



Class 2:

The Permanent Court of Arbitration

a view across the spectrum of international arbitration

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Deputy Secretary-General, Permanent Court of Arbitration

Basel Winter Arbitration School

3 February 2025

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

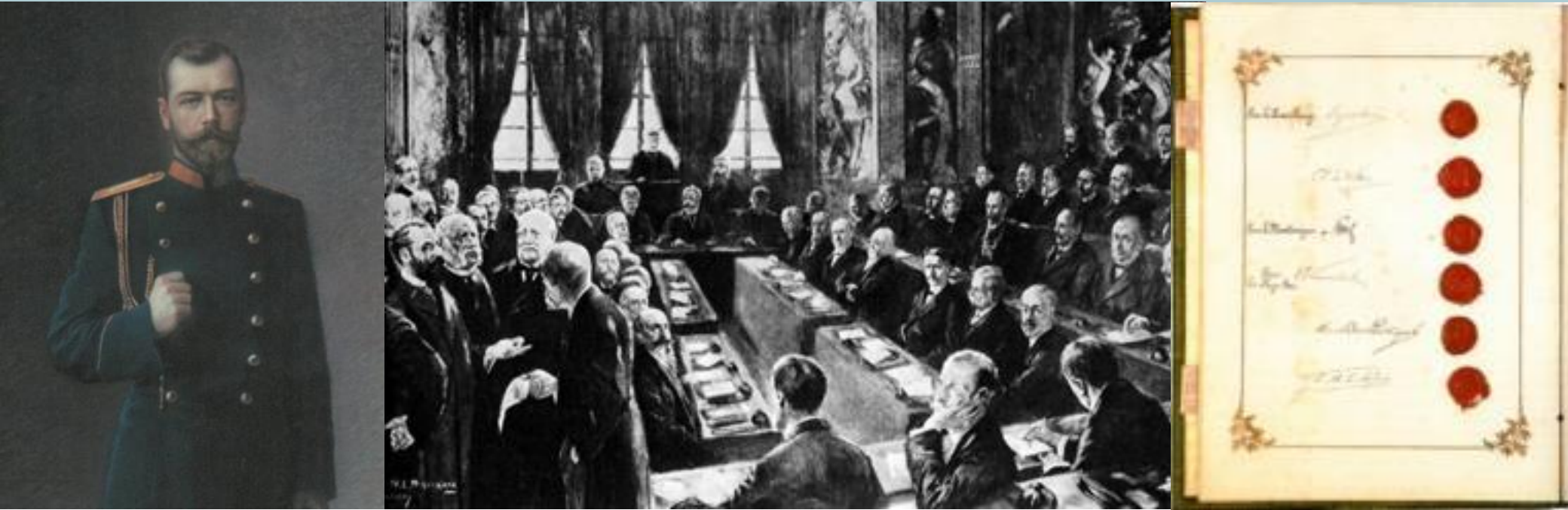
Jay Treaty Arbitration (USA v. United Kingdom, 1794)



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)

Washington du 22 mai 1902.

Cette somme d'un million quatre cent vingt mille six cent quatre vingt deux Dollars et soixante sept cents ($1,420,682 \frac{67}{100}$ Dollars) constituera le versement total des annuités échues et non payées par le Gouvernement de la République Mexicaine, savoir de la rente annuelle de quarante trois mille cinquante Dollars du Mexique et quatre vingt dix neuf cents ($43,050 \frac{99}{100}$ Dollars du Mexique) de puis le 2 février 1869 jusqu'au 2 février 1902;

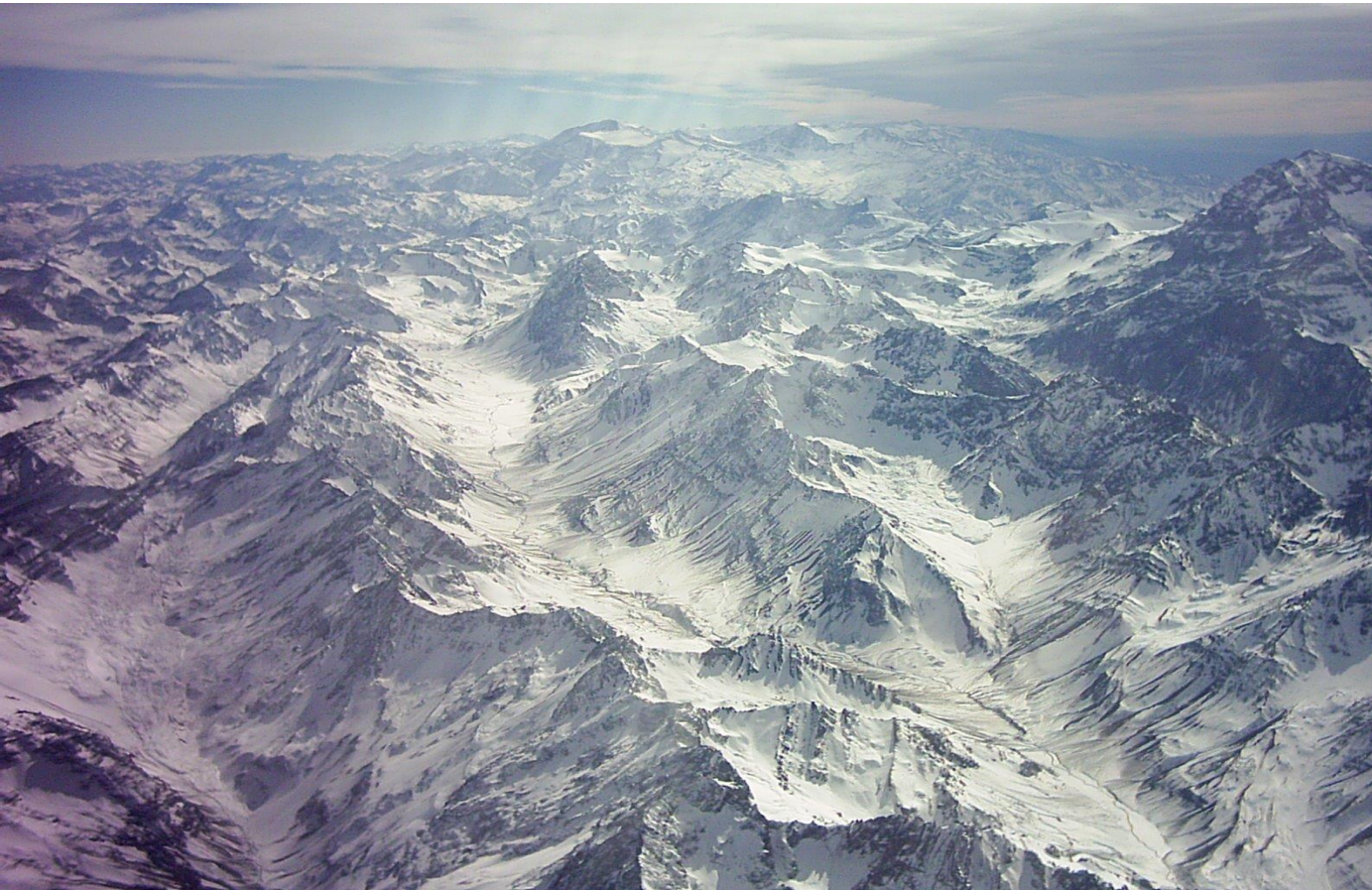
3^e Le Gouvernement de la République des Etats-Unis Mexicains paiera au Gouvernement des Etats-Unis d'Amérique le 2 février 1903 et chaque année suivante à cette même date du 2 février à perpétuité, la rente annuelle de quarante trois mille cinquante Dollars du Mexique et quatre vingt dix neuf cents ($43,050 \frac{99}{100}$ Dollars du Mexique) en monnaie ayant cours légal au Mexique.

Fait à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, en triple original, le 24 octobre 1902.



