International Arbitration in the Energy Sector
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State – State Arbitration

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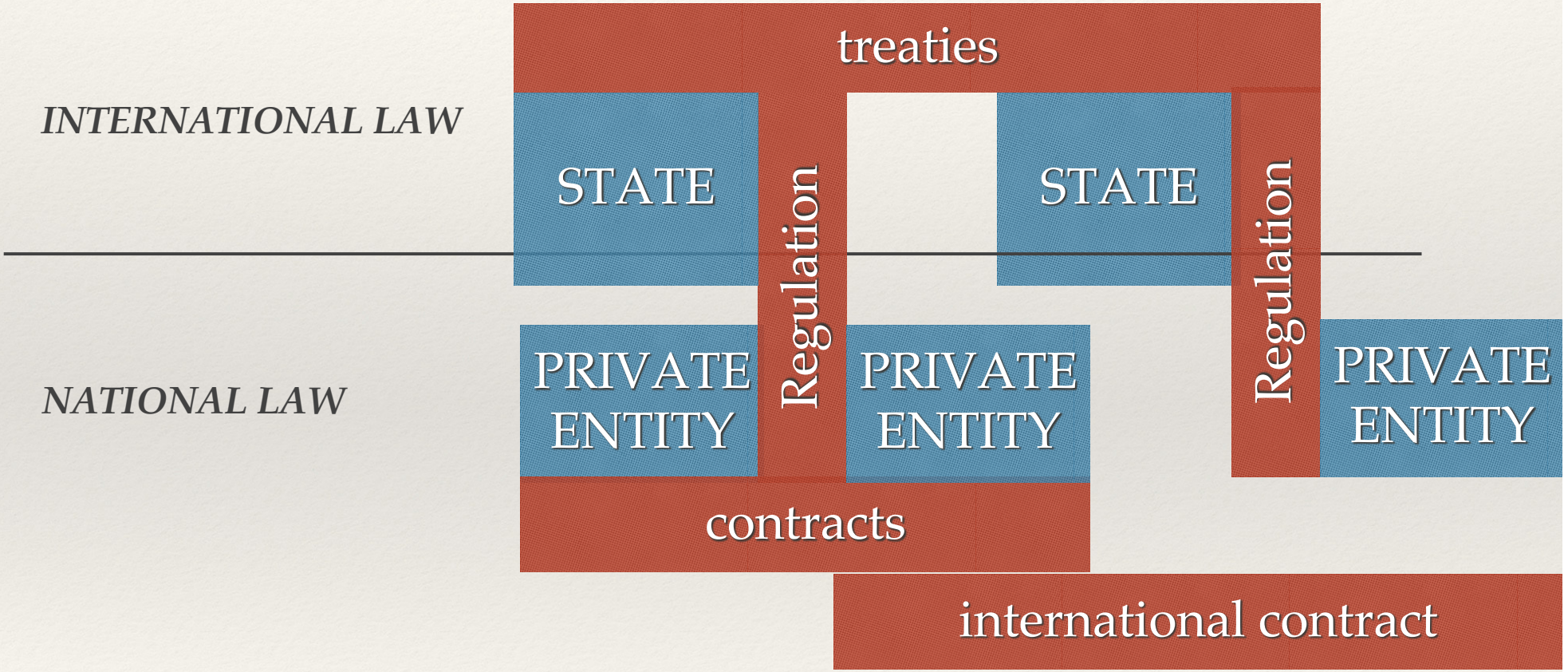
Stakeholders



Permanent Sovereignty over Natural Wealth and Resources (PSNR)

PSNR: An introduction

- *In many countries, underground natural resources, such as oil, gas or groundwater, belong to the state.*
- *The content of ownership and the restrictions within which the individual can exercise the right of ownership is defined by each sovereign state.*
- *Whether natural resources may be the object of a private property rights is determined by the body of domestic administrative law setting forth conditions under which natural resources may be explored and exploited (agreements, licenses, concessions, environmental regulation) as well as conditions under which the property rights are transferred to non-state actors (taxes, royalties).*

UNGA Resolution 1803 (XVII) adopted in 1962

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

PSNR

PSNR is a materialization of the internal dimension of a state's sovereignty = ***supreme/ultimate authority within a territory***.

