

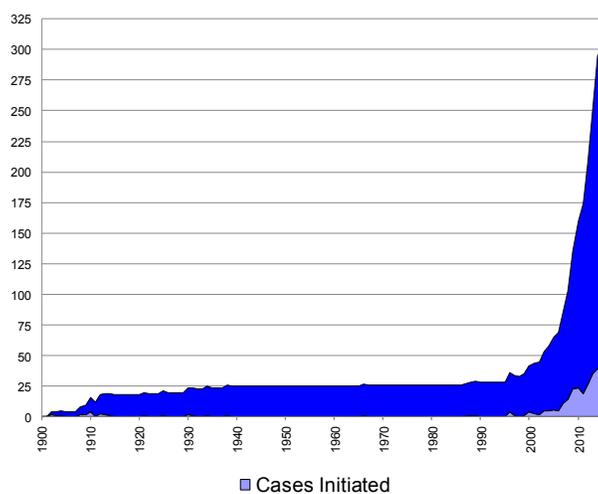


## A rising tide of cases: what role for arbitration and conciliation in the climate change context?

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IBA/ICC/PCA/SCC Side Event, COP23 Bonn, 16 November 2017  
Supporting the UNFCCC and Paris Agreement through International Dispute Settlement

## PCA caseload since 1899



[www.pca-cpa.org](http://www.pca-cpa.org)

## Part I

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### Arbitration of Inter-State Disputes

- Parties **consent** to refer their dispute
- to independent decision-makers of their **choosing**
- to make a **legally binding** decision based on law
- applying **flexible** procedures

1899 Convention: “effective and equitable means” of settling legal disputes where diplomacy has failed

### PCA Inter-State Arbitrations

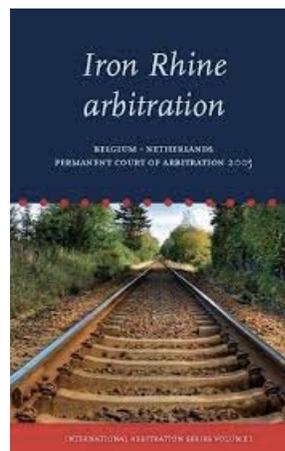
#### Consent by Special Agreement

• **Iron Rhine Arbitration 2005**, parties agreed, in diplomatic notes:

“to submit [the] dispute concerning the reactivation of the Iron Rhine to an arbitral tribunal ... set up under the auspices of the Permanent Court of Arbitration in The Hague”

**Checklist comment:**

• **Sources of law:** Tribunal applied “evolutive” interpretation of old treaties in light of modern standards of environmental law.



## PCA Inter-State Arbitrations

### Consent under Bilateral Treaty

- Kishenganga Arbitration (Pakistan v. India) 2014
- Arbitration clause in Indus Waters Treaty 1960



### Checklist comment:

**Sources of law:** “It is incumbent to interpret and apply this 1960 Treaty in light of customary international principles for the protection of the environment in force **today**

...

Contemporary customary international law [requires states] to take environmental protection into consideration when developing projects that may cause injury to a bordering state.”

## PCA Inter-State Cases

### *Indus Waters Kishenganga (Pakistan v. India)*

#### Checklist comments:

- **Transparency:** all decisions and case details published
- **Scientific evidence:** engineer member of tribunal, site visit
- **Appreciation of social impact:** site visit



## PCA Inter-State Cases

### Consent under Multilateral Treaty (e.g. **UNCLOS Part XV**)

#### *Art. 287 – Choice of Procedure*

(1) ... a State shall be free to choose ... one or more of the following means for the settlement of disputes ...

- (a) the International Tribunal for the Law of the Sea [...];
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII

14 UNCLOS cases at PCA:

- Chagos Maritime Protected Area (Mauritius v. UK)
- Arctic Sunrise (Netherlands v. Russia)
- Bay of Bengal Delimitation (Bangladesh v. India)
- South China Sea (Philippines v. China)

## PCA Inter-State Cases

### South China Sea Arbitration (2016)

- construction of artificial islands caused severe harm to coral reef environment, breached arts. 192, 194
- Toleration and support for poaching protected clams, turtles and corals also found to be unlawful
- Failure to consult, to communicate EIA, also unlawful

