Class 3:
The Permanent Court of Arbitration
a view across the spectrum of international arbitration

Martin Doe Rodríguez
Deputy Secretary-General, Permanent Court of Arbitration

Basel Winter Arbitration School
6 February 2024

Overview

I. The PCA

II. Inter-State Arbitration

III. Investment Arbitration

IV. Commercial Arbitration

V. New Horizons

How to resolve inter-State disputes?

"Now there are three Ways whereby Misunderstandings among Princes may be accommodated without a War . . .

The first is by a Conference . . .

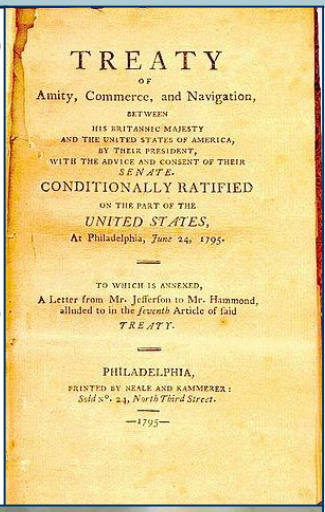
The second way to prevent War between those, who, not belonging to the same Jurisdiction, have no common Judge to appeal to, is to put the Matter to **Arbitration** . . .

The third Way to prevent War is to determine Differences by casting Lots . . ."

– Hugo Grotius, *De Jure Belli ac Pacis* (1625)

Historic Arbitrations

Jay Treaty Arbitration
(USA v. United Kingdom, 1794)

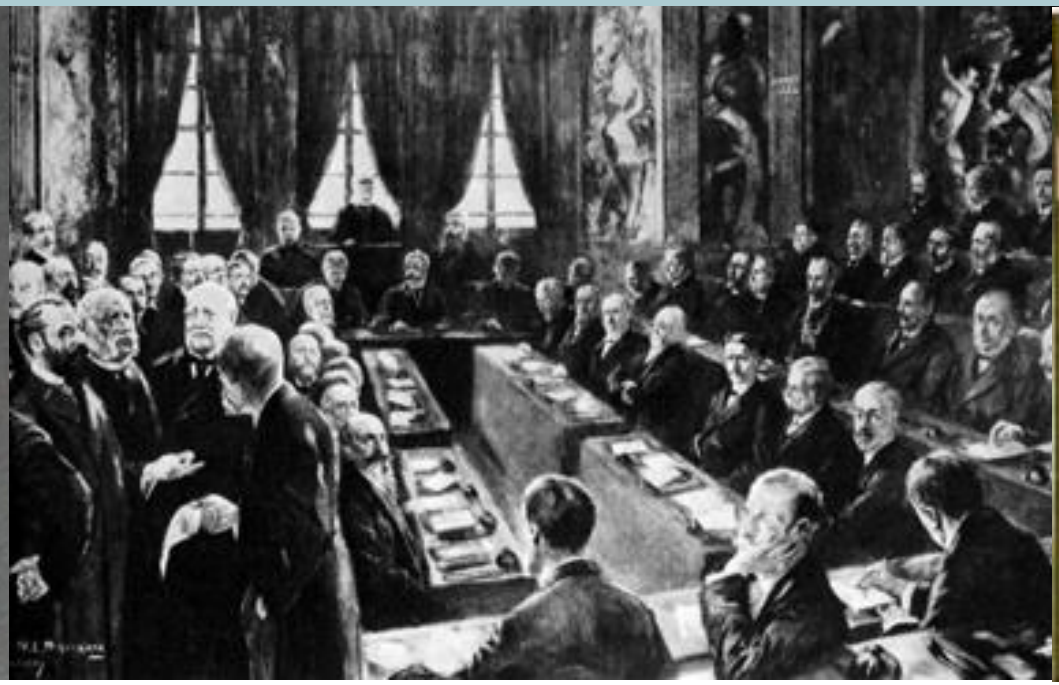

TREATY
OF
Amity, Commerce, and Navigation,
BETWEEN
HIS BRITANNIC MAJESTY
AND THE UNITED STATES OF AMERICA,
BY THEIR PRESIDENT,
WITH THE ADVICE AND CONSENT OF THEIR
SENATE.
CONDITIONALLY RATIFIED
ON THE PART OF THE
UNITED STATES,
At Philadelphia, *June* 24, 1795.

TO WHICH IS ANNEXED,
A Letter from Mr. Jefferson to Mr. Hammond,
alluded to in the *fourth* Article of said
TREATY.

PHILADELPHIA,
PRINTED BY NEALE AND KAMMERER:
Sold at No. 24, *North Third Street.*
—1795—

Alabama Claims Arbitration
(USA v. United Kingdom, 1869)

1899 Hague Peace Conference



"… arbitration is … the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle."

1899 Hague Convention

Convention for the Pacific Settlement of International Disputes (1899)

Art. 15: "International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law."

1899 Hague Convention

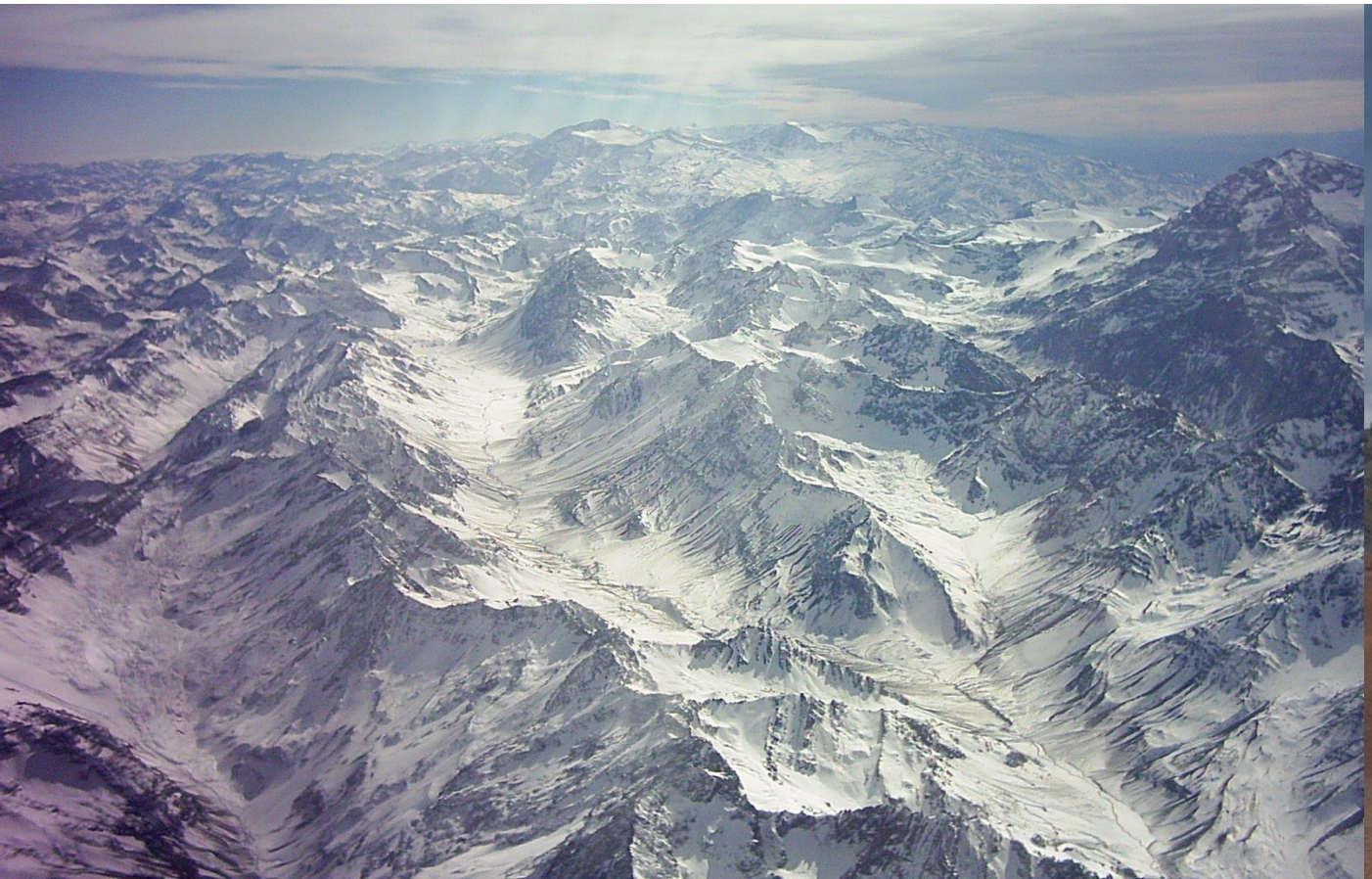
Art. 20: "With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times…"

First PCA Case

"Pious Fund of the Californias"
(USA v. Mexico, 1902)

Inter-State Arbitration

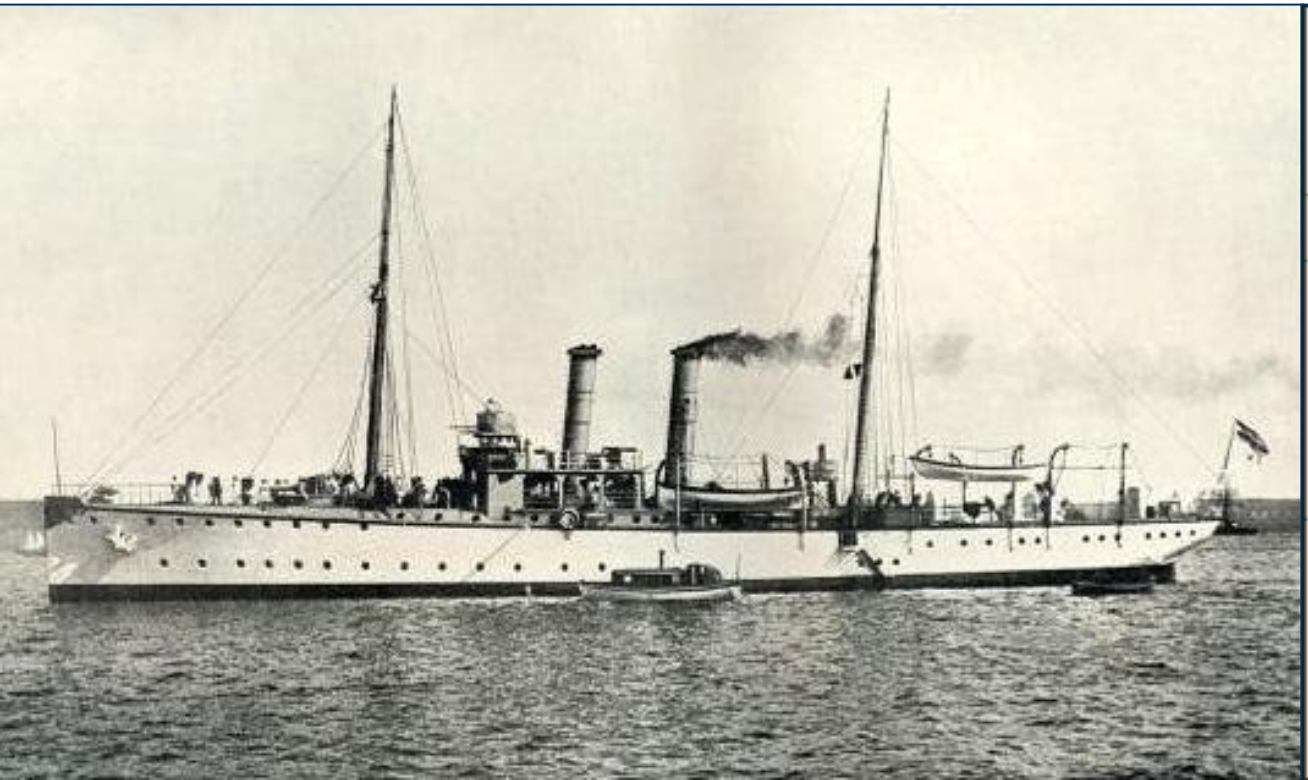
Cordillera of the Andes Arbitration
(Argentina v. Chile, 1902)