Terra Nullius

Areas recognized as *terra nullius* ***may be appropriated*** as not 'occupied'.
(Latin: "the land of no one")

Once such area is appropriated, it becomes part of the state's territory.

As a result, the state exercises its sovereignty over the appropriated territory and PSNR may be claimed.

(indigenous peoples?)

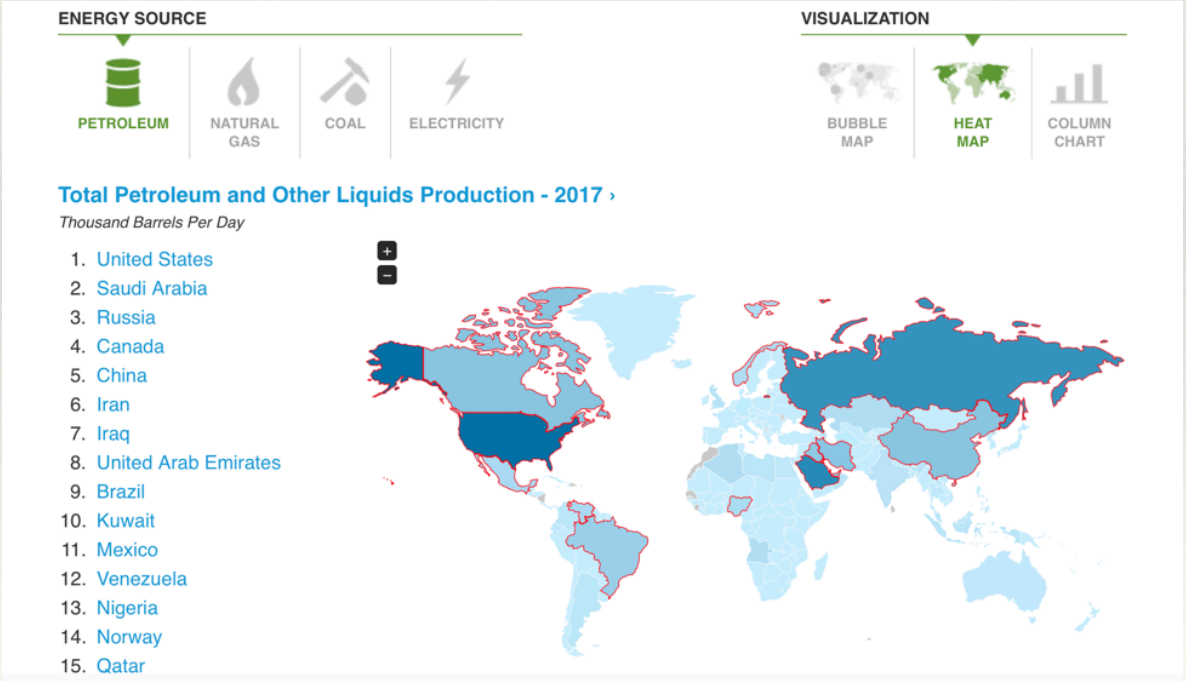
International Boundary Disputes and Natural Resources

International Boundary Disputes and Natural Resources

Two aspects of geography frequently give rise to international boundary disputes:

a) control and ownership of natural resources
b) land accessibility and security

Global energy demand continues to grow.
Global population is increasing.
The vast majority of the world's rapidly increasing energy needs are met through fossil fuels.



Determination of boundaries

Throughout history, empires and kingdoms expanded through invasion, occupation, conquest and colonisation or discovery.
Expansion of empires often proceeded in concert with exploitation of natural resources.

Example: Colonization often resulted in massive exploitation of natural resources in Africa, Asia, America. Local economies were restructured to ensure a flow of human and natural resources between the colony and the colonizing state.

18. and 19. centuries heralded exponential growth in demand for energy generating natural resources and the commencement of large-scale coal mining.

a) Invasion (use of force)
b) Boundary disputes

Determination of boundaries

Invasion (use of force)

UN Charter
Art. 2:
(…) *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

Boundary disputes

The New Geography of Conflict

The New Geography of Conflict

Control and ownership of natural resources continues to drive conquest and conflict between and within states throughout the world.

Scarcity of energy resources -> conflict.