#### **Checklist comment:**

- Scientific evidence:** 3 independent coral scientists; a maritime safety expert, and a hydrographer for critical assessment of both sides' technical claims



Figure 20: Fairy Cross Reef, 17 January 2012  
(Ames 78)



Figure 21: Fairy Cross Reef, 19 October 2015  
(Ames 78)

## PCA Inter-State Cases

### South China Sea

#### Checklist comment:

- **Transparency:** documents (pleadings, questions, transcripts) published, regular press releases
- **Non-party participation:** 9 UNCLOS member states granted observer status (but not US)
- **Sources:** in interpreting UNCLOS, tribunal took account of other environmental obligations (e.g. CBD, CITES), and jurisprudence of ITLOS, ICJ...



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### How a Fight Over South China Islands Led to Climate Win

In a twist, war games over strategic maritime territory have produced a ruling with implications for global climate action

PUBLISHED: JULY 12, 2017  
AUTHORS: FREEDOM-KAI PHILLIPS, SILVIA MACIUNAS

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“The approach adopted by the Tribunal opens the door for further inquiry into the scope of UNCLOS, in particular, obligations under Article 192 to preserve and protect the marine environment, under Article 212 to prevent pollution to or through the atmosphere, and Article 237 relating to cooperation under other conventions, to be interpreted in light of obligations under other multilateral environmental agreements such as the UNFCCC.”

## UNFCCC Dispute?

### UNFCCC, Article 14:

1. In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned **shall seek a settlement of the dispute through negotiation** or any other peaceful means of their own choice.

2. When ratifying ... or at any time thereafter, a Party... **may declare** in a written instrument. . . that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as **compulsory** . . . In relation to any Party accepting the same obligation:

- (a) Submission of the dispute to the [ICJ], and/or
- (b) **Arbitration** in accordance with procedures to be adopted by the [COP] as soon as practicable, in an annex on arbitration.



### IBA Recommendation 3.1.2 (i)

The UNFCCC COP should adopt the PCA as the UNFCCC's preferred arbitral body."

*[mirrored in Art. 24 Paris Agreement]*

## Declarations under UNFCCC

### Netherlands

17 February 2010

#### Declaration:

"The Kingdom of the Netherlands declares, in accordance with paragraph 2 of Article 14 of the United Nations Framework Convention on Climate Change, that it accepts both means of dispute settlement referred to in that paragraph as compulsory in relation to any Party accepting one or both means of dispute settlement."

### Solomon Islands

#### Declaration:

"In pursuance of article 14 (2) of the said Convention [the Government of the Solomon Islands] shall recognise as compulsory, arbitration, in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration."

### Tuvalu

#### Declaration:

"In pursuance of article 14 (2) of the said Convention [the Government of the Solomon Islands] shall recognise as compulsory, arbitration, in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration."

## Sample declarations under Paris

### Netherlands Declaration:

“The Kingdom of the Netherlands, for the European part of the Netherlands, declares in accordance with Article 14, paragraph 2, of the United Nations Framework Convention on Climate Change in conjunction with Article 24 of the Paris Agreement, **that it accepts both means of dispute settlement referred** to in that paragraph as compulsory in relation to any Party accepting one or both means of dispute settlement.”

### Vanuatu Declaration:

“WHEREAS the Government of the Republic of Vanuatu declares its understanding that ratification of the Paris Agreement **shall in no way constitute a renunciation of any rights under any other laws, including international law**, and the communication depositing the Republic’s instrument of ratification shall include a declaration to this effect for international record...”

## Part II

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### Conciliation of Inter-State Disputes

- Parties **consent** to refer their dispute
- to independent conciliators of their **choosing**
- applying **flexible, non-adversarial** procedures
- to lead to a **recommendation**

## Conciliation under UNFCCC?

### UNFCCC, Article 14:

5... if **after 12 months** following notification by one Party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, **the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.**

6. A conciliation commission **shall be created upon the request** of one of the parties to the dispute... The commission shall render a **recommendatory award**, which the parties shall consider **in good faith**.

7. Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an **annex on conciliation**.