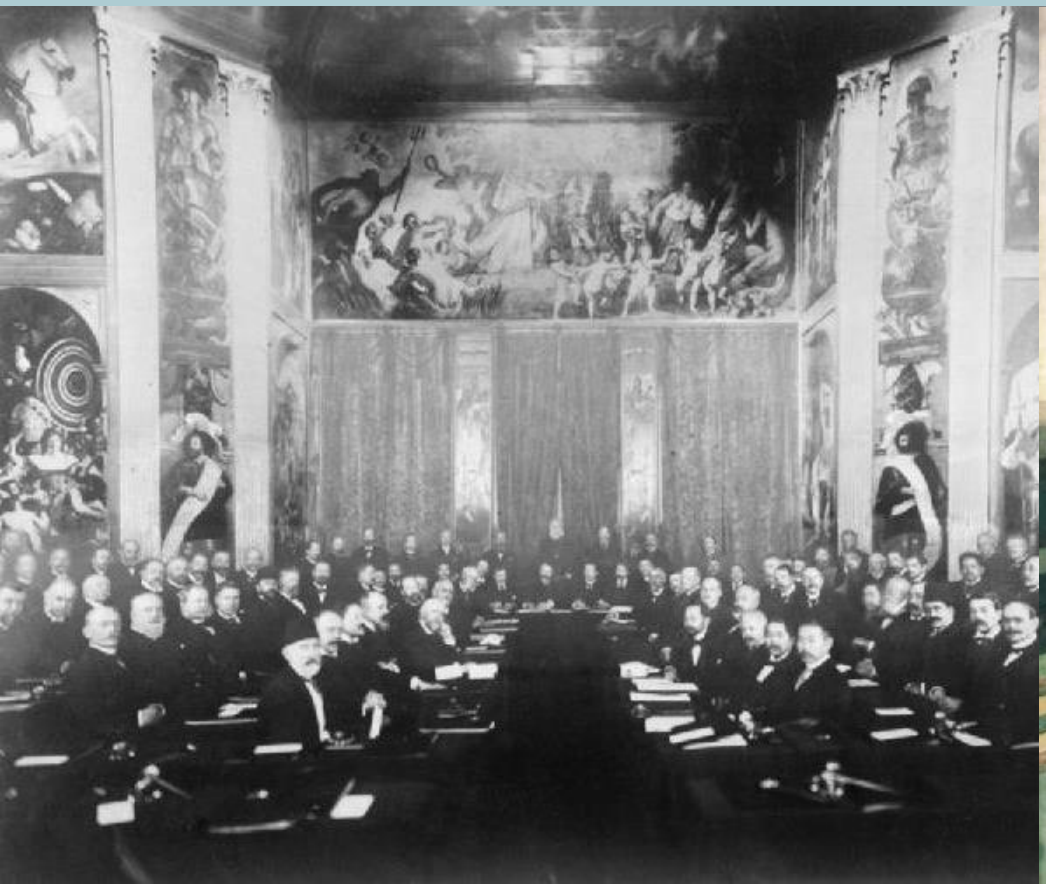
Inter-State Arbitration

Preferential Treatment of the Blockading Powers of Venezuela

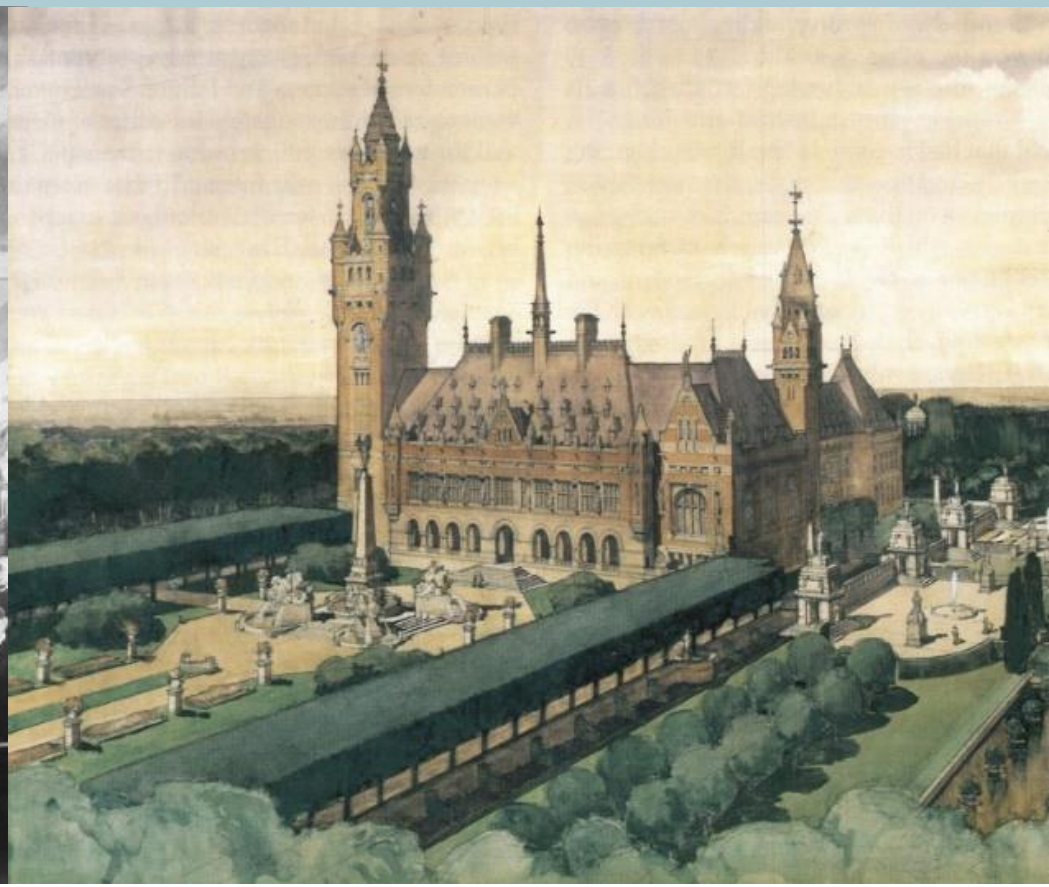
(Germany, UK, Italy v. Venezuela, 1903)



1907 Hague Peace Conference



Second Hague Peace Conference
(1907)



Peace Palace
(1907-1913)

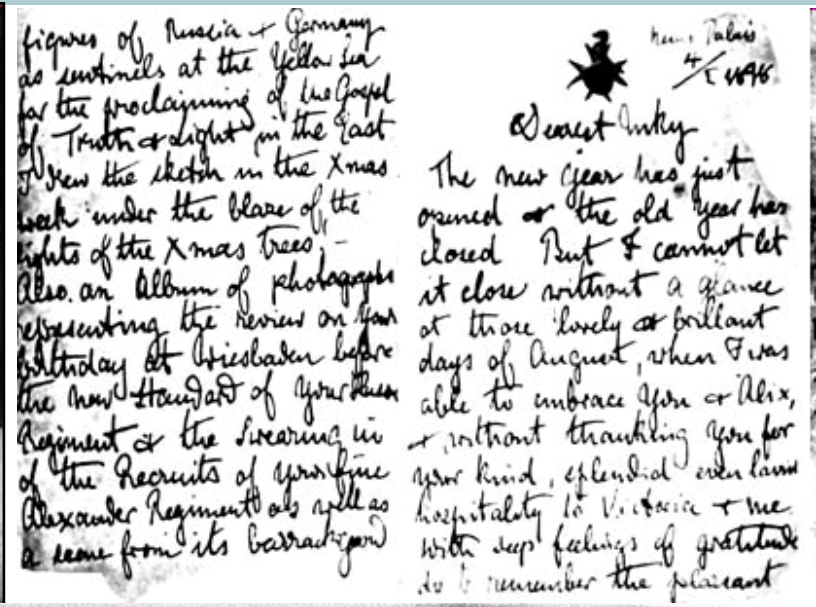
Early Success of Arbitration

1903-1912
1. Japanese House Tax (Germany, France, and Great Britain / Japan)
2. Preferential Treatment of Claims of Blockading Powers Against Venezuela (Germany, UK and Italy/Venezuela, 1903)
3. Muscat Dhows (France/Great Britain, 1904)
4. Deserters of Casablanca (France/Germany, 1908)
5. The Grisbadarna Case (Norway/Sweden, 1908)
6. North Atlantic Coast Fisheries (USA/UK, 1909)
7. The Orinoco Steamship Company (Venezuela/USA, 1909)
8. Arrest and Restoration of Savakar (France/UK, 1910)
9. Canevaro Claim (Italy/Peru, 1910)
10. Russian Claim for Indemnities (Russia/Turkey, 1910)
11. The "Carthage" (France v. Italy, 1912)
12. Boundaries in the Island of Timor (The Netherlands v. Portugal)

World War I

Tsar Nicholas II to Kaiser Wilhelm, 29 July 1914, 8.20 pm

"Thanks for your telegram conciliatory and friendly. Whereas official message presented today by your ambassador to my minister was conveyed in a very different tone. Beg you to explain this divergency! **It would be right to give over the Austro-servian problem to the Hague conference.** Trust in your wisdom and friendship."



figures of Russia + Germany as sentinels at the Yellow Sea for the proclaiming of the Gospel of Truth + Light in the East drew the sketch in the Xmas week under the blaze of the lights of the Xmas trees. Also an Album of photographs representing the Review on your birthday at Wiesbaden before the new Standard of your Queen Regiment + the Swearing in of the Recruits of your fine Alexander Regiment als well as a scene from its barrack-yard

Dearest Nicky

The new year has just opened + the old year has closed But I cannot let it close without a glance at those lovely + brilliant days of August, when I was able to embrace you + Alix, + without thanking you for your kind, splendid + even last hospitality to Victoria + me with deep feelings of gratitude do I remember the pleasant

World War II

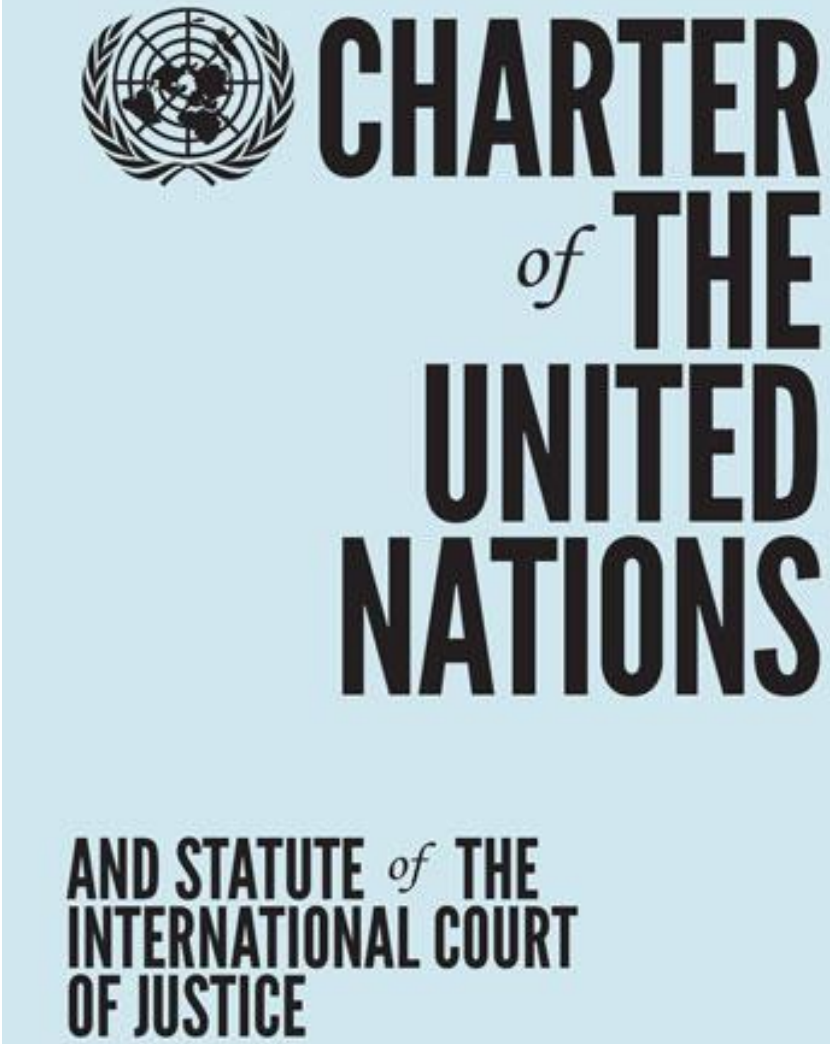
1899-1914:	15 Inter-State Arbitrations
1914-1918:	World War I
1922:	League of Nations / PCIJ
1935:	*RCA v. China*
1939-1945:	World War II

Inter-State Dispute Settlement

"**Article 33**

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."

– UN Charter (1945)