Reading: The New Geography of Conflict (Michael Klare, Foreign Affairs, 2001)

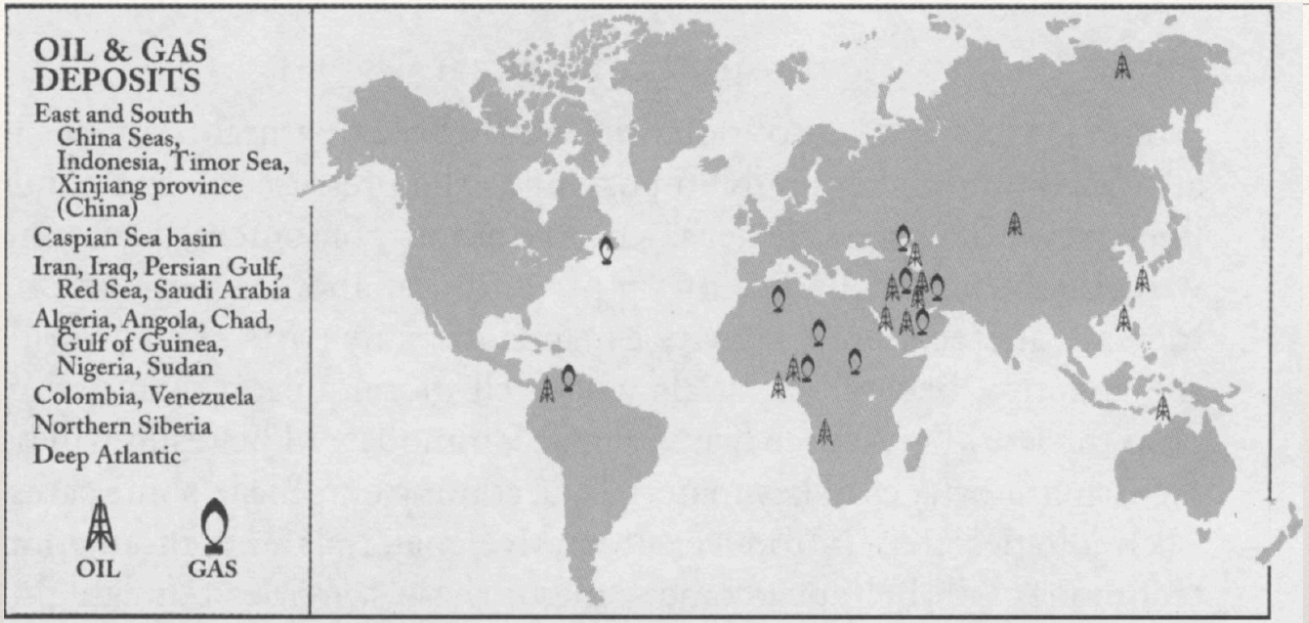
Correlation between natural resources and conflicts.
He identified key conflict zones:

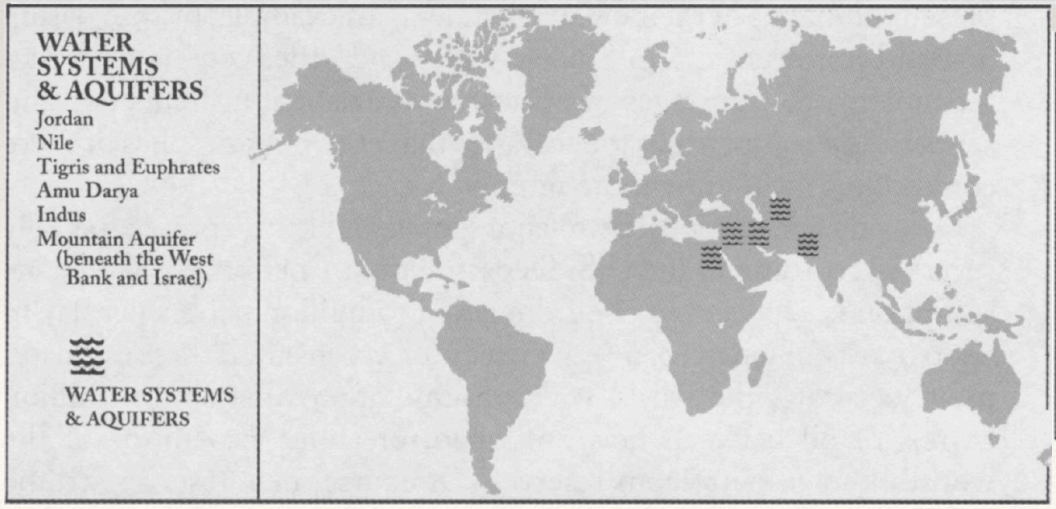
Persian Gulf
Caspian Sea basin
South China Sea
Algeria, Angola, Chad, Colombia, Indonesia, ***Nigeria***, ***Sudan*** and ***Venezuela***.