Inter-State Arbitration

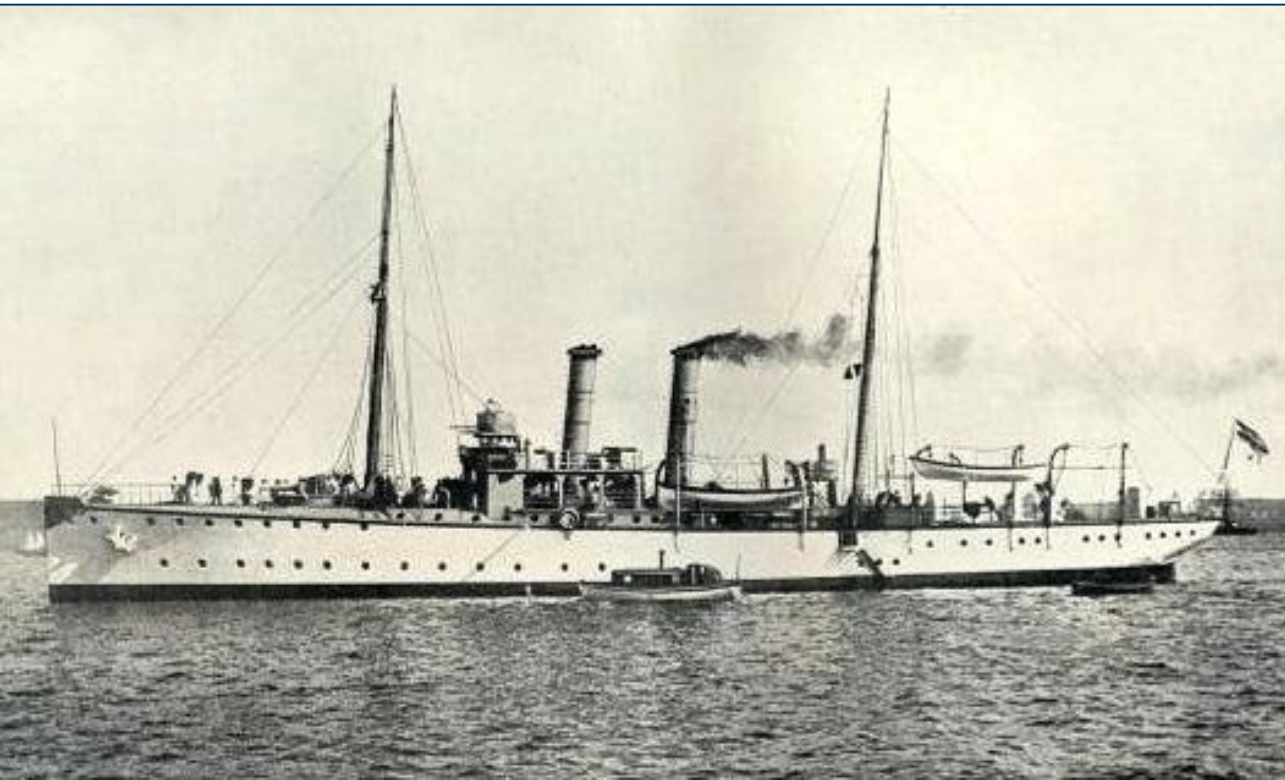
Cordillera of the Andes Arbitration (Argentina v. Chile, 1902)



Inter-State Arbitration

Preferential Treatment of the Blockading Powers of Venezuela

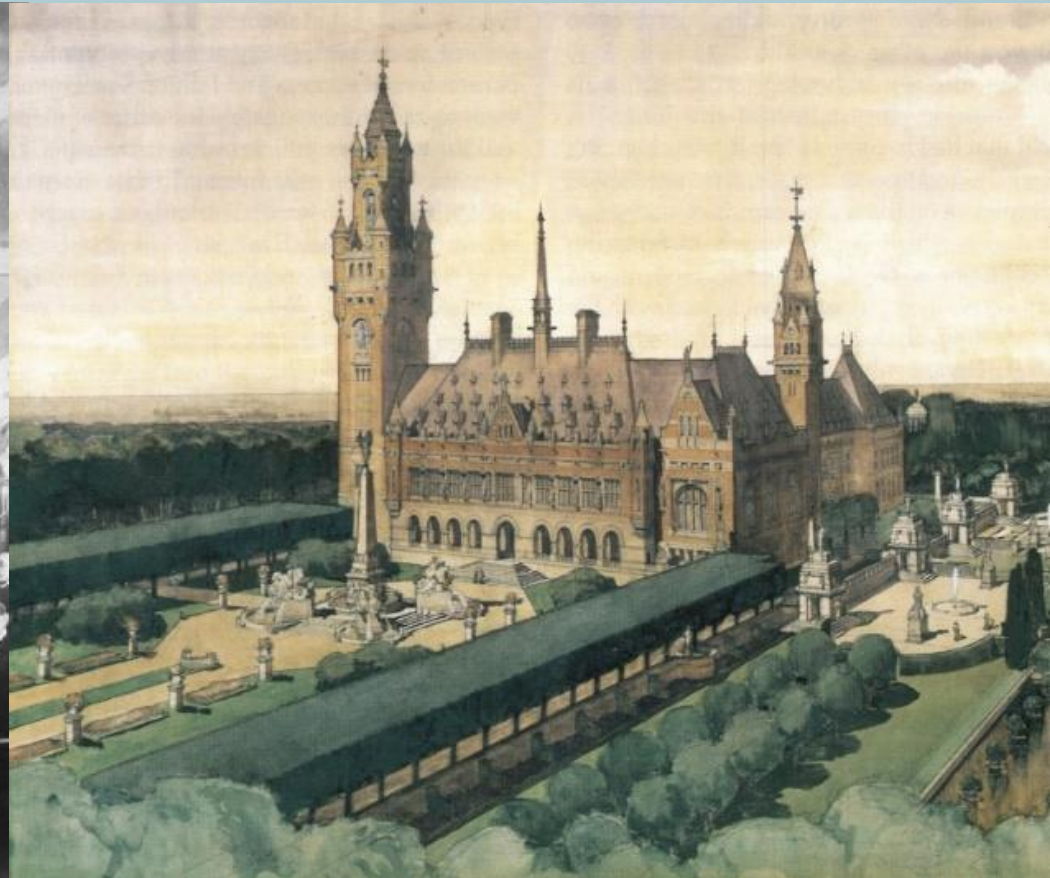
(Germany, UK, Italy v. Venezuela, 1903)



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 & Right in the East
I saw 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 Hundred of your
Regiment & the swearing in
of the recruits of your fine
Alexander Regimentals as well as
a scene from its barracks yard

St. Petersburg
4/1/1915

Dear Uncle

The new year has just
opened or 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 & Alex,
& without thanking you for
your kind, splendid & ever 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:	<i>RCA v. China</i>
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)



CHARTER
of **THE**
UNITED
NATIONS

AND STATUTE *of* THE
INTERNATIONAL COURT
OF JUSTICE



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

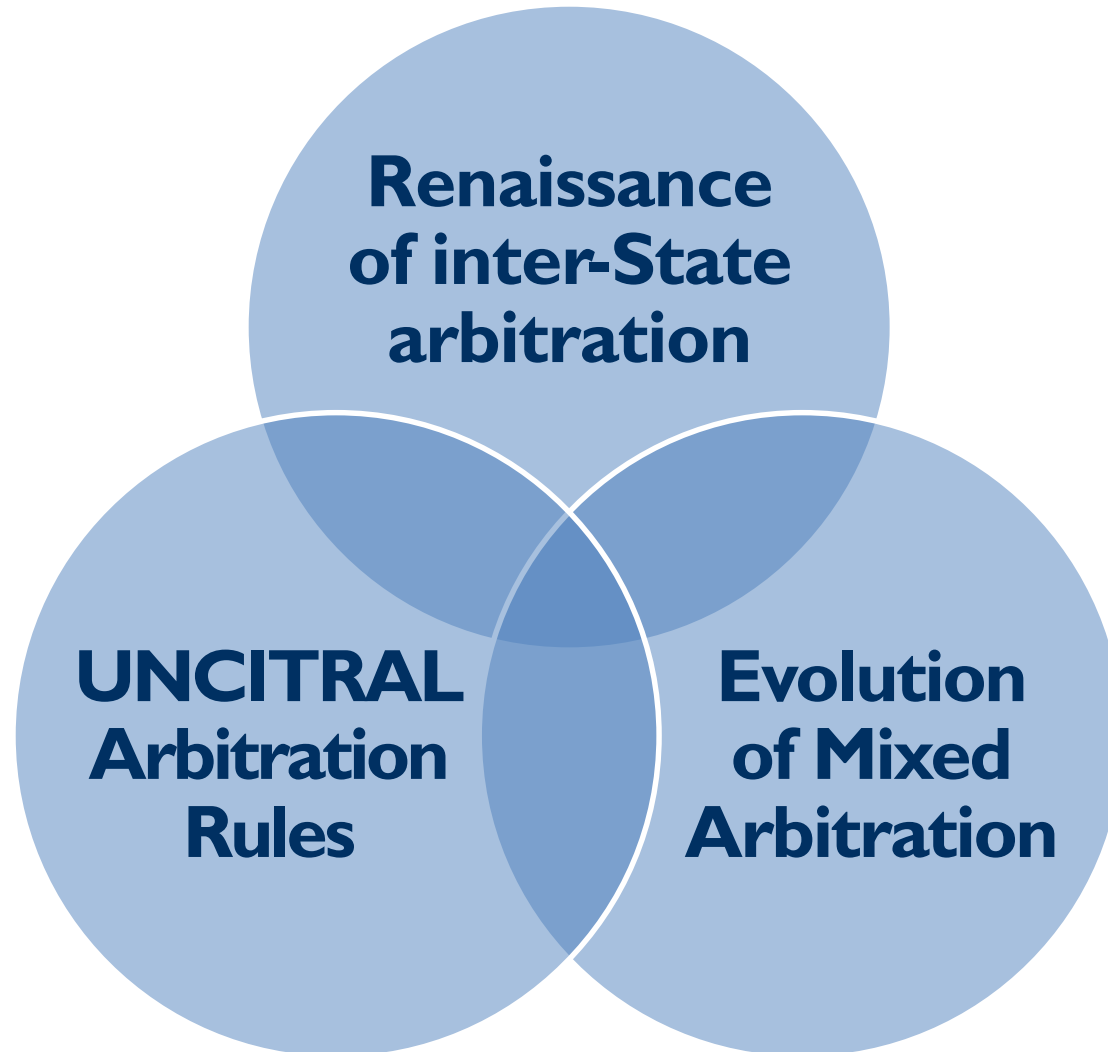
1945: United Nations / ICJ

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)