Post-war Period

1899-1914: 15 Inter-State Arbitrations

1914-1918: World War I

1922: League of Nations / PCIJ

1935: ***RCA v. China***

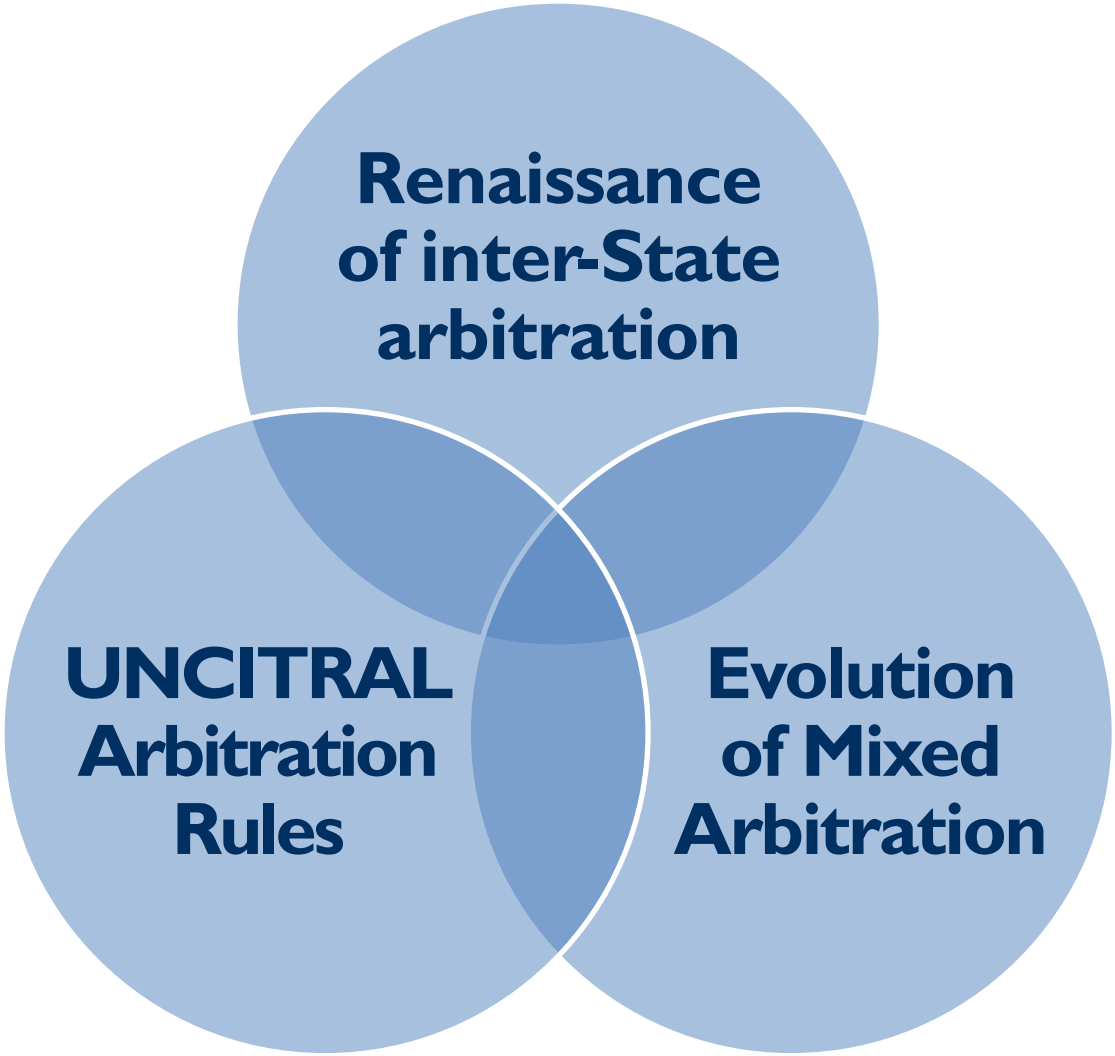
1939-1945: World War II

1945: United Nations / ICJ

Relative inactivity, until…

Renaissance

Relative inactivity, until…



Renaissance of Inter-State Arbitration

1903-1912	2001-2010
1. Preferential Treatment of Claims of Blockading Powers Against Venezuela (Germany, UK and Italy/Venezuela, 1903)	1*. Eritrea-Ethiopia Boundary Commission (2001)
2. Muscat Dhows (France/Great Britain, 1904)	2*. Ireland v. UK (OSPAR Arbitration, 2001)
3. Deserters of Casablanca (France/Germany, 1908)	3*. Ireland v. United Kingdom (MOX Plant Case, 2002)
4. The Grisbadarna Case (Norway/Sweden, 1908)	4*. Belgium/Netherlands (Iron Rhine Arbitration, 2003)
5. North Atlantic Coast Fisheries (USA/UK, 1909)	5*. Barbados/Trinidad and Tobago (2004)
6. The Orinoco Steamship Company (Venezuela/USA, 1909)	6*. Guyana v. Suriname (2004)
7. Arrest and Restoration of Savakar (France/UK, 1910)	7*. Malaysia v. Singapore (2004)
8. Canevaro Claim (Italy/Peru, 1910)	8*. The Government of Sudan v. SPLM/A (Abyei Arbitration, 2008)
9. Russian Claim for Indemnities (Russia/Turkey, 1910)	9*. Eritrea-Ethiopia Claims Commission (2001-2009)
10. The "Carthage" (France v. Italy, 1912)	10*. [Confidential Case] (2009)
	11*. Bangladesh v. India (2010)

…27 more cases since 2010.

Inter-State Arbitration vs Adjudication

1. Expertise
2. Flexibility/Time Pressures
3. Transparency/Confidentiality
4. Special/Default Forum

Eritrea v. Yemen

Tribunal:

Prof. Sir Robert Jennings

Judge Stephen M. Schwebel

Dr. Ahmed Sadek El-Kosheri

Mr. Keith Highet

Judge Rosalyn Higgins

Indus Waters Kishenganga Arbitration (Pakistan v. India)

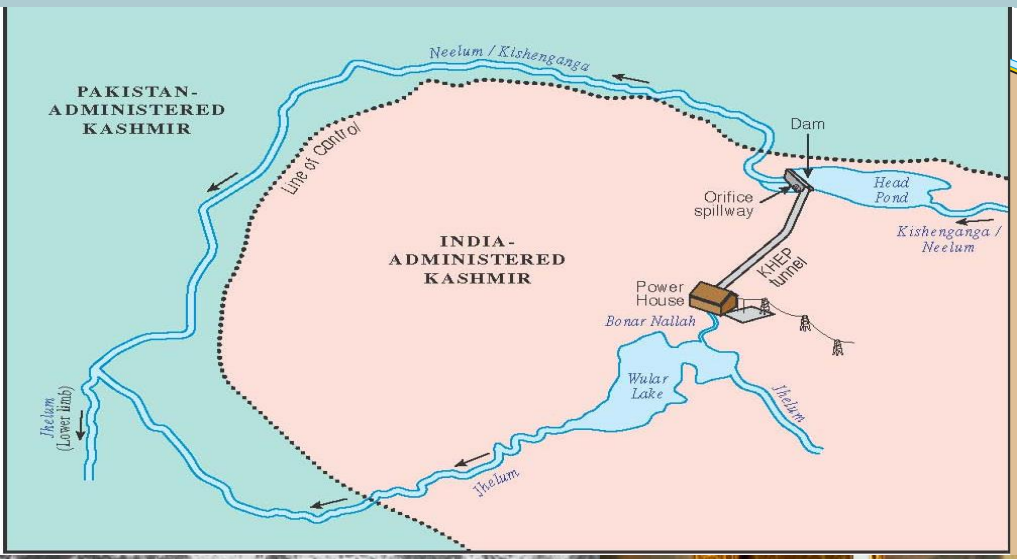
Indus Waters Treaty 1960: Two Arbitrators by each party and one each from the following categories:

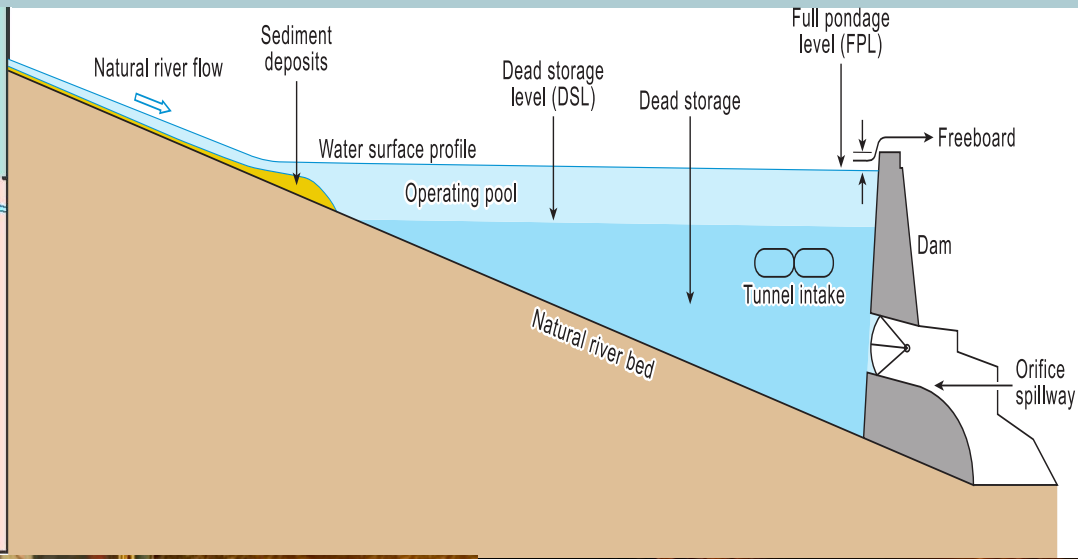
"(i) Persons qualified by status and reputation to be Chairman of the Court of Arbitration who may, but need not, be engineers or lawyers.

(ii) Highly qualified engineers.

(iii) Persons well versed in international law."

Indus Waters Kishenganga Arbitration (Pakistan v. India)





Croatia/Slovenia

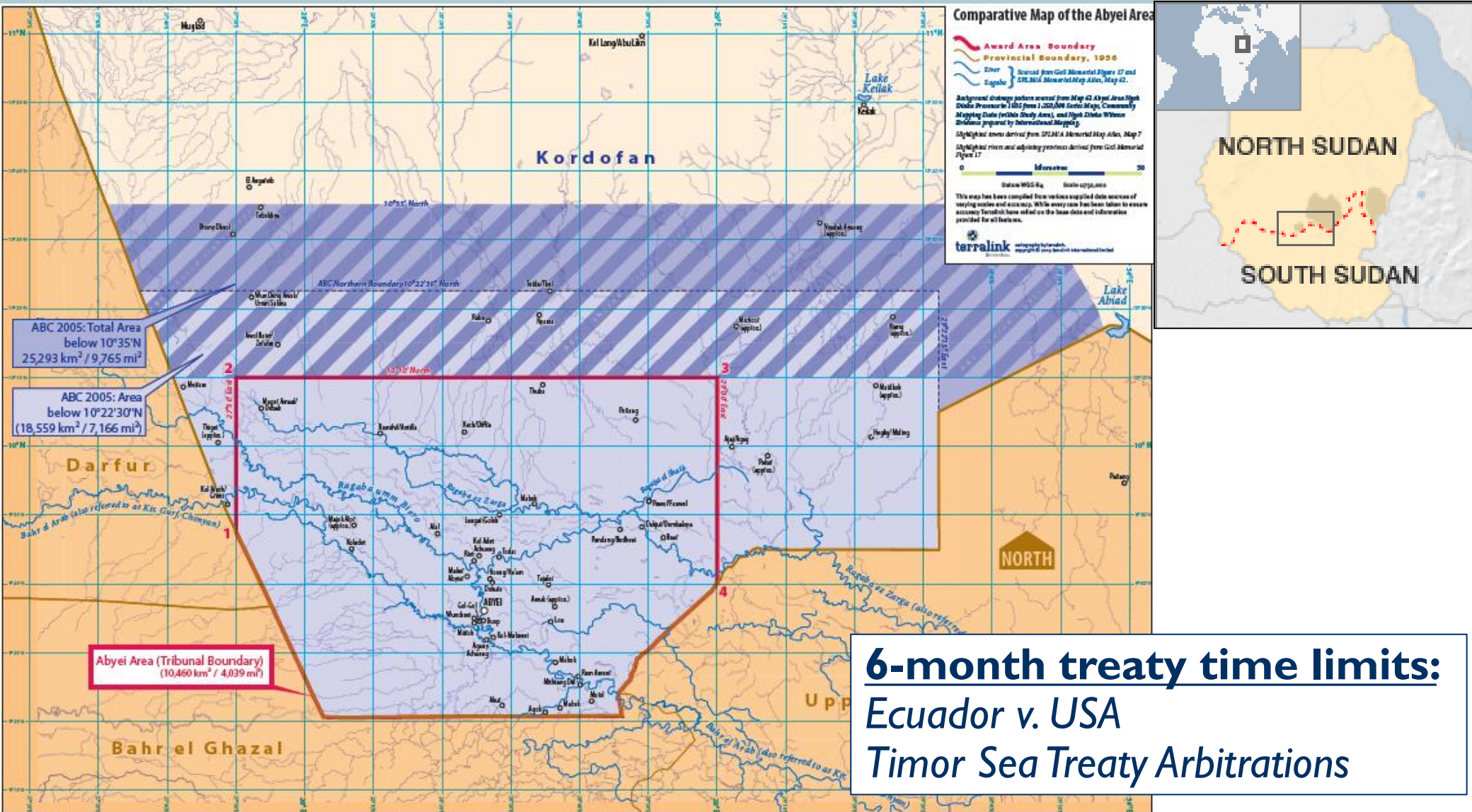
Article 4: Applicable Law

(1) The Arbitral Tribunal shall apply

(a) the rules and principles of international law for the determinations referred to in Article 3 (1) (a);

(b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3 (1) (b) and (c).

Abyei Arbitration
(Sudan v. Sudan People's Liberation Movement/Army)



6-month treaty time limits:

Ecuador v. USA

Timor Sea Treaty Arbitrations

Confidential Cases

1903-1912	2001-2010
1. Preferential Treatment of Claims of Blockading Powers Against Venezuela (Germany, UK and Italy/Venezuela, 1903)	1*. Eritrea-Ethiopia Boundary Commission (2001)
2. Muscat Dhows (France/Great Britain, 1904)	2*. Ireland v. UK (OSPAR Arbitration, 2001)
3. Deserters of Casablanca (France/Germany, 1908)	3*. Ireland v. United Kingdom (MOX Plant Case, 2002)
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9. Russian Claim for Indemnities (Russia/Turkey, 1910)	9*. Eritrea-Ethiopia Claims Commission (2001-2009)
10. The "Carthage" (France v. Italy, 1912)	**10*. [Confidential Case] (2009)**
	11*. Bangladesh v. India (2010)

…23 more cases since 2010.

Transparency (Abyei Arbitration)

UNCLOS

ITLOS

Arbitration

ICJ

125 out of 168 states have not chosen a procedure for the settlement of disputes;
19 have chosen ITLOS; 7 have chosen the ICJ; 5 have chosen Annex VII arbitration;
and 12 have chosen both ITLOS and ICJ

French and G-77 position at UNCLOS III

"The French delegation asserted that the common denominator should be the procedure that is the 'moins intégrée', the one that requires that smallest sacrifice [of sovereignty] from States and, following this logic, arbitration should be chosen."