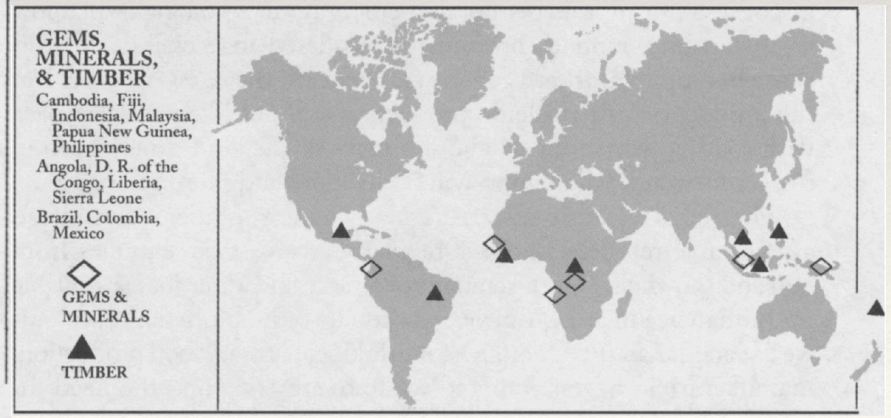
> ***Security officials have begun to pay much greater attention to problems arising from intensified competition over access to critical materials – especially those such as oil that often lie in contested or politically unstable areas.***

> ***Increased competition over access to major sources of oil and gas, growing friction over the allocation of shared water supplies, and internal warfare over valuable export commodities have produced a new geography of conflict.***
>
> ***Contested oil and gas fields, shared water systems, embattled diamond mines – provide a guide to likely conflict zones in 21st century.***