...28 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



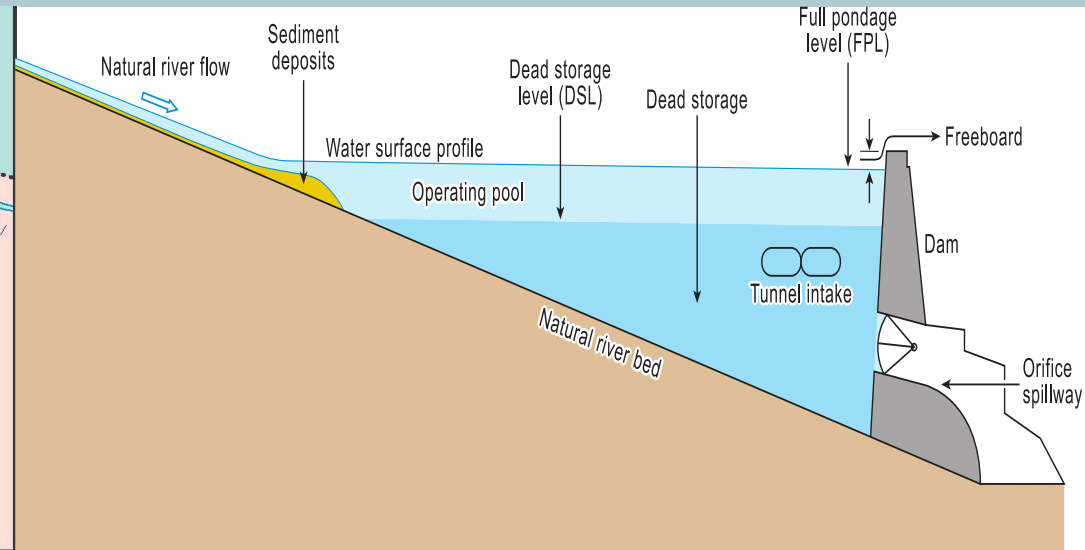
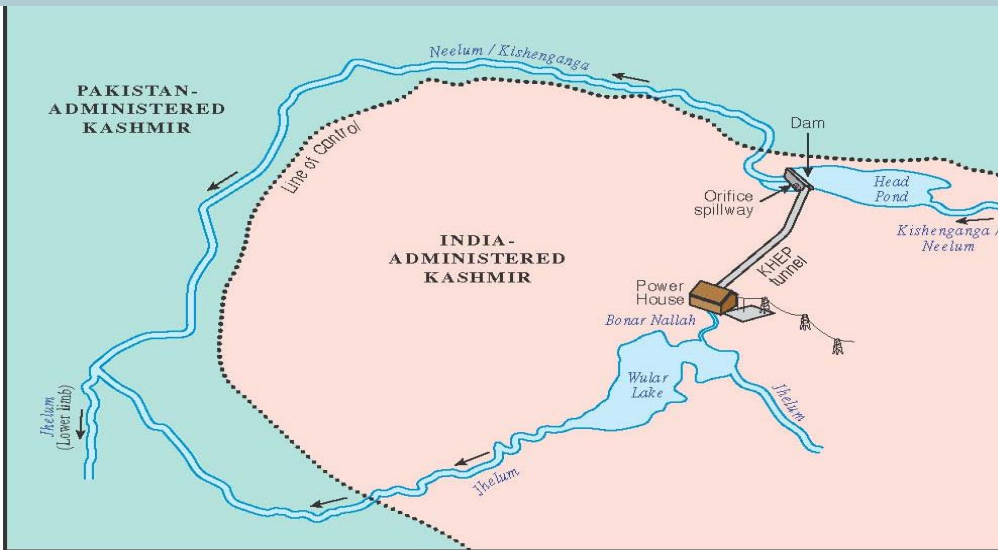
Indus Waters Kishenganga Arbitration (Pakistan v. India)

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

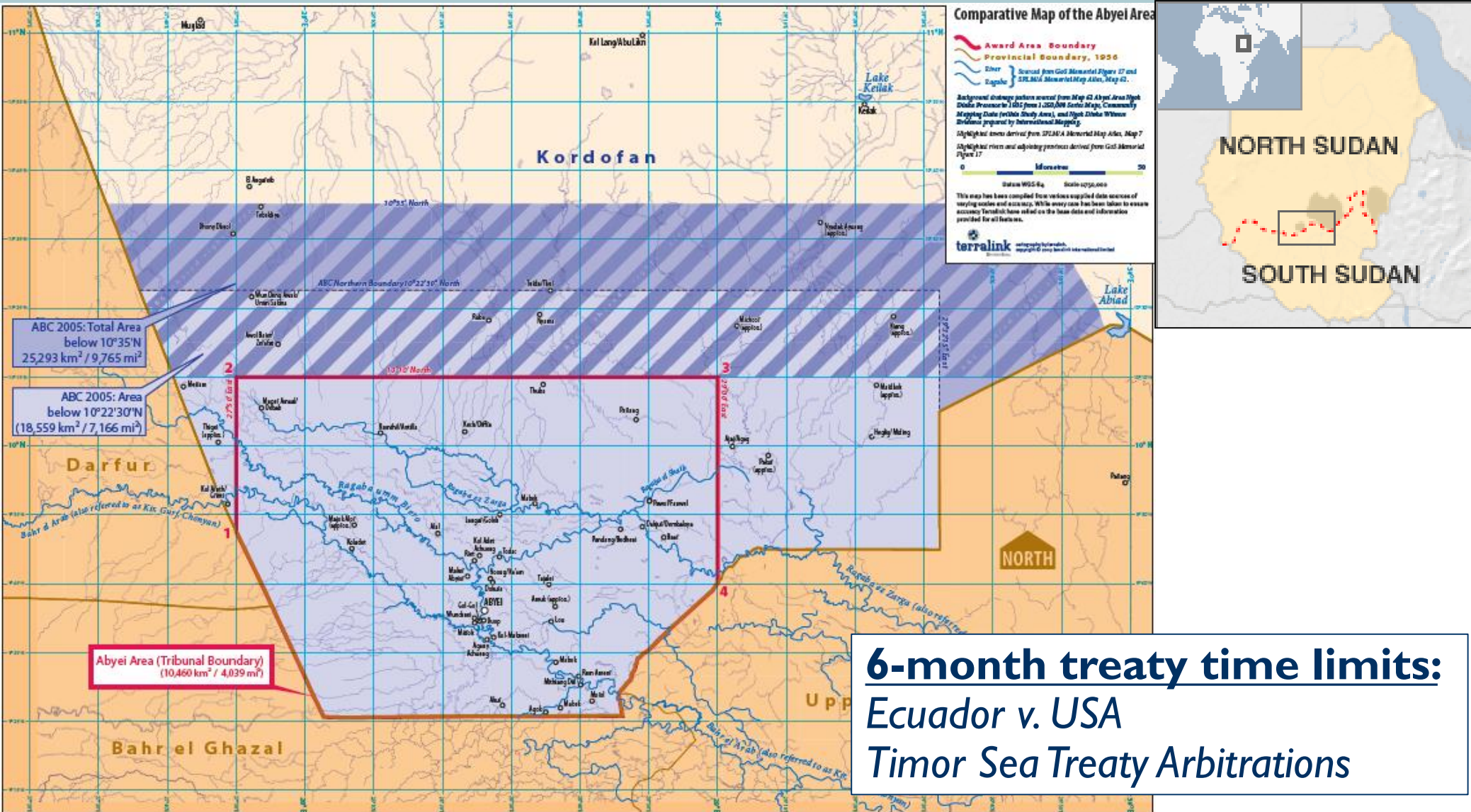
(1) The Arbitral Tribunal shall apply

(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)



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)
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	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 rôle de la conférence des Nations Unies* in *Le nouveau droit international de la mer* (1983)**