- **Guy de Lacharrière, *La réforme du droit de la mer et le role de la conférence des Nations Unies* in Le nouveau droit international de la mer (1983)**

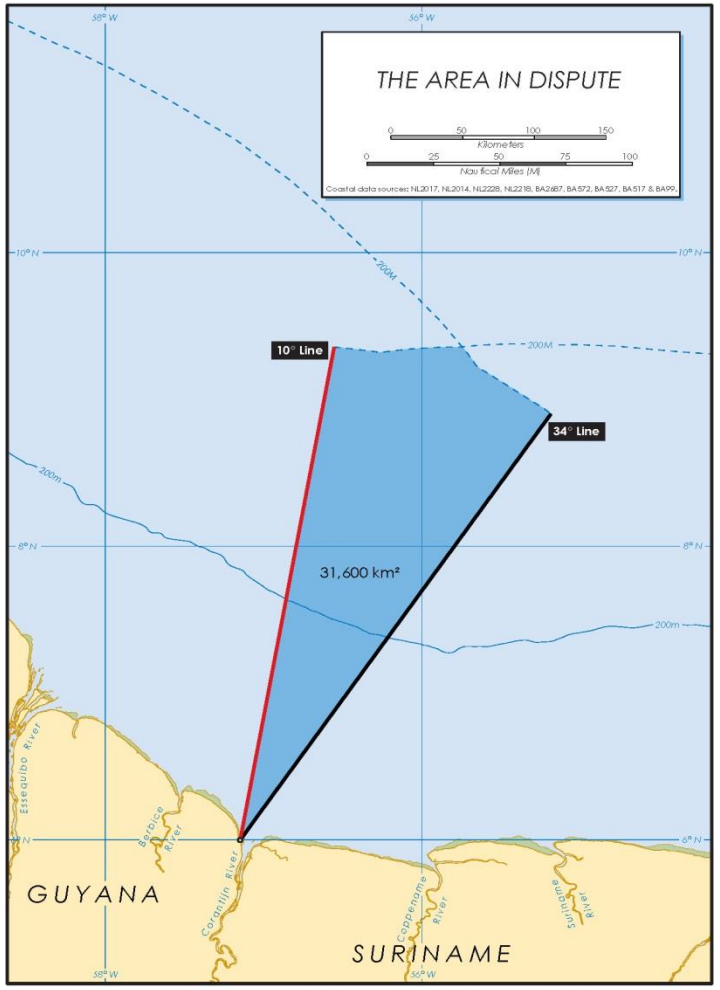
UNCLOS Article 287

Article 287 – Choice of Procedure

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

[…]

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII…



UNCLOS

Maritime Delimitation:

Guyana v. Suriname (2007)

Barbados v. Trinidad and Tobago (2006)

Bangladesh v. India (2014)

Philippines v. China (2016)

Environmental Matters:

MOX Plant (Ireland v. UK) (2008)

Chagos MPA (Mauritius v. UK) (2015)

Land Reclamation:

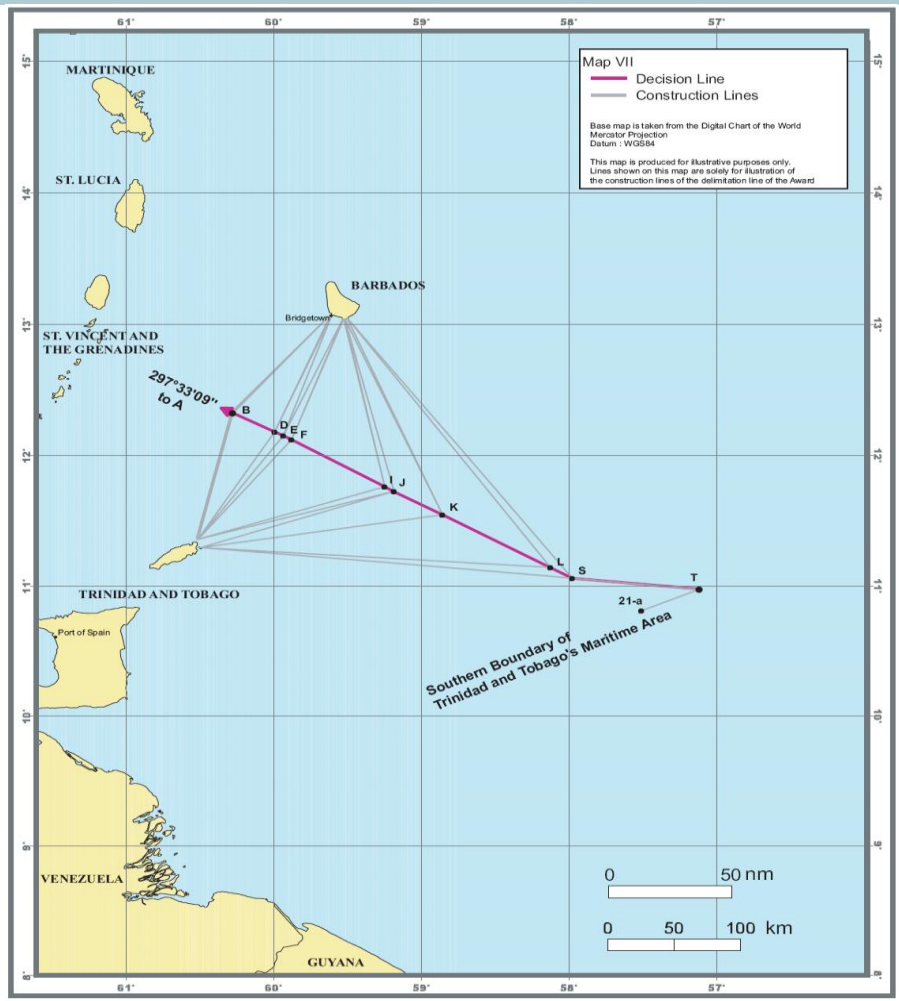
Malaysia v. Singapore (2005)

Ships:

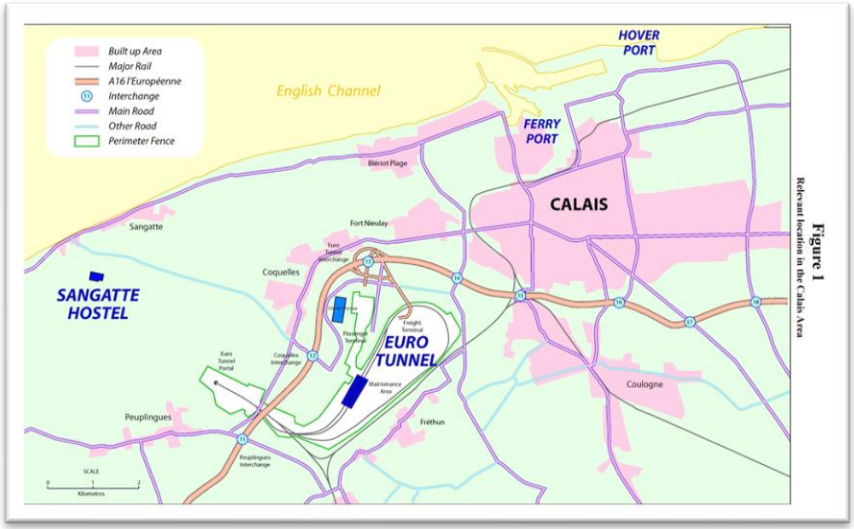
Argentina v. Ghana (2013) – ARA Libertad

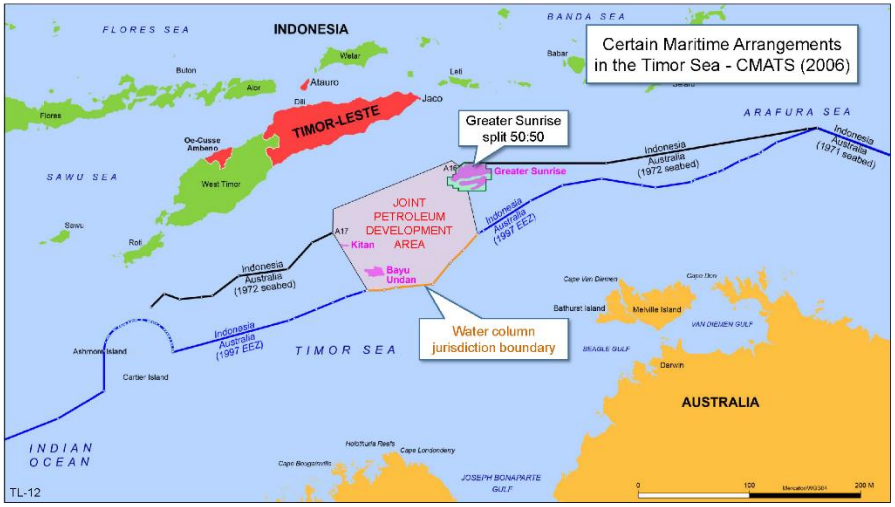
Netherlands v. Russia (2017) – Arctic Sunrise

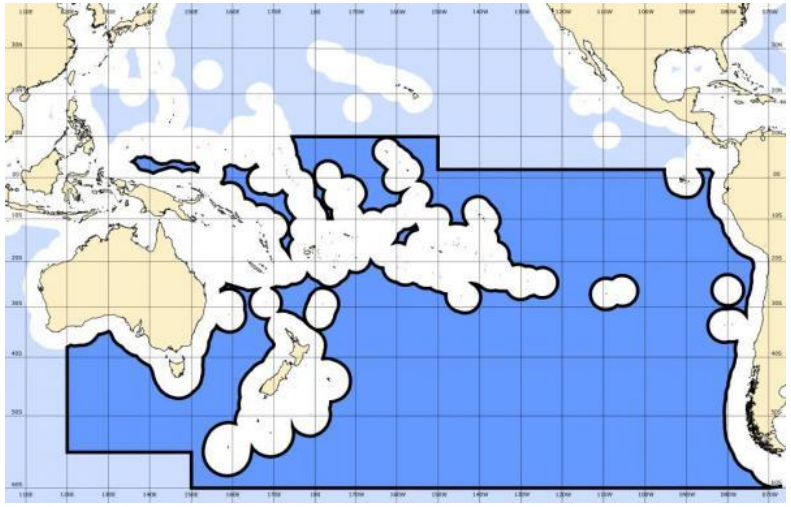
Malta v. São Tomé (2019) – Duzgit Integrity



Special Cases

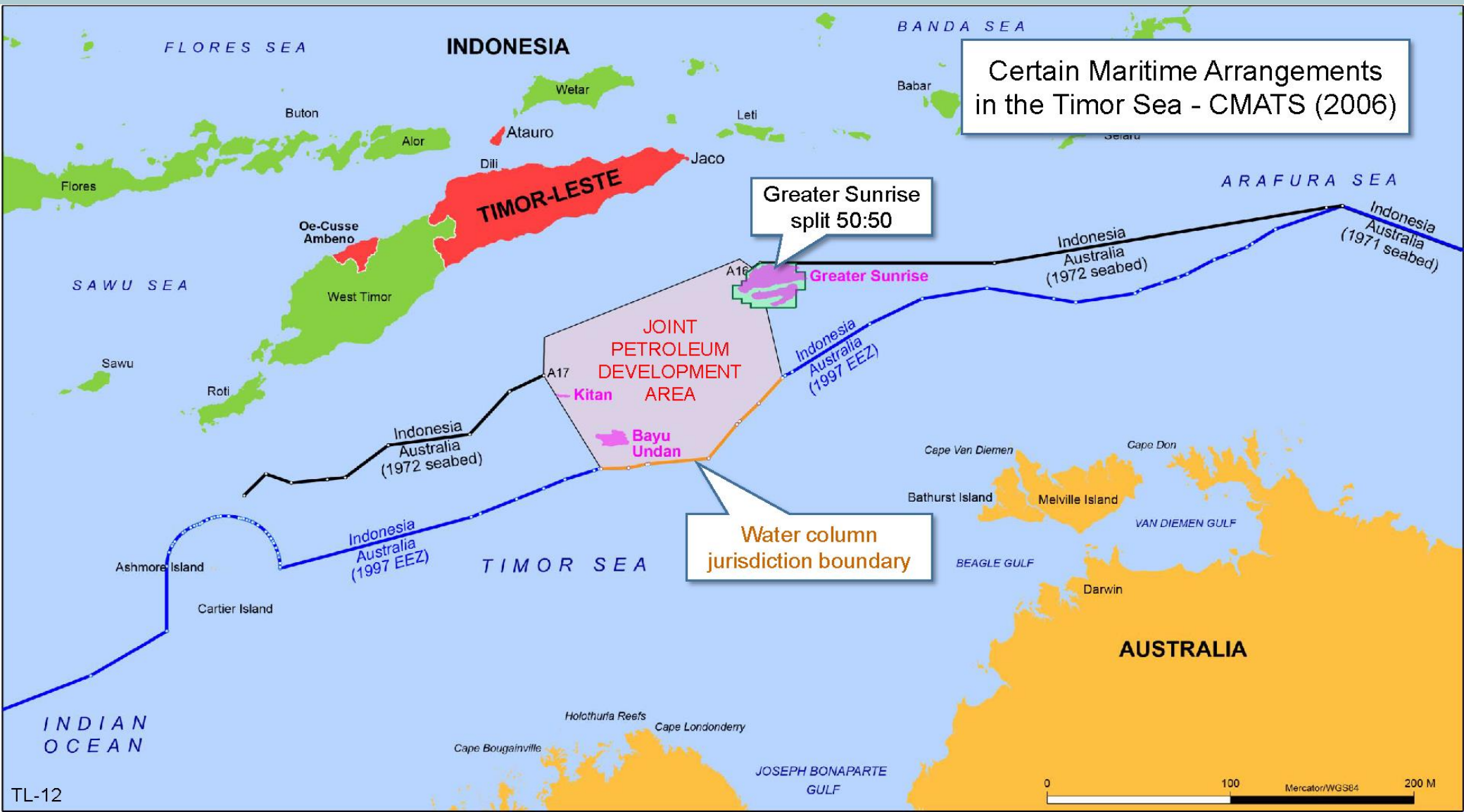






Case Study:
The Timor Sea Conciliation
(*Timor-Leste v. Australia*)

Timor-Leste/Australia Conciliation



TL-12

Timor-Leste/Australia Conciliation

Article 298 – Optional exceptions to applicability of section 2

"When signing, ratifying or acceding to this Convention or at any time thereafter, a State may […] declare in writing that it does not accept [binding dispute settlement] with respect to […] disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, provided that a State having made such a declaration shall […] accept submission of the matter to conciliation under Annex V."

Timor-Leste/Australia Conciliation

***Timor Sea Conciliation*, Decision on Competence, 19 September 2016, para. 66:**

"Article 298 embodies a compromise on dispute settlement following extensive negotiations between those States which favoured compulsory and binding dispute settlement procedures and other States which sought to exclude even non-binding dispute settlement procedures. Article 298(1)(a)(i) establishes the limits of what a party to the Convention can unilaterally exclude from compulsory settlement of disputes and, in particular, from compulsory conciliation under Annex V, section 2 of the Convention."

