferences
- 1899: Permanent Court of Arbitration (PCA)
- 1899: Hague Convention for the Pacific Settlement of International Disputes





B. A very short history (cont.)

- 1922: Permanent Court of International Justice (PCIJ)
- 1945: International Court of Justice (ICJ)



B. A very short history (cont.)

“Mixed Arbitration”

1. Injuries to aliens after war and revolution (World war I; Mexican revolution).
2. Resource (oil) concessions
3. ICSID (in force 1966)
4. Iran-US Claims Tribunal (since 1981), ca. 4000 claims.



C. Functions of Transparency in international arbitration

I. Manifestations

1. Access to documents

2. Oral hearings

[3. amicus curiae briefs]



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C. Functions of Transparency in international arbitration

II. Rationales



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C. Functions of Transparency in international arbitration

1. Compliance with awards



C. Functions of Transparency in international arbitration

2. Fairness and rule-of-law based procedure

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

Preamble

The Parties to this Convention,

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

Noting the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency,



C. Functions of Transparency in international arbitration

3. Systemic operability

4. (Democratic) legitimacy and accountability

“Private rights, public problems”



D. Regulation of Transparency in Arbitration

- ICSID transparency reform in arbitration rules 2006
- PCA rules 2012
- UNCITRAL Transparency Rules for investor-state arbitration 2014



UNCITRAL transparency rules

Referrals to those UNCITRAL Rules :

by the Mauritius Convention 2014 (9 ratifications)

by CETA 2016

by EU – Vietnam 2019

Power of the tribunals to adapt UNCITRAL rules (Art. 3 b)

example: ICSID, *BSG v Guinea*, Procedural order no. 2 (2015)



D. Regulation of Transparency in Arbitration

I. Transparency of Documents

1. The Object: What?

See ICSID, *Biwater Gauff*, PO No 3, paras 149 ff.



D. Regulation of Transparency in Arbitration

I. Transparency of Documents

2. "If" and "under what circumstances"?

- **Arbitral awards**
- Art. 48(4) ICSID Arbitration Rules (2006)
- Art. 34(5) PCA (2012)



D. Regulation of Transparency in Arbitration

I. Transparency of Documents

2. "If" and "under what circumstances"? (continued)

Publication of other documents:

- Art. 18(2) WTO DSU (1994)
- Art. 3(1)-(3) UNCITRAL Rules (2012)
- Art. 8.36(2) CETA (2016)
- Art. 3.46(2) EU – Vietnam (2019)



D. Regulation of Transparency in Arbitration

I. Transparency of Documents

3. Timing: When?

- ICSID, *Biwater Gauff*, paras 137-138 and 140
- Art. 3(4) UNCITRAL



D. Regulation of Transparency in Arbitration

I. Transparency of Documents

4. Publicising actor: by whom?

- Art. 3(3) UNCITRAL
- Art. 7(7) UNCITRAL



D. Regulation of Transparency in Arbitration

I. Transparency of Documents

5. Modalities and procedures: how?

- Proactive or reactive
- Art. 3(4) and Art. 8 UNCITRAL: repository
- Transparency registry



D. Regulation of Transparency in Arbitration

II. Transparency of the oral hearings

Art. 6 UNCITRAL

Compare: Art. 32(2) ICSID Arbitration Rules

Exceptions:

Art. 6(2) and 7(2) UNCITRAL



ICSID, *Biwater Gauff v. Tanzania* (2006)

- Dar es Salaam Water Supply and Sanitation Project.
- BGT bound by human right to water?
- Objects of and considerations on transparency?



E. Conclusions

- Transparency as a general principle of international law?
 - Charles H. Brower II, para. 5 (Reading).