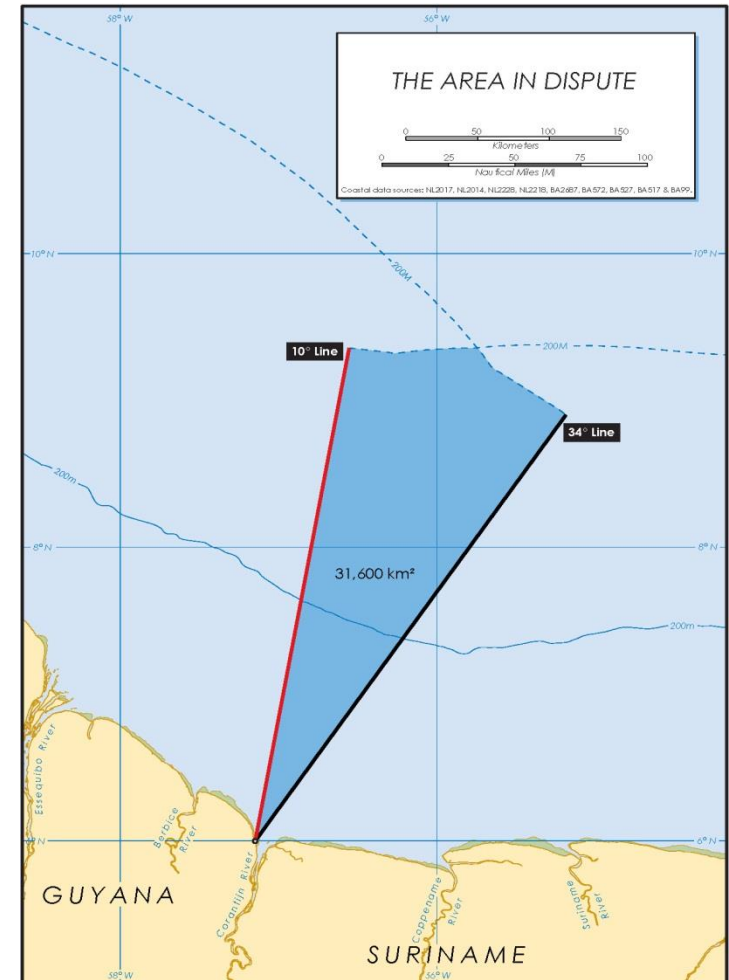
UNCLOS Article 287

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:

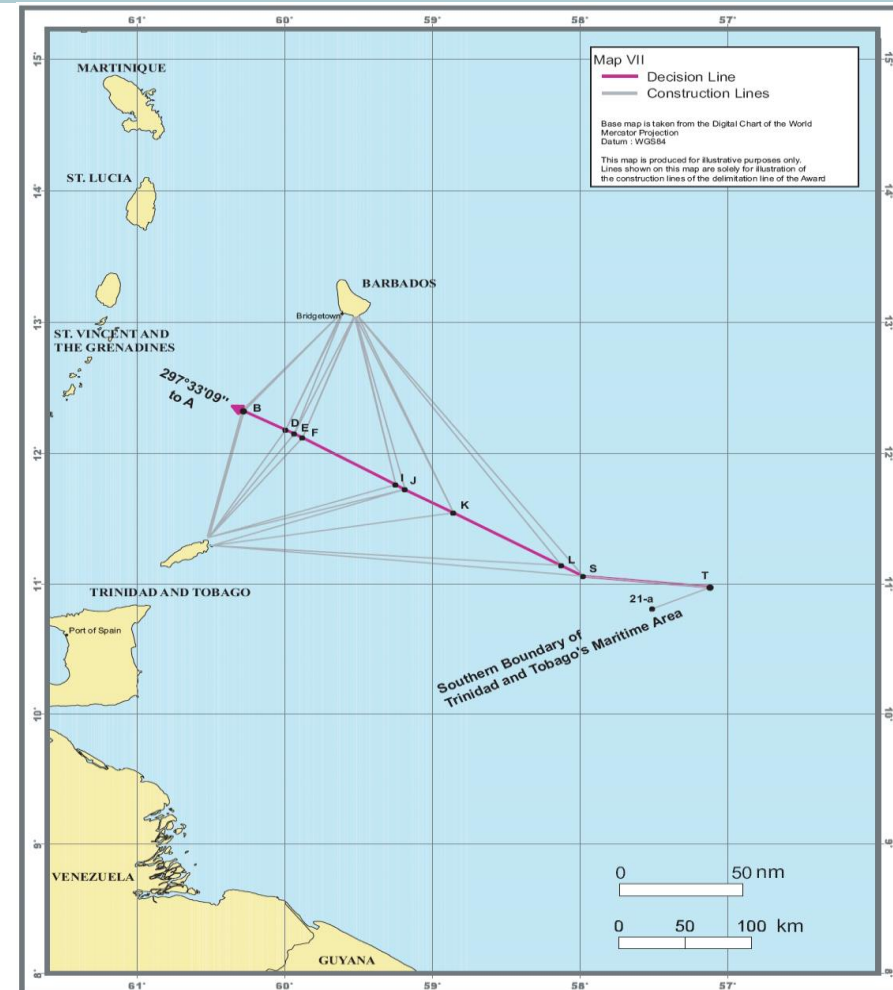
- MOX Plant (Ireland v. UK) (2008)
- Chagos MPA (Mauritius v. UK) (2015)

Land Reclamation:

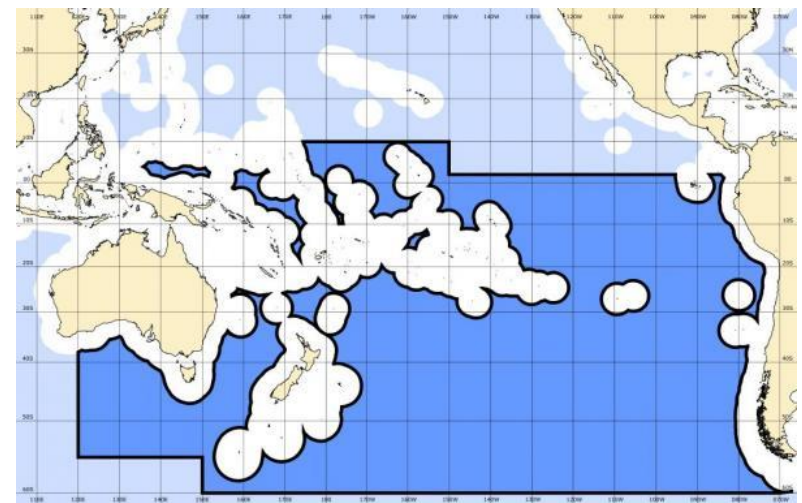
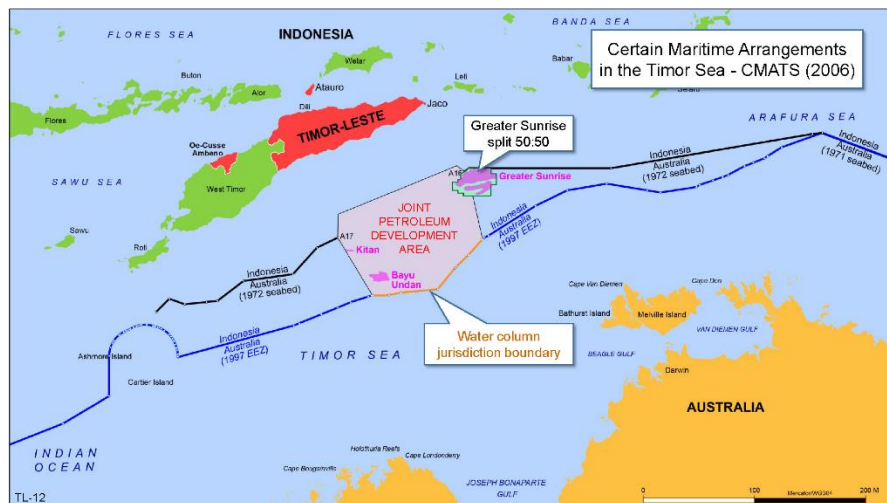
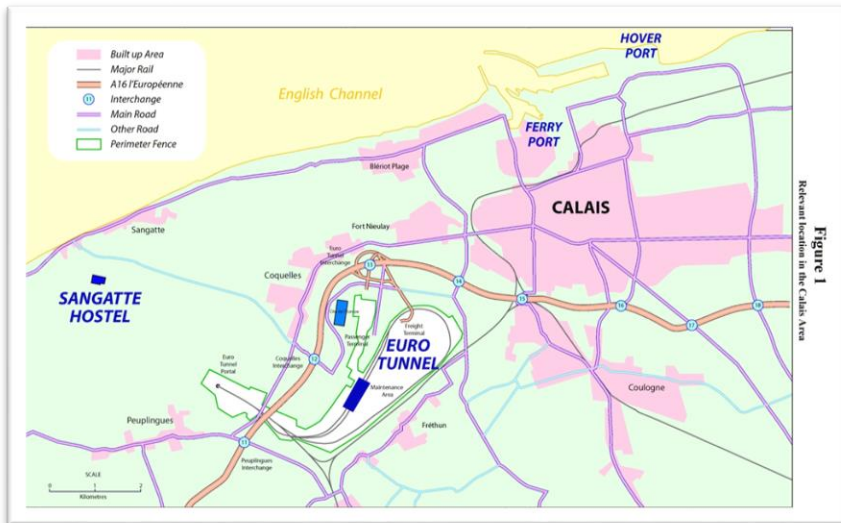
- Malaysia v. Singapore (2005)