Conciliation

Expertise

Conciliation Commission:

H.E. Ambassador Peter Taksøe-Jensen (diplomat; UNOLA)

Dr. Rosalie Balkin (Int'l Maritime Organization; DFAT)

Judge Abdul G. Koroma (ICJ; UN)

Prof. Donald McRae (ILC; University of Ottawa)

Judge Rüdiger Wolfrum (ITLOS; Max Planck Institute)

Transparency

Timor-Leste/Australia Conciliation

2013: *Timor Sea Treaty Arbitration I (Espionage Case)*

2014: *Certain Documents Case (ICJ)*

2015: *Timor Sea Treaty Arbitration II (Tax Jurisdiction Case)*

2016: *Timor Sea Conciliation* commenced (11 April)

Opening Session (29 August)

Decision on Competence (19 September)

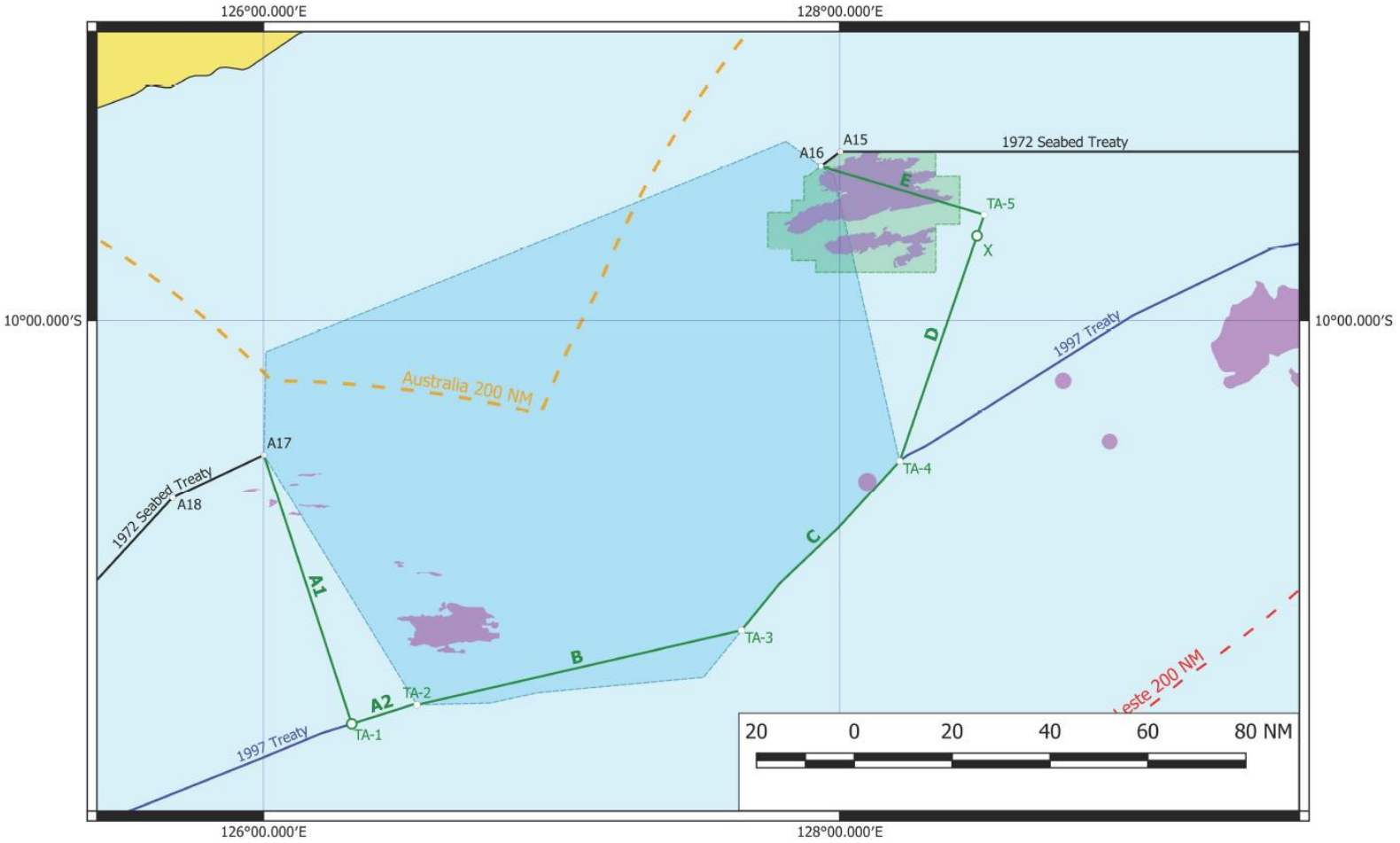
Press Release (26 Sept 2016): "The Commission anticipates that ***future meetings will be conducted largely in a confidential setting*** in order to provide an environment conducive to facilitating the eventual success of the conciliation."

Timor-Leste/Australia Conciliation

11 April 2016:	Conciliation proceedings commenced
29 August 2016:	Opening Session
19 September 2016:	Decision on Competence
9 January 2017:	Coordinated termination of CMATS treaty
20 January 2017:	Arbitrations withdrawn
30 August 2017:	Boundary agreement reached
13 October 2017:	Treaty text agreed
Nov 2017-Feb 2018:	Engagement with private stakeholders
6 March 2018:	Treaty signature at UN Headquarters

Timor-Leste/Australia Conciliation

Timor Sea Conciliation, Comprehensive Package Agreement, Annex A: Sketch Map of Proposed Maritime Boundary and Special Regime



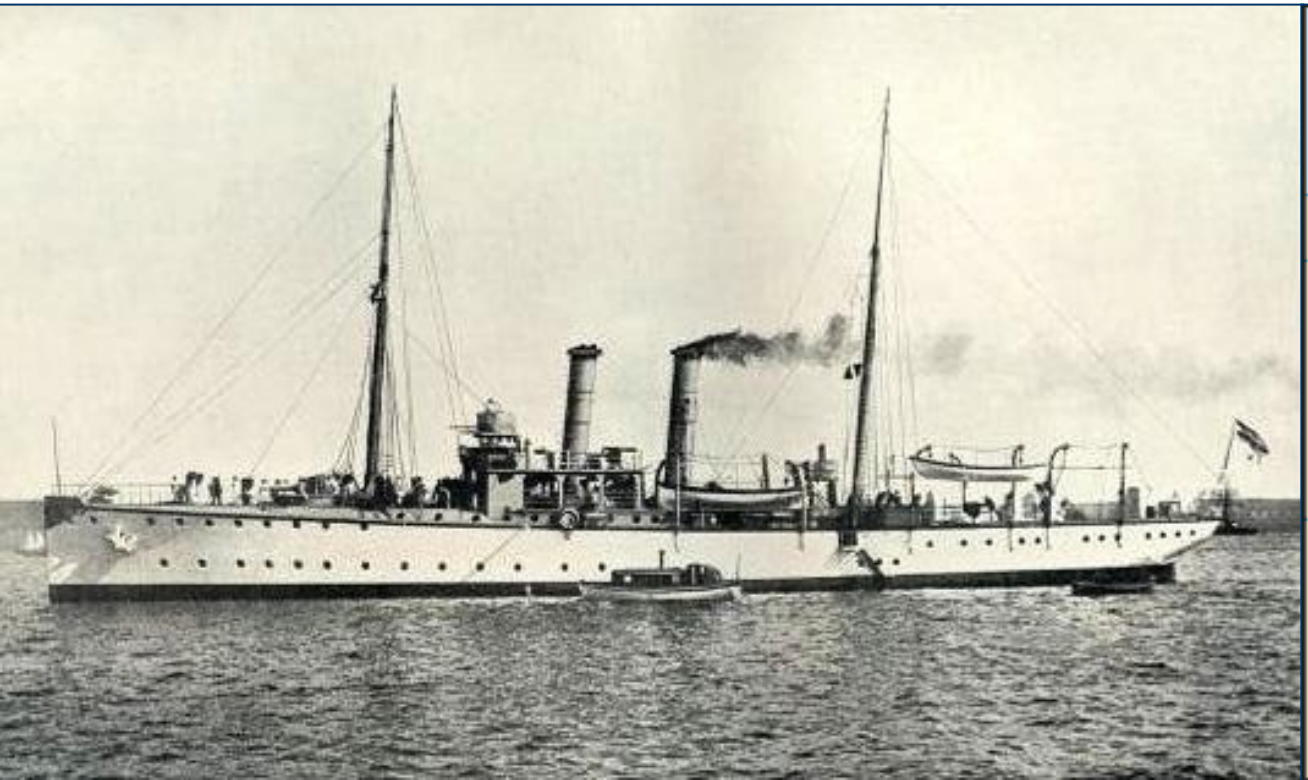
Timor-Leste/Australia Conciliation

Timor-Leste/Australia Conciliation

Inter-State Arbitration

Preferential Treatment of the Blockading Powers of Venezuela

(Germany, UK, Italy v. Venezuela, 1903)

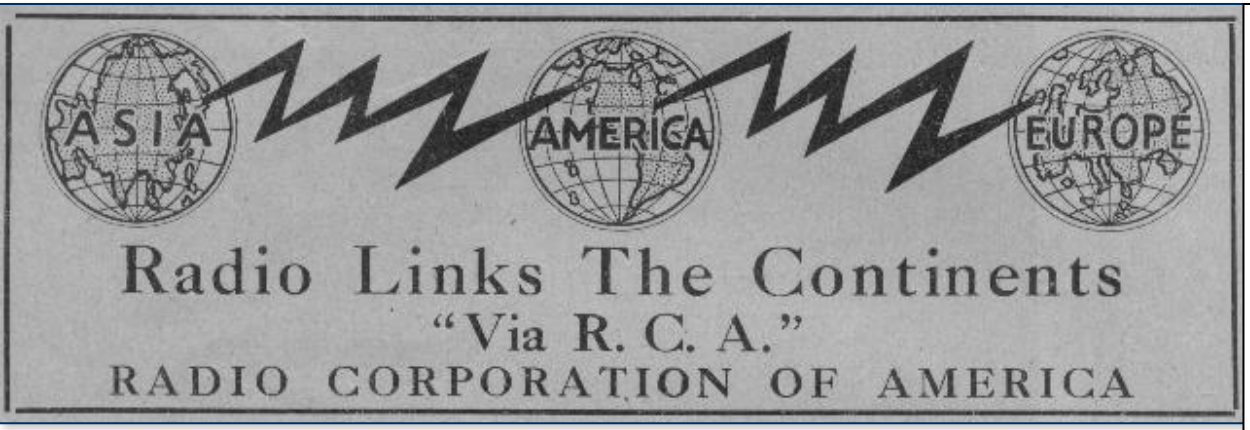


Genesis of Mixed Arbitration

Period	Method
Middle Ages	Private Warfare
Up to 17th Century	Private Reprisal
18th – 19th Century	Public Reprisal ("Gunboat Diplomacy")
19th – 20th Century	Diplomatic Protection / Inter-State Adjudication
20th Century	Mixed Arbitration
Late 20th Century onwards	Investor-State Arbitration (& contract arbitration)

Genesis of Mixed Arbitration

Radio Corporation of America v. China (1935)



Dossier Radio Corporation n° 5

Dr. J. A. VAN HAMEL

La Haye, le 4 juillet 1935.

Monsieur le Secrétaire Général du Bureau
International de la Cour Permanente d'Arbitrage

L A H A Y E.

Monsieur le Secrétaire Général,

J'ai l'honneur de vous faire parvenir une copie dûment certifiée de la décision arbitrale dans l'affaire Radio Corporation of America contre National Government of the Republic of China, dont je vous fais part à toutes fins utiles

En réitérant mes remerciements très sincères et mon appréciation chaleureuse pour l'assistance prêtée par vos services dans cette affaire, je vous prie d'agréer, Monsieur le Secrétaire Général, l'expression de ma parfaite considération.

Van Hamel

Président des Arbitres.

Evolution of Mixed Arbitration

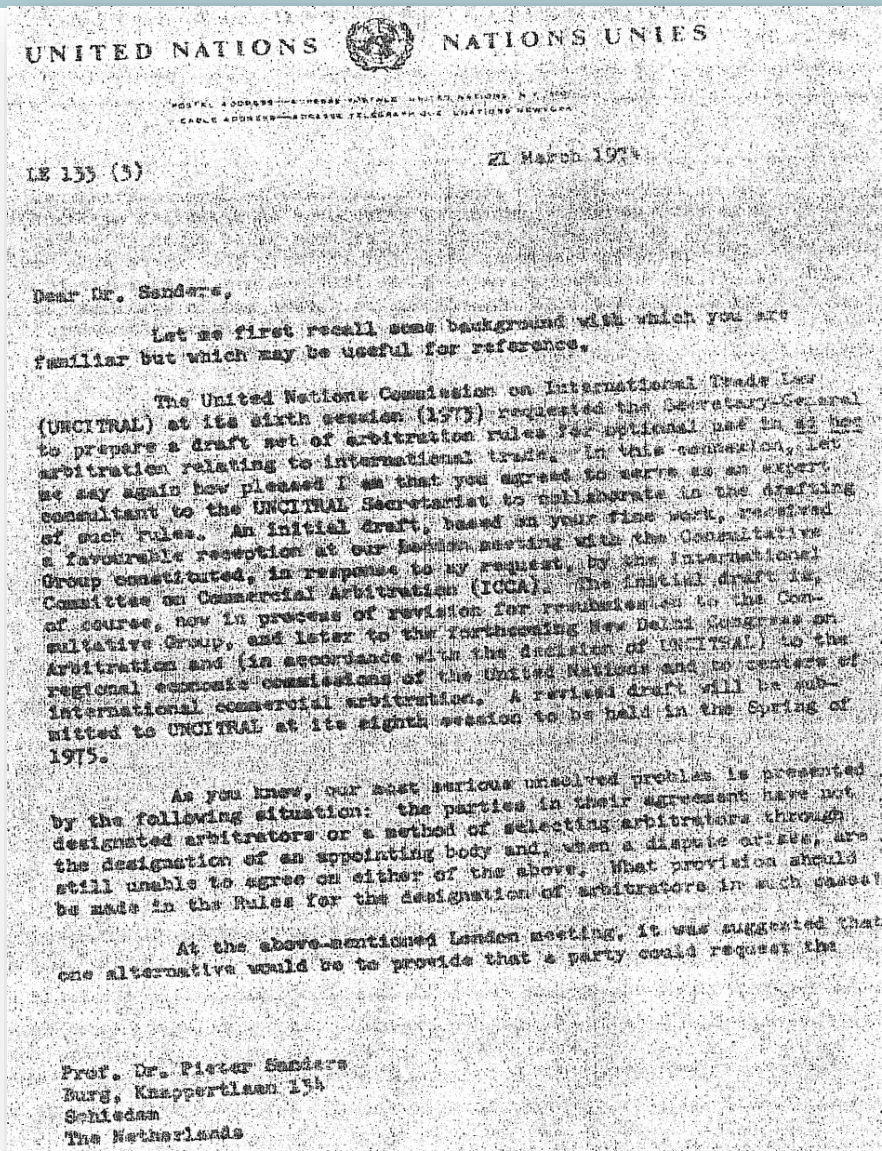
1935: First PCA mixed arbitration (*RCA v. China*)

1960: PCA Rules for Mixed Arbitration

1965: ICSID Convention

1976: UNCITRAL Rules

1980s-: BITs/MITS



UNITED NATIONS NATIONS UNIES

LE 133 (5) 21 March 1974

Dear Mr. Sanders,

Let me first recall some background with which you are familiar but which may be useful for reference.