*[mirrored in Art. 24 Paris Agreement]*

## PCA and Interstate Conciliation



Timor Sea Conciliation  
(UNCLOS, Annex V)



### Checklist comment:

- **Transparency:** webcast; press releases; but some elements private to build trust

“The Conciliation Commission has met regularly with the governments of Timor-Leste and Australia over the last year... The true breakthrough . . . occurred in Copenhagen on 30 August of this year. This week has involved the translation of that agreement into the form of a draft treaty . . . **The Parties’ engagement has been efficient and constructive.** . . . It has been a pleasure to see the governments of Timor-Leste and Australia forming a common position and standing **together to ensure that the resources of the seabed are developed to the benefit of both peoples.**”

## What else does Paris provide for?

### Treaty Review and Compliance Mechanisms?

#### Article 15

1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.
2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties.

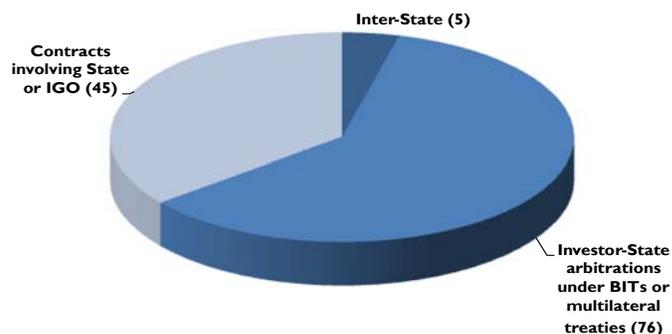


#### PCA experience with treaty review...

- Participants: 4 states, 2 IGOs, 1 'fishing entity'
- Fully transparent, and conducted in 4 languages
- Resolved within 6 weeks, at low cost
- Russian Federation accepted recommendations

## Part II

### Mixed Arbitrations



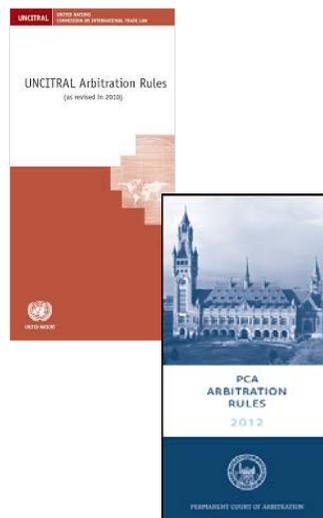
## PCA Contract Cases

### PCA Environmental Rules 2001

- 2015: CDM dispute
- 2014: dispute about Emissions Reductions Units
- 2013: two disputes about Emissions Reductions Units
- 2009: Joint Implementation dispute
- 2009: dispute about Emissions Reductions Units

### Other relevant cases

- 2014: two CDM disputes under 1976 UNCITRAL Rules
- 2010: CDM dispute under 2010 UNCITRAL Rules



## Uptake of Rules in Climate Finance

- Contribution Agreements (between States and Fund)

9. Any dispute, controversy or claim between the Fund and the Contributor arising out of or relating to this Contribution Agreement, which has not been settled pursuant to paragraph 9.1 of the Standard Provisions, shall be submitted to arbitration in accordance with the Arbitration Rules 2012 of the Permanent Court of Arbitration in force on the date hereof, and the following provisions: (a) the number of arbitrators shall be three (3); (b) the place of arbitration shall be Seoul, Republic of Korea; and (c) the language of the arbitral proceedings shall be English. Any arbitral award shall be final and binding upon the Fund and the Contributor. The Fund and the Contributor shall carry out the award without delay. The provisions set forth in this paragraph 9 shall be in lieu of any other procedure for the settlement of disputes between the Fund and the Contributor.



GREEN  
CLIMATE  
FUND

- Standard Conditions for Readiness and Preparatory Support Grants  
“18.01 ... Any dispute... shall be referred to and finally resolved by arbitration in accordance with the [PCA] Arbitrations Rules 2012”

[see also IETA, Gold Standard Foundation, The Compact for other uptake of PCA Rules]

## Other developments in mixed arbitrations

### Conciliations:

(1) CDM hydroelectric project; (2) construction contract; (3) NGO/IGO project

### Multi-stakeholder engagement (business & human rights)

- 2 PCA cases under Bangladesh Accord: consent of over 200 global fashion companies, global & local unions (ILO, govts, NGOs involved in negotiation, binding, with arbitration)



## Thank you



more info: [www.pca-cpa.org](http://www.pca-cpa.org)