Ships:

- Argentina v. Ghana (2013) – ARA Libertad
- Netherlands v. Russia (2017) – Arctic Sunrise
- Malta v. São Tomé (2019) – Duzgit Integrity



Special Cases





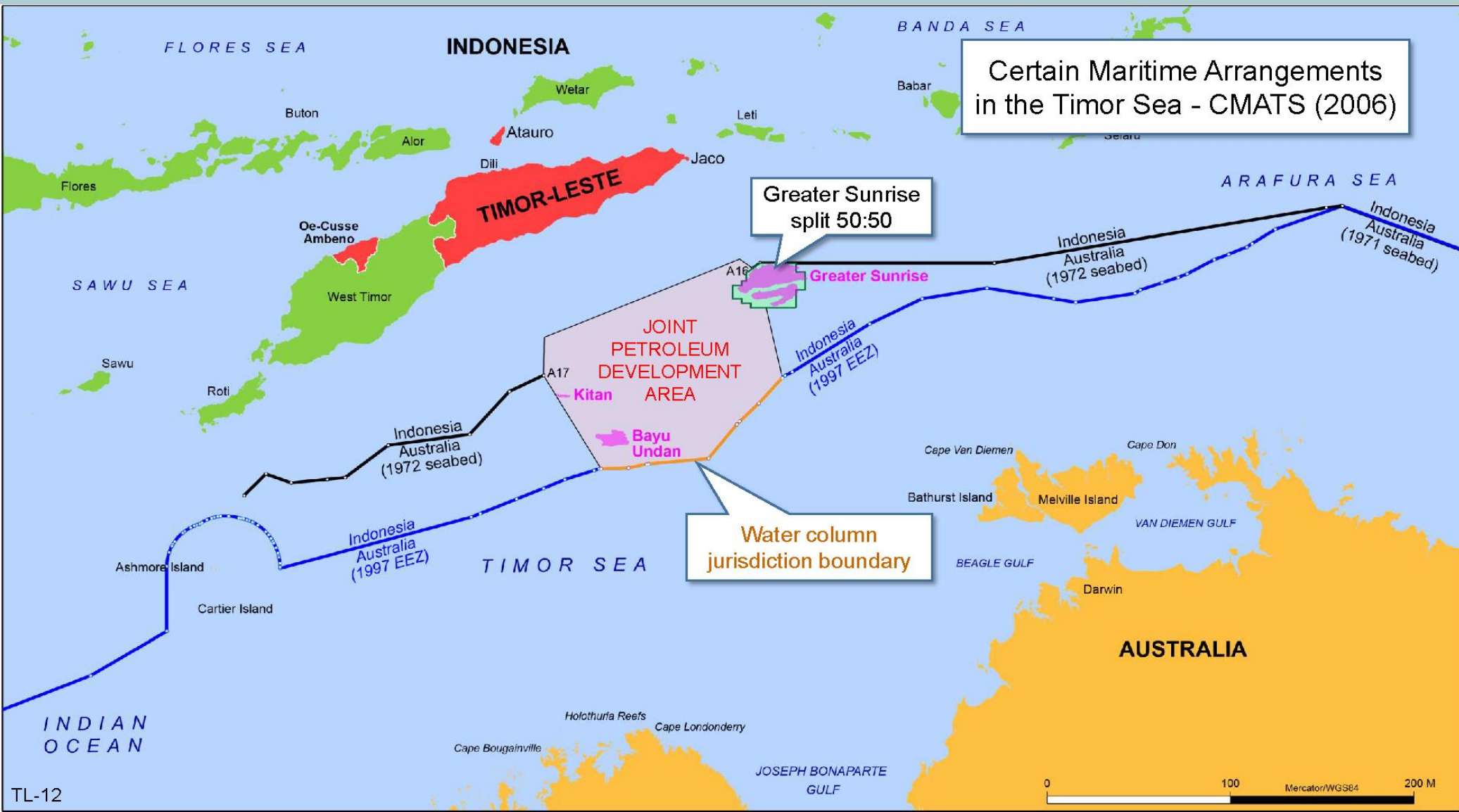
Case Study:

The Timor Sea Conciliation

(Timor-Leste v. Australia)



Timor-Leste/Australia Conciliation





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



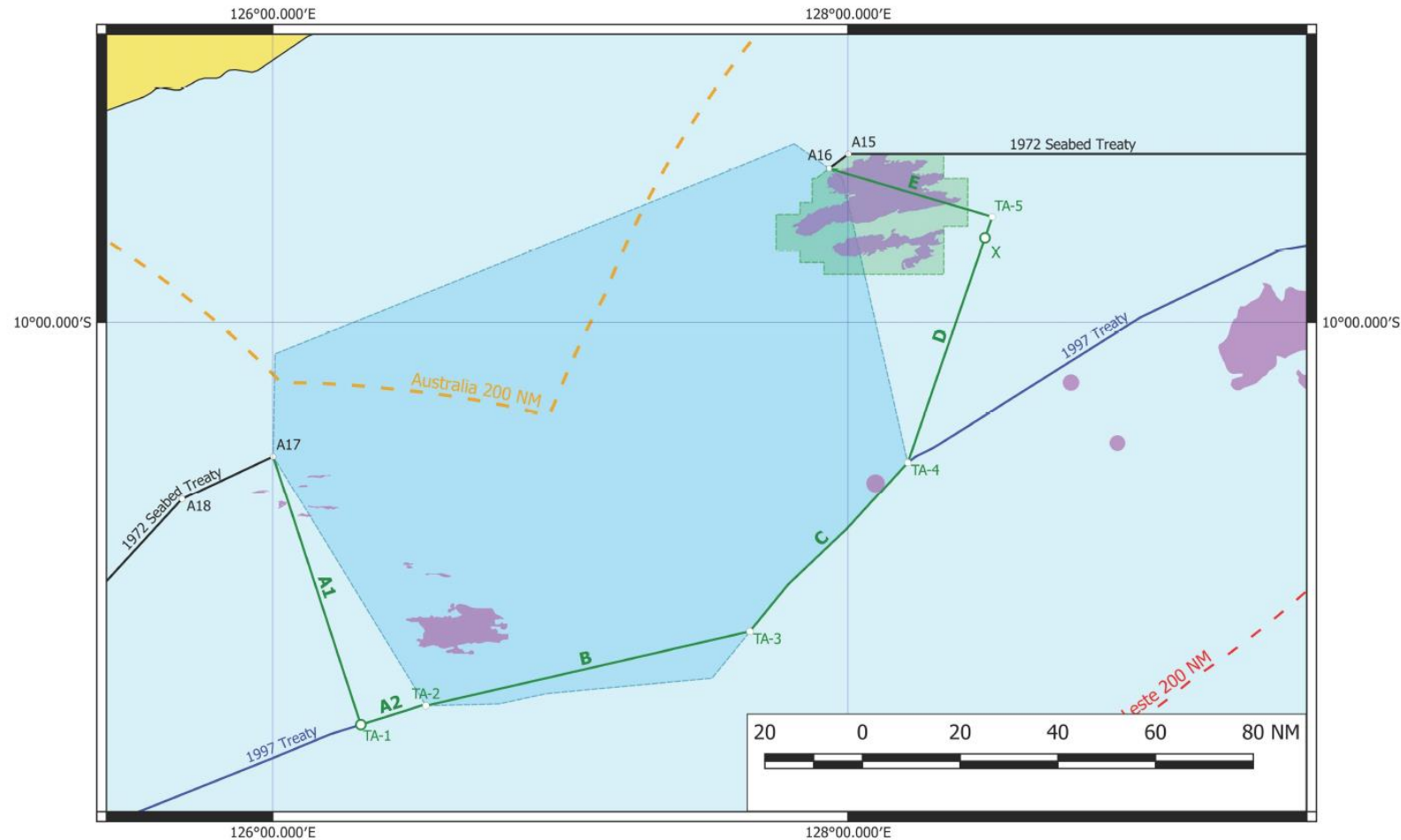
- 11 April 2016:** Conciliation proceedings commenced
- 29 August 2016:** Opening Session
- 19 September 2016:** Decision on Competence
- 9 January 2017:** Coordinated termination of CMATS treaty
- 20 January 2017:** Arbitrations withdrawn
- 30 August 2017:** Boundary agreement reached
- 13 October 2017:** 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