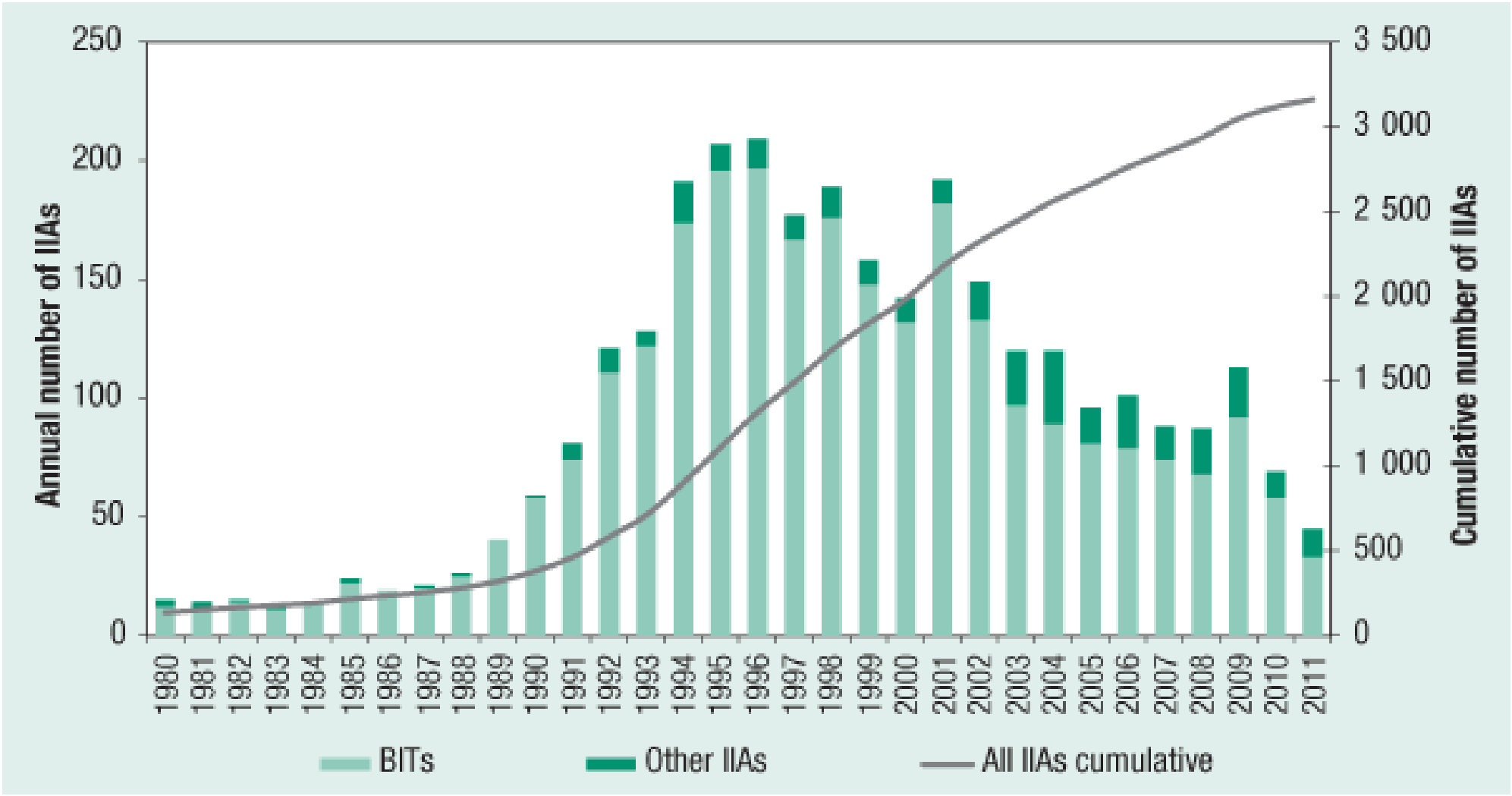
The United Nations Commission on International Trade Law (UNCITRAL) at its sixth session (1973) requested the Secretary-General to prepare a draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade. In this connection, let me say again how pleased I am that you agreed to serve as an expert consultant to the UNCITRAL Secretariat to collaborate in the drafting of such rules. An initial draft, based on your fine work, received a favourable reception at our London meeting with the Consultative Group constituted, in response to my request, by the International Committee on Commercial Arbitration (ICCA). The initial draft is, of course, now in process of revision for resubmission to the Consultative Group, and later to the forthcoming New Delhi Congress on Arbitration and (in accordance with the decision of UNCITRAL) to the regional economic commissions of the United Nations and to centers of international commercial arbitration. A revised draft will be submitted to UNCITRAL at its eighth session to be held in the Spring of 1975.

As you know, our most serious unsolved problem is presented by the following situation: the parties in their agreement have not designated arbitrators or a method of selecting arbitrators through the designation of an appointing body and, when a dispute arises, are still unable to agree on either of the above. What provision should be made in the Rules for the designation of arbitrators in such cases?

At the above-mentioned London meeting, it was suggested that one alternative would be to provide that a party could request the

Prof. Dr. Pieter Sanders
Burg. Knappertlaan 154
Schiedam
The Netherlands

Evolution of Mixed Arbitration



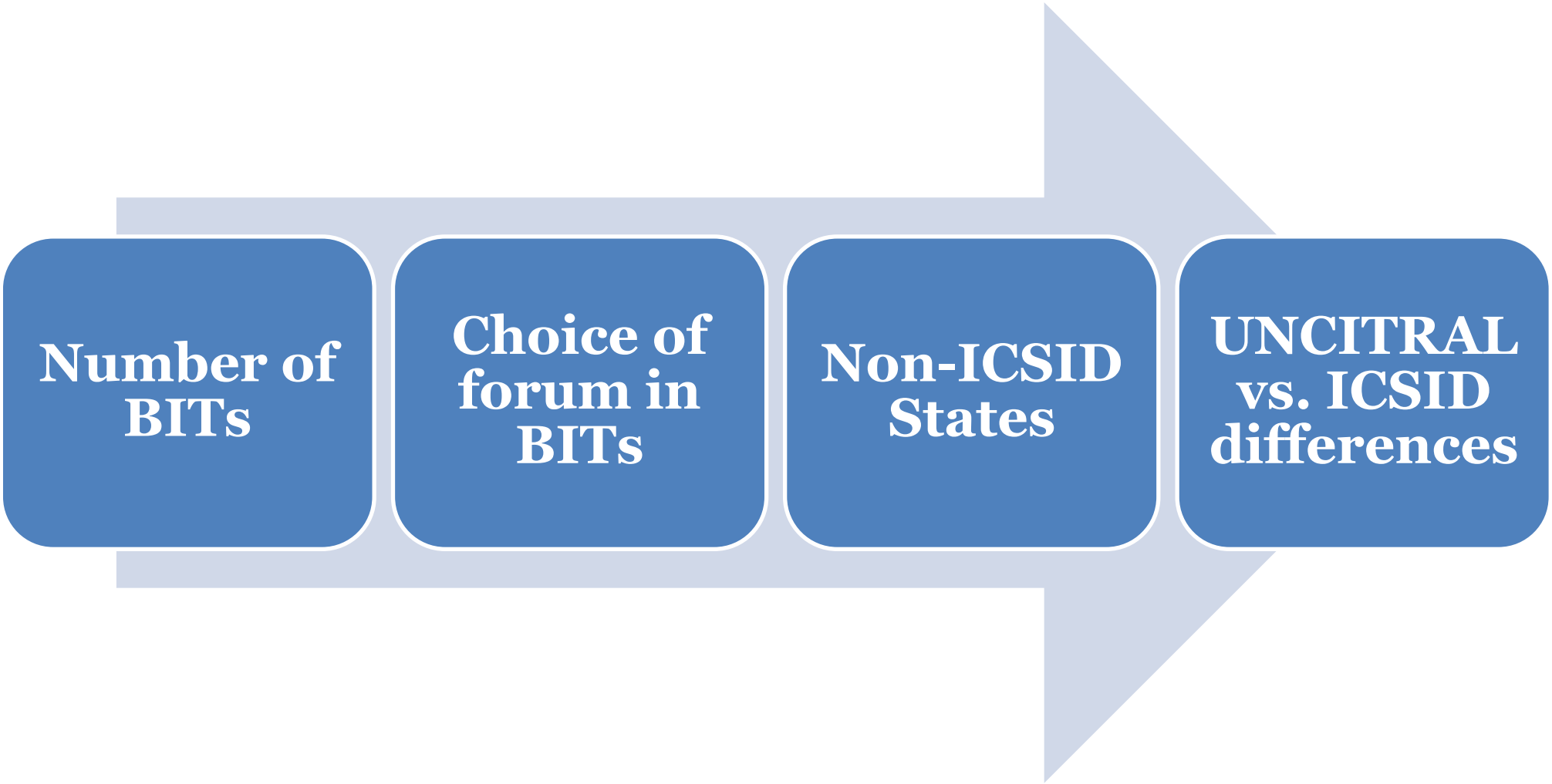
Treaty-based Investment Arbitration

Article 9.19(4) of the CPTPP:

"4. The claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:

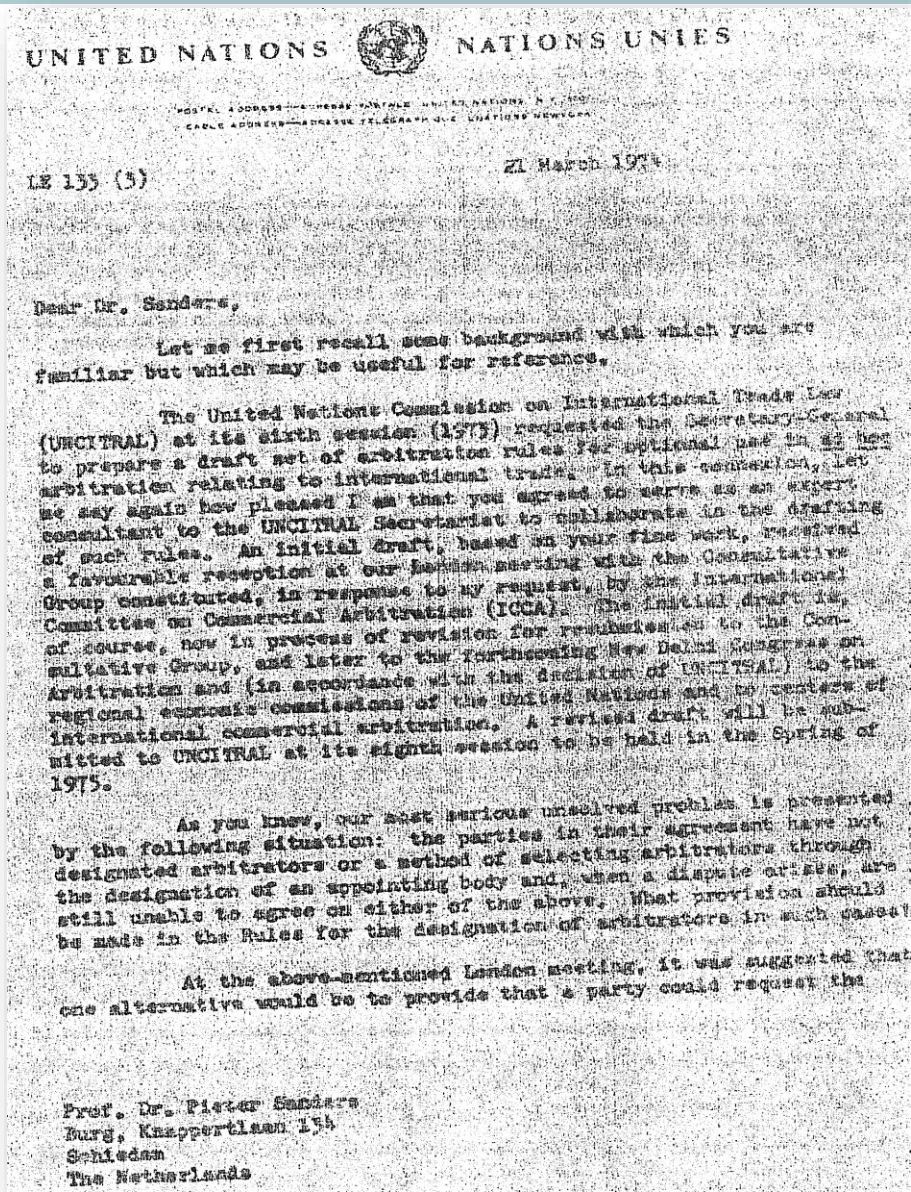
- (a) the ICSID Convention […];
- (b) the ICSID Additional Facility Rules […];
- (c) the UNCITRAL Arbitration Rules; or
- (d) if the claimant and respondent agree, any other arbitral institution or any other arbitration rules."