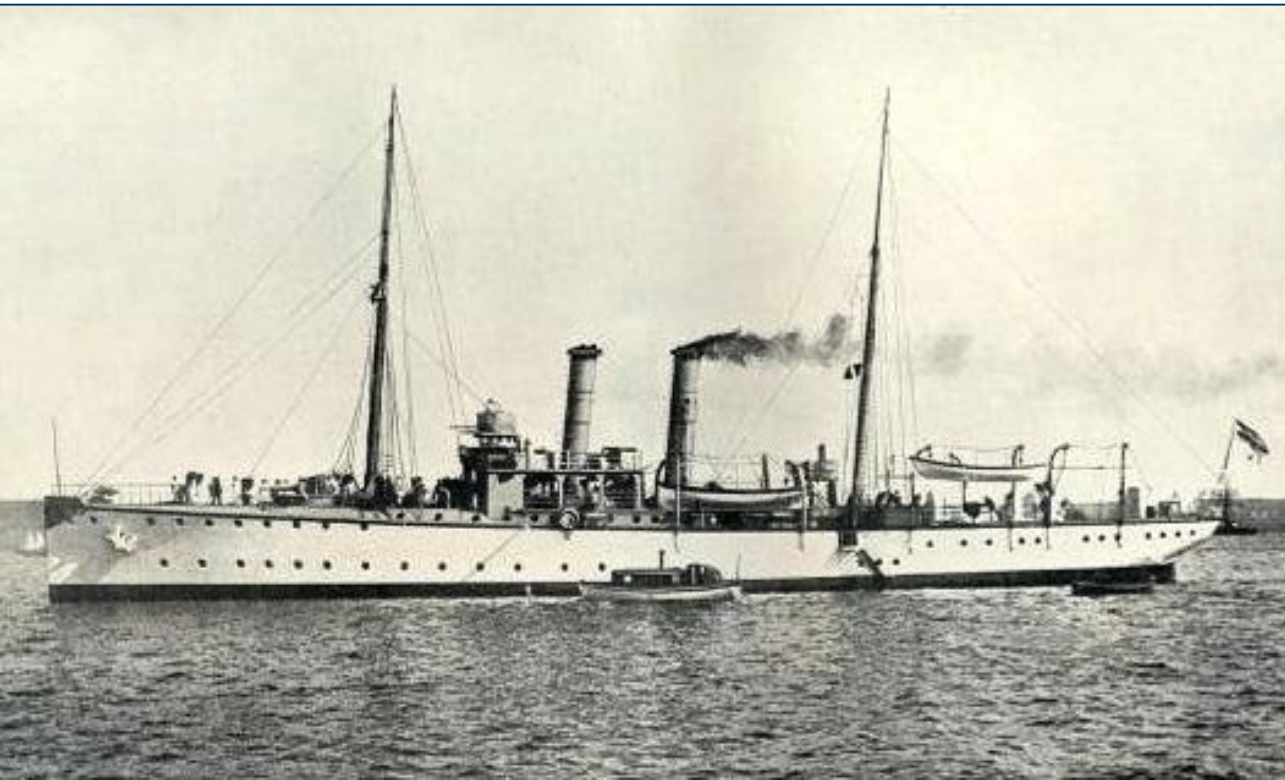
Timor-Leste/Australia Conciliation



Inter-State Arbitration

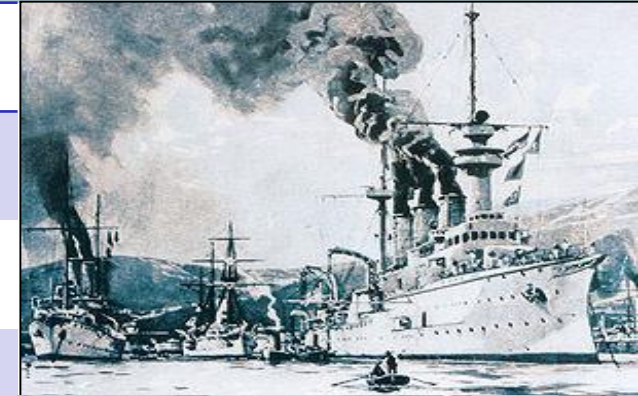
Preferential Treatment of the Blockading Powers of Venezuela

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



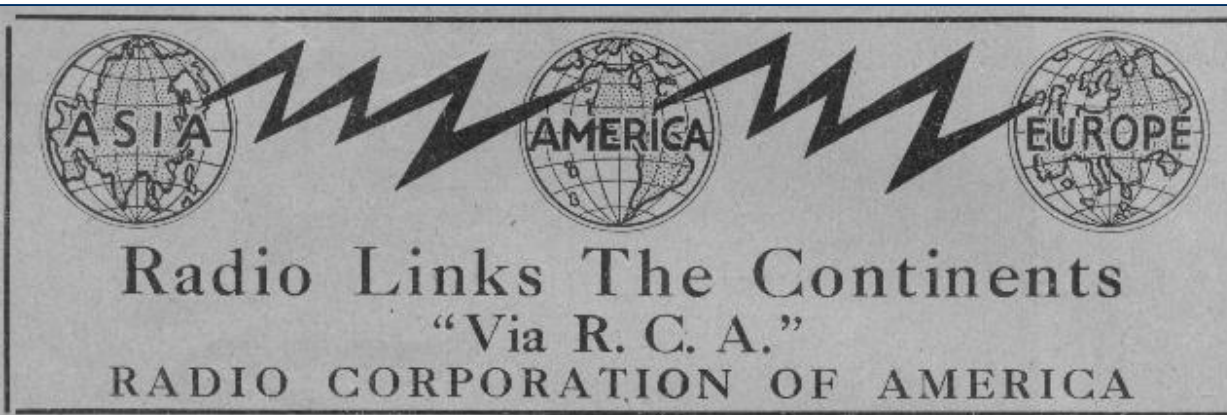
Genesis of Mixed Arbitration

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



Genesis of Mixed Arbitration

Radio Corporation of America v. China (1935)



Ass. Radio Corp. 42.5
DR. J. A. VAN HAMEL

La Haye, le 4 juillet 1935.

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

LA HAYE.

Monsieur le Secrétaire Général,

J'ai l'honneur de vous
faire parvenir une copie dûment certifiée de la dé-
cision 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 remer-
ciements très sincères et mon appréciation chaudi-
reuse pour l'assistance prêtée par vos services dans
cette affaire, je vous prie d'agréer, Monsieur le
Secrétaire Général, l'expression de ma parfaite con-
sédération.

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

POSTAL ADDRESS: UNITED NATIONS, N. Y. 10017
CABLE ADDRESS: DESSA, TELEGRAPH CODE: UNATIONS NEW YORK

LE 135 (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.

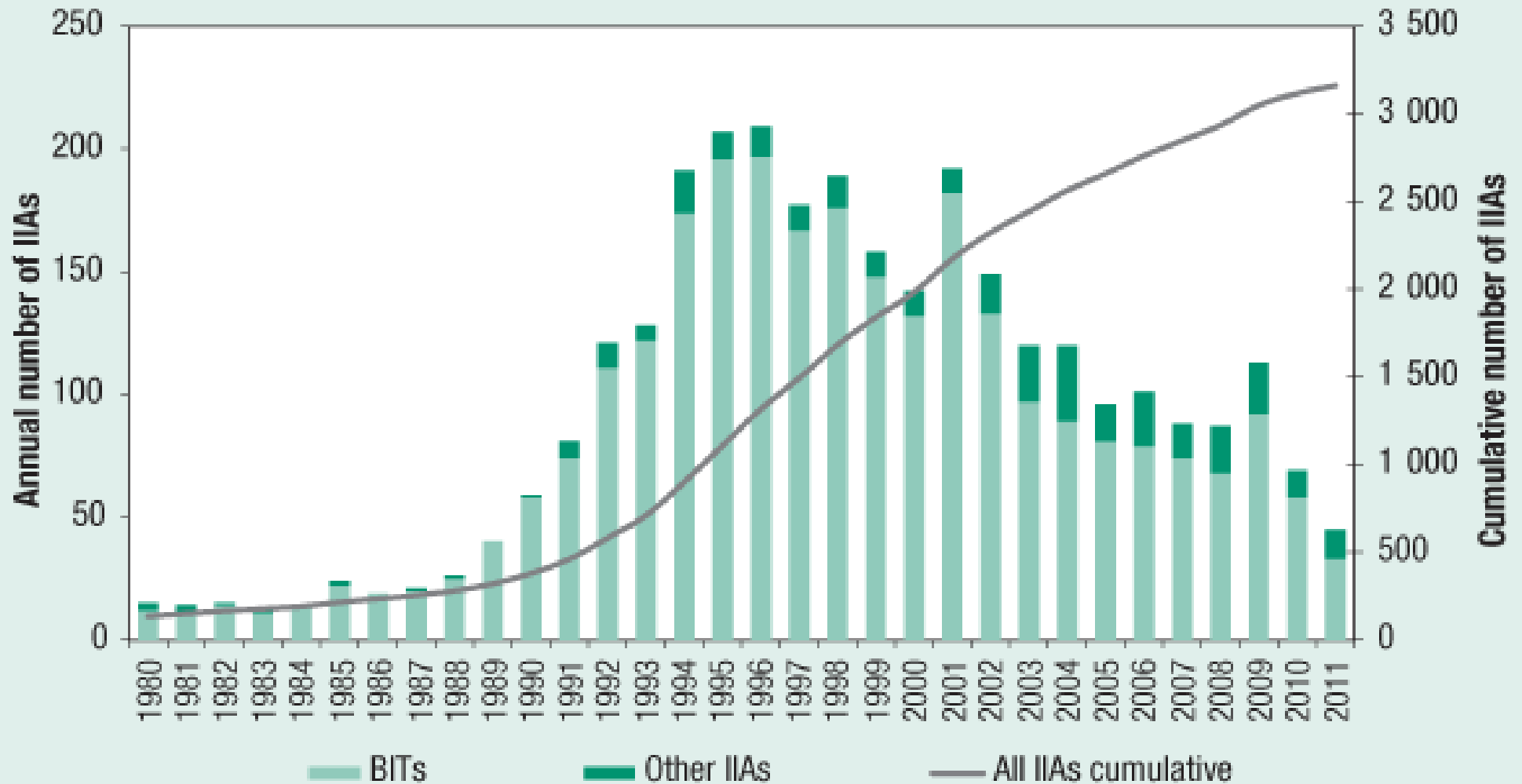
The United Nations Commission on International Trade Law (UNCITRAL) at its sixth session (1973) requested the Secretary-General to prepare a draft set of arbitration rules for optional use in all arbitration relating to international trade. In this connection, let me say again how pleased I am that you 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 recommendation 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 134
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



**Number of
BITs**

**Choice of
forum in
BITs**


**Non-ICSID
States**

**UNCITRAL
vs. ICSID
differences**



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

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CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNITED NATIONS, N. Y.

LE 133 (3) 21 March 1974

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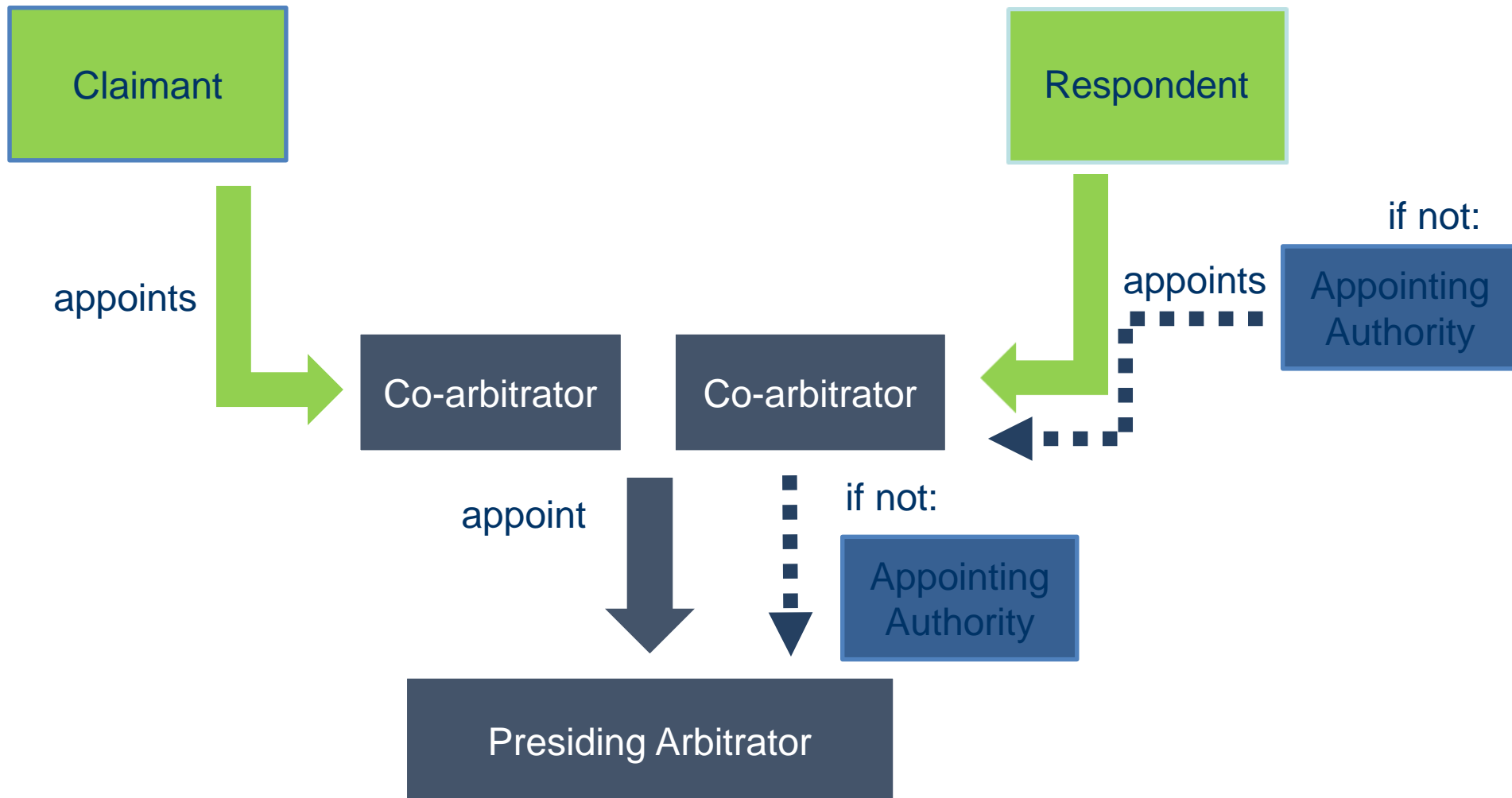
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Appointment of Arbitrators






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

UNITED NATIONS  NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N. Y., 100
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNITED NATIONS, NEW YORK

LE 133 (3) 21 March 1974

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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.

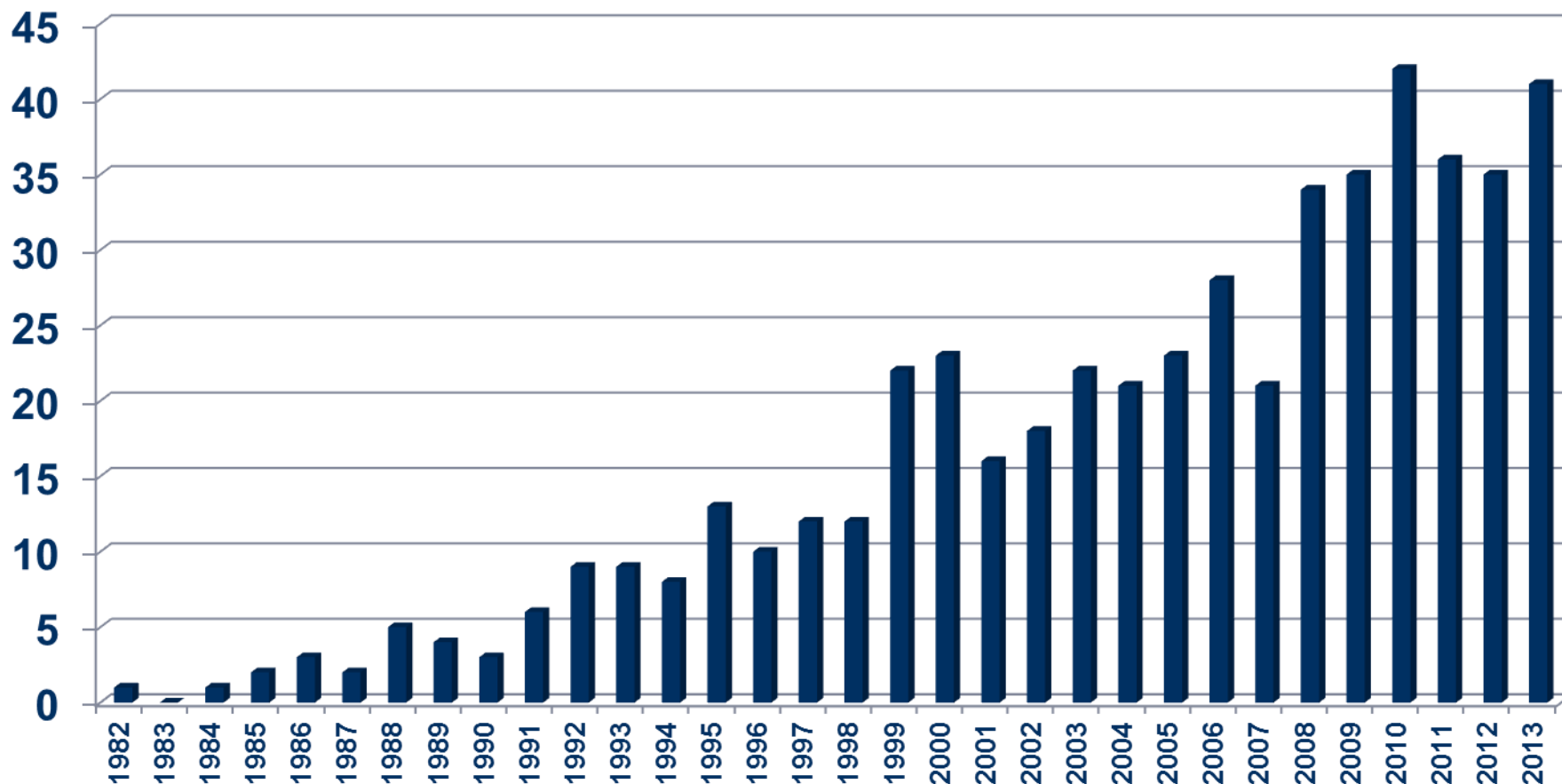
37. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed that no additional organ or body should be established under United Nations auspices for the designation of the appointing authority.