UNCITRAL Investment Arbitration



UNCITRAL Rules (1976)

- Created in 1976 for commercial arbitration
- Intended to be compatible with any national legal tradition
- Designed to be principally ad hoc (non-institutional)
- Still need third party to break certain impasses (i.e. the "appointing authority")



UNITED NATIONS NATIONS UNIES

LE 133 (5) 21 March 1974

Dear Dr. Sanders,

Let me first recall some background with which you are familiar but which may be useful for reference.

The United Nations Commission on International Trade Law (UNCITRAL) at its sixth session (1973) requested the Secretary-General to prepare a draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade. In this connection, let me say again how pleased I am that you agreed to serve as an expert consultant to the UNCITRAL Secretariat to collaborate in the drafting of such rules. An initial draft, based on your fine work, received a favourable reception at our London meeting with the Consultative Group constituted, in response to my request, by the International Committee on Commercial Arbitration (ICCA). The initial draft is, of course, now in process of revision for remarks as to the Consultative Group, and later to the forthcoming New Delhi Congress on Arbitration and (in accordance with the decision of UNCITRAL) to the regional economic commissions of the United Nations and to centres of international commercial arbitration. A revised draft will be submitted to UNCITRAL at its eighth session to be held in the Spring of 1975.

As you know, our most serious unsolved problem is presented by the following situation: the parties in their agreement have not designated arbitrators or a method of selecting arbitrators through the designation of an appointing body and, when a dispute arises, are still unable to agree on either of the above. What provision should be made in the Rules for the designation of arbitrators in such cases?

At the above-mentioned London meeting, it was suggested that one alternative would be to provide that a party could request the

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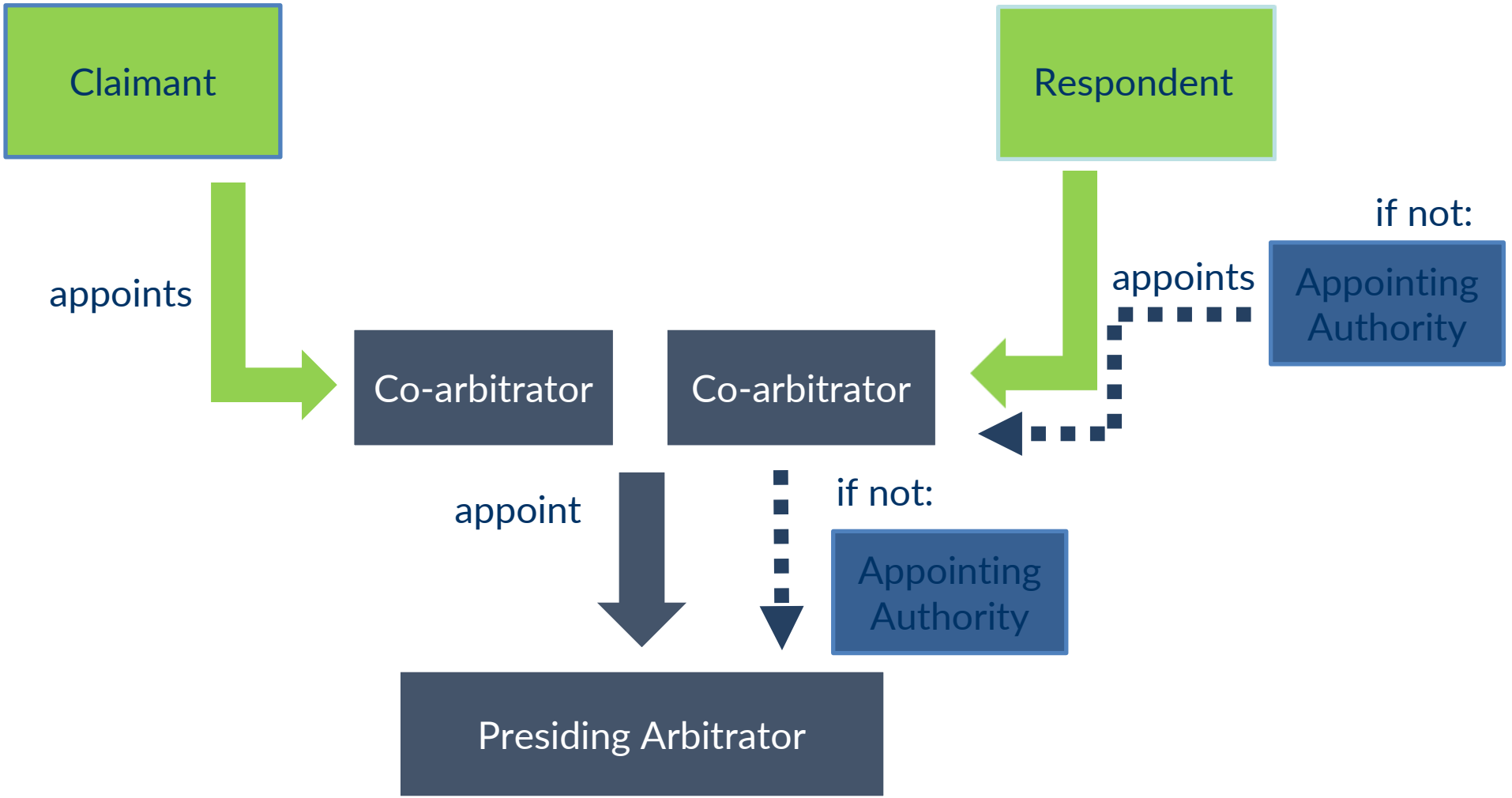
Burg. Knappertlaan 15b
Schiedam
The Netherlands

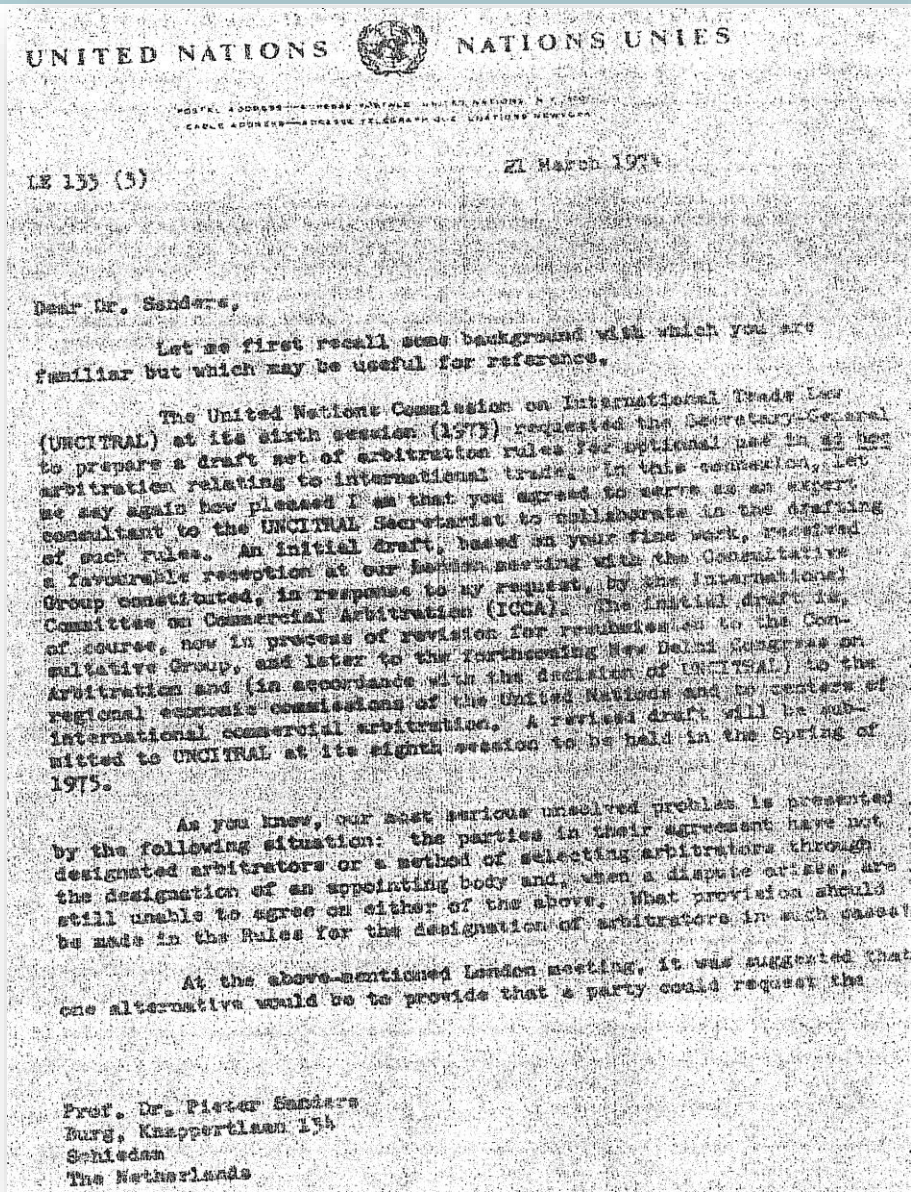
Appointment of Arbitrators



Appointing Authority

Who will appoint arbitrators in case of default by a party?

- Need third party to break impasses (i.e. the "appointing authority")
- **Institutional arbitration:** usually institution
- **UNCITRAL Rules:** designated by PCA
- **Ad hoc:** named in advance or courts of seat



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UNCITRAL Rules (1976)

The meeting was suspended at 11.05 a.m. and resumed at 11.15 a.m.

33. Mr. LEBEDEV (Union of Soviet Socialist Republics), referring to article 7, paragraph 4, of the integrated text, said that, if the Permanent Court of Arbitration at The Hague was prepared to carry out the functions described in the draft rules, then there was no real need to create an additional body. Any attempt to do so would create obvious difficulties and complications.

34. He asked whether the function of the proposed supreme authority would be to appoint arbitrators directly or simply to designate an appointing authority.

35. Mr. VIS (Secretary of UNCITRAL) said that the Secretary-General of the Permanent Court of Arbitration at The Hague had made it clear that he would be willing to designate an appointing authority but not to appoint an arbitrator.

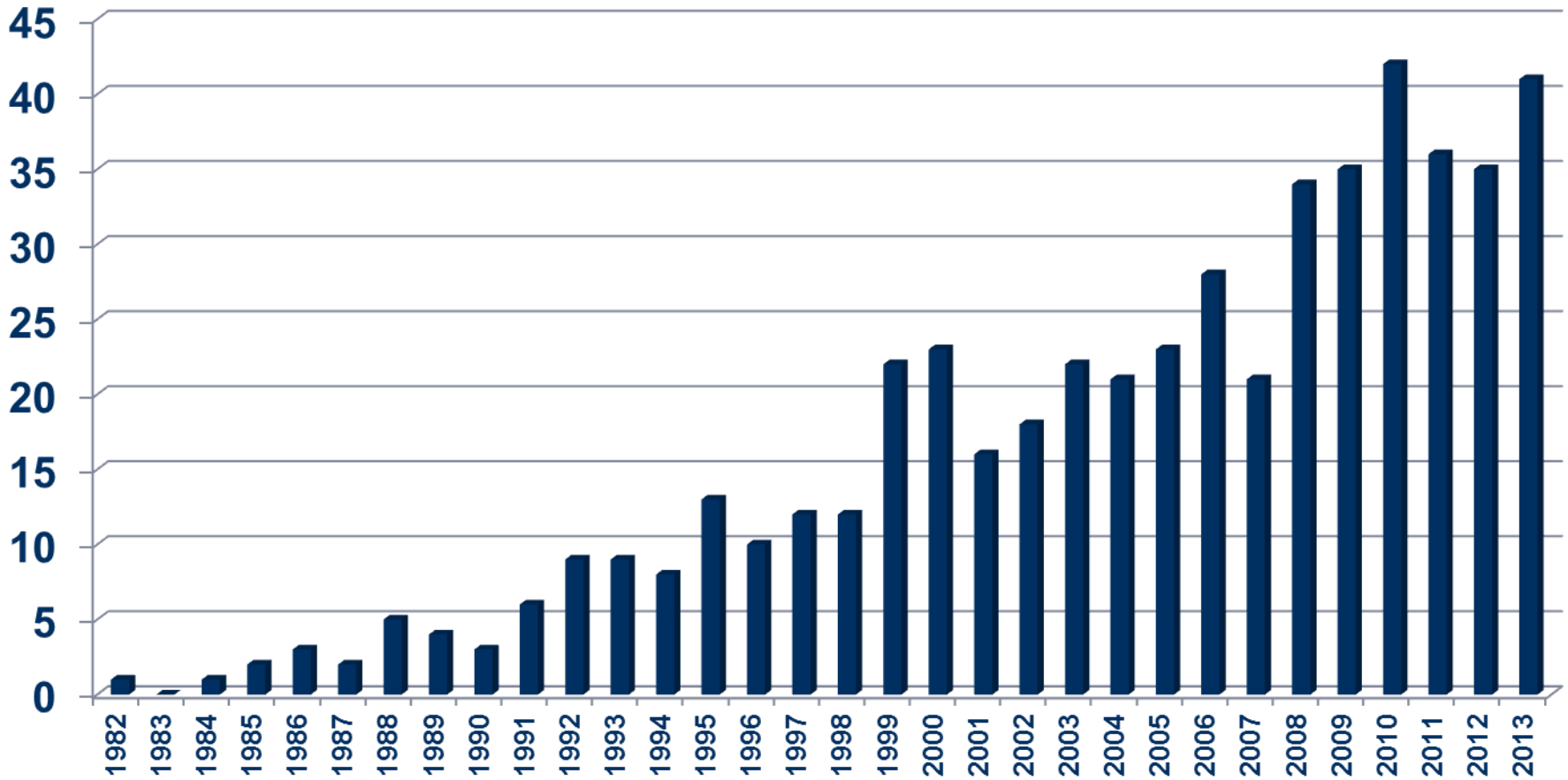
36. Mr. GUEST (United Kingdom) and Mr. HOLTZMANN (United States of America) agreed with the views expressed by the representative of the Soviet Union.