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. AAI 90

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. AAI85

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

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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**



I. Constitution of Tribunals

ICSID	UNCITRAL
<ul style="list-style-type: none">▪ Art: 38: If parties fail to appoint arbitrators, Chairman of World Bank appoints from ICSID Panel	<ul style="list-style-type: none">▪ Art. 6-9: If parties fail to appoint arbitrators, can approach Appointing Authority (AA), or PCA S-G to designate an AA<ul style="list-style-type: none">▪ Not bound to pick from any particular pool of candidates
<ul style="list-style-type: none">▪ Chairman cannot appoint national of one of the parties	<ul style="list-style-type: none">▪ AA to take into account advisability of appointing a nationality other than parties

I. Constitution of Tribunals

ICSID	UNCITRAL
<ul style="list-style-type: none">▪ 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) <p>-----</p> <p>~263 days</p>	<ul style="list-style-type: none">▪ 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 <p>-----</p> <p>120-150 days</p>

2. Independence and Impartiality

ICSID	UNCITRAL
“on account of any fact indicating a <u>manifest lack</u> ”	“if circumstances exist that give rise to <u>justifiable doubts</u> ”

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
<ul style="list-style-type: none">▪ Disclosure to be made after appointment	<ul style="list-style-type: none">▪ Disclosures to be made when approached in connection with a dispute (usually before appointment)
<ul style="list-style-type: none">▪ Challenges decided by co-arbitrators or, if no consensus, by Chairman of World Bank	<ul style="list-style-type: none">▪ Challenges decided by Appointing Authority
<ul style="list-style-type: none">▪ No time limit but challenges to be “prompt” and before close of proceedings	<ul style="list-style-type: none">▪ Time limit of 15 days
<ul style="list-style-type: none">▪ Automatic suspension of proceedings	<ul style="list-style-type: none">▪ 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 <u>to the exclusion of any other remedy.</u> ”	“A request for interim measures addressed by any party to a judicial authority <u>shall not be deemed incompatible</u> with the agreement to arbitrate, or as a waiver of that agreement.”
<i>Caratube v. Kazakhstan</i> , ICSID Case No.ARB/08/12	<i>Chevron-Texaco v. Ecuador</i> , 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
<ul style="list-style-type: none">▪ Debate: Article 25 imposes “outer limits of jurisdiction” beyond what is in the BIT <p>(<i>Salini v. Morocco</i>; <i>MHS v. Malaysia</i>; <i>Phoenix Action v. Czech Republic</i>)</p>	<ul style="list-style-type: none">▪ Debate: no Article 25 equivalent but some question now about objective criteria to be read into terms in a BIT. <p>(<i>Romak v. Uzbekistan</i>)</p>

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



UNCITRAL

UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL

Arbitration Rules

(with new article 1, paragraph 4, as adopted in 2013)

UNCITRAL

Rules on Transparency
in Treaty-based
Investor-State Arbitration



UNITED NATIONS

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
<ul style="list-style-type: none">■ Art. 52: Self-contained system of review per narrow grounds to be decided by ad hoc committee drawn from Panel	<ul style="list-style-type: none">■ Subject to review by supervisory national courts of place of arbitration
<ul style="list-style-type: none">■ 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.	<ul style="list-style-type: none">■ Enforcement is pursuant to New York Convention (can be refused on limited grounds)
<ul style="list-style-type: none">■ Non-pecuniary obligations do not come under Article 54	<ul style="list-style-type: none">■ Very rare for courts to refuse to enforce investor-State awards

UNCITRAL Arbitration at the PCA



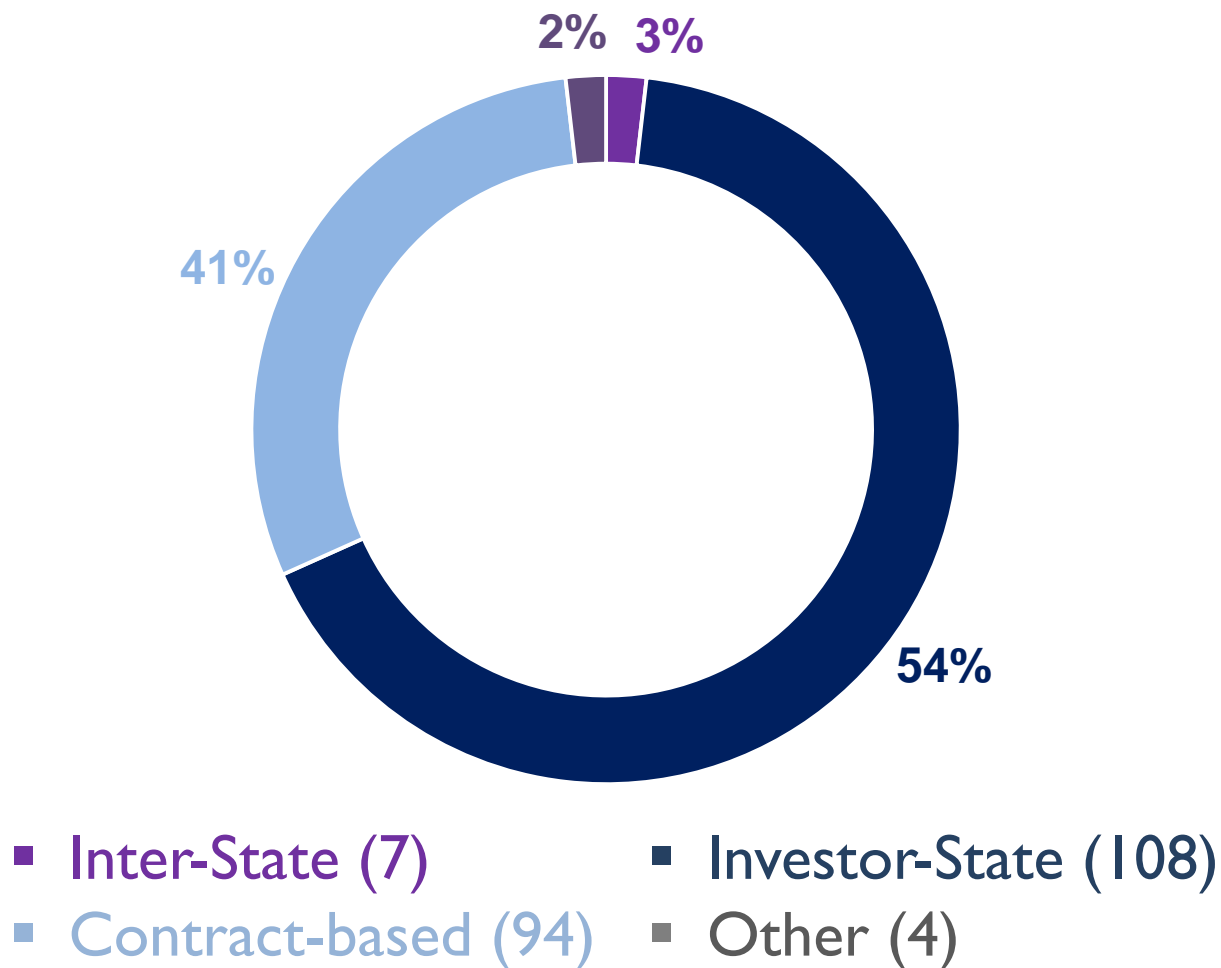
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The PCA Today



Global Reach



New Horizons: Outer Space



Taurus I

[Based in **Houston**,
licensed by the **US**
Federal
Communication
Commission]



- **Occurred** in the geostationary orbit
- **Caused** hundreds of pieces of debris



Centauri 5

[French **private**
company, licensed by
the **French**
government]

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