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed that no additional organ or body should be established under United Nations auspices for the designation of the appointing authority.

38. It was so decided.

UNCITRAL asked PCA to fulfill role of selecting appointing authority instead of creating new UN body for this purpose

Appointing Authority Requests



Quiz time!

PCA Case No. AA190

Applicable Law and Jurisdiction

Any dispute or difference between the Parties arising out of or relating to this Agreement which cannot be settled amicably shall be referred to and determined by arbitration in The Hague under the International Arbitration Rules.

Anonymous case

Disputes arising in connection with this agreement shall be determined by a single arbitrator to be appointed by the Director General of the World Health Organization.

PCA Case No. AA185

34.9 UNCITRAL Rules to Apply

Arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between these rules and the provisions of this Article 34, the provisions of this Article 34 shall govern.

PCA Case No. AA185

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

PCA Case No. AA185

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

PCA Case No. AA499

- UNCITRAL Rules (1976)
- 10 Claimants jointly commence single arbitration under 6 BITs:
  - BIT 1 provides for UNCITRAL Rules
  - BIT 2 provides for UNCITRAL Rules
  - BIT 3 provides for UNCITRAL Rules with SCC as AA
  - BIT 4 provides for UNCITRAL Rules with SCC as AA
  - BIT 5 provides for ad hoc arbitration with SCC as AA
  - BIT 6 provides for UNCITRAL Rules
- Claimants appoint arbitrator
- Respondent appoints different arbitrators for each BIT
- Claimant requests designation of SCC as AA for whole case

PCA Case No. AA499-504

- **ANSWER**
- Examine *prima facie* competence in respect of each BIT
  - SGPCA *prima facie* competent to designate?
    - BIT 1 provides for UNCITRAL Rules: ✔
    - BIT 2 provides for UNCITRAL Rules: ✔
    - BIT 3 provides for UNCITRAL Rules with SCC as AA: ✘
    - BIT 4 provides for UNCITRAL Rules with SCC as AA: ✘
    - BIT 5 provides for ad hoc arbitration with SCC as AA: ✘
    - BIT 6 provides for UNCITRAL Rules: ✔
- SGPCA *prima facie* competent to designate for whole case? ✘

UNCITRAL Arbitration at the PCA

Great majority (probably >85%) of all UNCITRAL investment cases are administered by PCA

Parties today often assume PCA administration when selecting UNCITRAL option

Formally, PCA administration recorded by the tribunal and the parties in Terms of Appointment or Procedural Order No.1

UNCITRAL vs ICSID Investment Arbitration

1. Constitution of tribunals
2. Independence and Impartiality
3. Interim Relief
4. Jurisdiction
5. Transparency
6. Annulment/Enforcement

1. Constitution of Tribunals

ICSID	UNCITRAL
▪ Art: 38: If parties fail to appoint arbitrators, Chairman of World Bank appoints from ICSID Panel	▪ Art. 6-9: If parties fail to appoint arbitrators, can approach Appointing Authority (AA), or PCA S-G to designate an AA ▪ Not bound to pick from any particular pool of candidates
▪ Chairman cannot appoint national of one of the parties	▪ AA to take into account advisability of appointing a nationality other than parties

1. Constitution of Tribunals

ICSID	UNCITRAL
▪ Registration of request for arbitration (~83 days from request) ▪ Each party appoints an arbitrator ▪ Parties attempt to agree on chair (90 days) ▪ Presiding arbitrator appointed by ICSID (~180 days from registration) ---------- ~263 days	▪15 days to agree on number of arbitrators ▪30 days to appoint second arbitrator ▪50-60 days to request and designate an AA ▪10-15 days to appoint second arbitrator ▪30 days for co-arbs to appoint presiding arbitrator ▪25-30 days for AA to run list-procedure ---------- 120-150 days

2. Independence and Impartiality

ICSID	UNCITRAL
"on account of any fact indicating a **manifest lack**"	"if circumstances exist that give rise to **justifiable doubts**"

Contrasting standards (Nov-Dec 2009):

1. *Participaciones Inversiones Portuarias v. Gabon*, ICSID (rejected)
2. *Perenco v. Ecuador*, PCA/IBA (upheld)
3. *ICS v. Argentina*, PCA/UNCITRAL (upheld)

Recasting ICSID standard (2013-2014): "relates not to the seriousness of the allegation, but to the ease with which the lack […] may be perceived."

1. *Blue Bank v. Venezuela* (2013) (upheld)
2. *Burlington v. Ecuador* (2013) (upheld)

2. Independence and Impartiality

ICSID	UNCITRAL
▪ Disclosure to be made after appointment	▪ Disclosures to be made when approached in connection with a dispute (usually before appointment)
▪ Challenges decided by **co-arbitrators or, if no consensus, by Chairman of World Bank**	▪ Challenges decided by **Appointing Authority**
▪ No time limit but challenges to be "prompt" and before close of proceedings	▪ Time limit of 15 days
▪ Automatic suspension of proceedings	▪ No automatic suspension of proceedings

3. Interim Relief

ICSID Art. 26	UNCITRAL Art. 26
"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration **to the exclusion of any other remedy**."	"A request for interim measures addressed by any party to a judicial authority **shall not be deemed incompatible** with the agreement to arbitrate, or as a waiver of that agreement."
Caratube v. Kazakhstan, ICSID Case No. ARB/08/12	*Chevron-Texaco v. Ecuador*, PCA Case No. 2009-23

3. Interim Relief

***In Re Caratube International Oil Company LLP*, US District Court (DC Circ.), 11 August 2010:**

"The nature of the Tribunal, however, counsels against granting Caratube's petition. […] Caratube had the option of arbitrating this dispute under the ICSID rules, or in accordance with the [UNCITRAL Rules] […] Yet Caratube chose to bring this dispute before an ICSID arbitration panel. […] This Court is reluctant, then, to interfere with the parties' bargained-for expectations concerning the arbitration process."

4. Jurisdictional Limitations

ICSID Convention Art. 25: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment…"

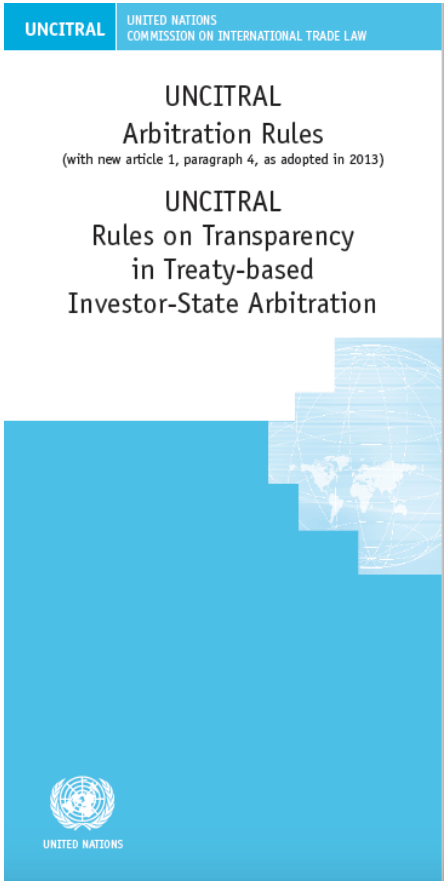
ICSID	UNCITRAL
▪ Debate: Article 25 imposes "outer limits of jurisdiction" beyond what is in the BIT (*Salini v. Morocco; MHS v. Malaysia; Phoenix Action v. Czech Republic*)	▪ Debate: no Article 25 equivalent but some question now about objective criteria to be read into terms in a BIT. (*Romak v. Uzbekistan*)

4. Jurisdictional Limitations

ICSID Convention Art. 25: "…any legal dispute arising directly out of an investment between a Contracting State […] and a national of another Contracting State…"

" 'National of another Contracting State' […] does not include any person who on either date also had the nationality of the Contracting State party to the dispute"

5. Transparency and Third Parties



- Methanex v. USA (2001)
- NAFTA FTC Notes (2001/2004)
- ICSID Rules (2006)
- UNCITRAL Transparency Rules (2013)
- Mauritius Convention (2014)
- ICC/SCC Rules?

6. Annulment/Enforcement

ICSID	UNCITRAL
▪ Art. 52: Self-contained system of review per narrow grounds to be decided by ad hoc committee drawn from Panel	▪ Subject to review by supervisory national courts of place of arbitration
▪ Art. 54: Member States recognize awards as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgment of a court in that State.	▪ Enforcement is pursuant to New York Convention (can be refused on limited grounds)
▪ Non-pecuniary obligations do not come under Article 54	▪ Very rare for courts to refuse to enforce investor-State awards

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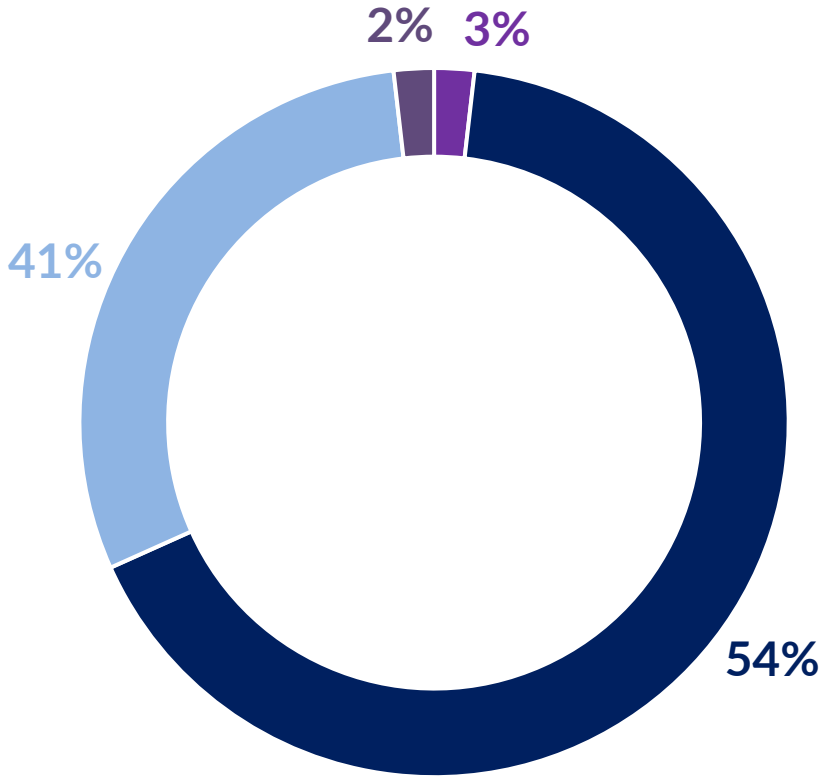
Great majority (probably >85%) of all UNCITRAL investment cases are administered by PCA

Parties today often assume PCA administration when selecting UNCITRAL option

Formally, PCA administration recorded by the tribunal and the parties in Terms of Appointment or Procedural Order No.1

The PCA Today



- Inter-State (7)
- Investor-State (108)
- Contract-based (94)
- Other (4)

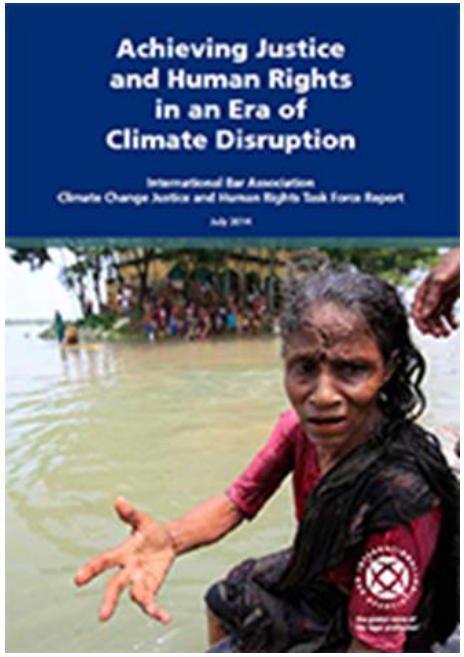
Global Reach

* Subject to domestic processes (ratification, etc.).

New Horizons: Outer Space

THE ARTEMIS ACCORDS

New Horizons: Climate Change



IBA Recommendation 3.1.2 (i)

"The Task Force encourages the UNFCCC COP and UNCLOS parties to adopt the PCA as the preferred arbitral body."

Hague climate change judgement could inspire a global civil movement
Emma Howard

Dutch ruling could trigger similar cases worldwide with citizens taking their governments to courts to make them act on climate promises

Warm crimes: The bid to put 'toxic' carbon in the dock

"Litigation will be coming. There's going to be billions of dollars on the table at some point"

New Horizons:
Business & Human Rights

ACCORD
on Fire and Building Safety in Bangladesh

"**5. Dispute resolution.** Any dispute . . . shall first be presented to and decided by the [Steering Committee]. Upon request of either party, the decision of the SC may be appealed to . . . a final and binding arbitration process . . . administered by the PCA."

The Hague Rules
On Business and
Human Rights
Arbitration

December 2019

The Hague

CILC
Center for International Legal Cooperation


COUR PERMANENTE D'ARBITRAGE
MDCCCIC

Thank you!

www.pca-cpa.org