The New Geography of Conflict



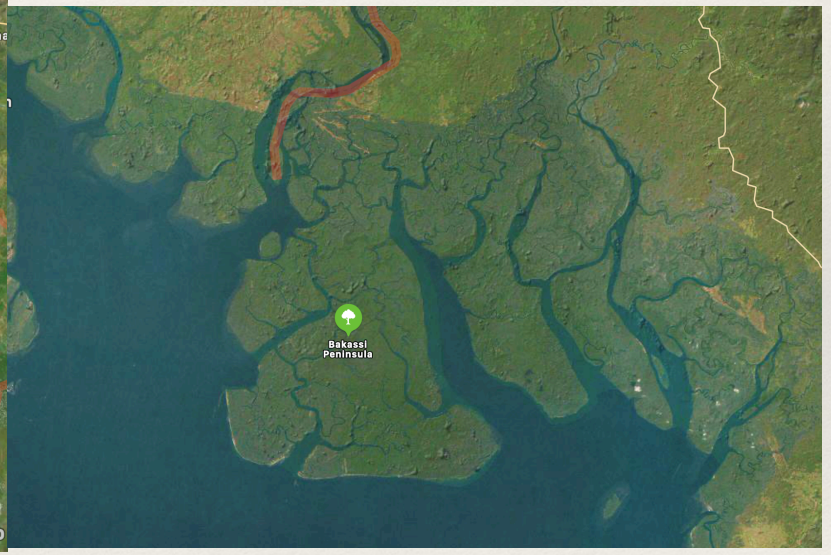




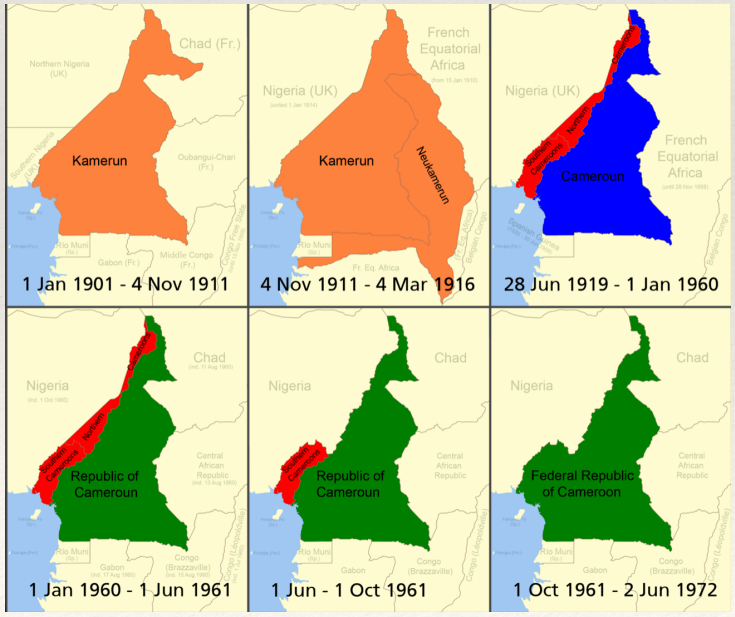
Boundary Disputes

Boundary disputes

Oil-rich Bakassi Peninsula (Cameroon v. Nigeria)



Boundary disputes



Oil-rich Bakassi Peninsula (Cameroon v. Nigeria)

Cameroon declared independence in 1960 (French).
Nigeria declared independence in 1960 (UK).

The status of ***British Cameroons*** was unclear.

A United Nations-sponsored plebiscite took place:
The northern part of the territory voting to remain part of Nigeria, while the southern part voted for reunification with Cameroon.

The northern part of British Cameroons was transferred to Nigeria, while the southern part joined Cameroon

Boundary disputes

Oil-rich Bakassi Peninsula (Cameroon v. Nigeria)

However, the land and maritime boundaries between Nigeria and Cameroon were not clearly demarcated. One of the disputed areas was - the Bakassi Peninsula, an area with large oil and gas reserves.

The two countries were close to going to war in 1981, when five Nigerian soldiers were killed during border clashes.

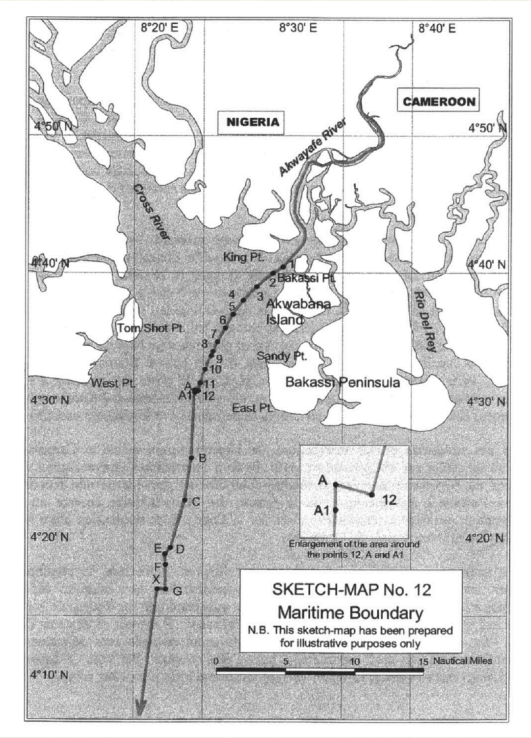
Incidents, including kidnapping, killing, clashes, torturing …

Cameroon referred the matter to the ICJ requesting that it determine the question of sovereignty over the oil-rich Bakassi Peninsula and a parcel of land in the area of Lake Chad. Cameroon also asked the Court to specify the land and maritime boundary between the two states, and to order an immediate and unconditional withdrawal of Nigerian troops from alleged Cameroonian territory in the disputed area.

On October 10, 2002, the Court ruled that sovereignty over the Bakassi Peninsula and the Lake Chad area lay with Cameroon

Boundary disputes

The Court confirmed that the goal of reestablishing the boundary between the newly created British and French mandates following World War I was achieved through a 1919 Franco-British declaration (Milner-Simon Declaration), which was invoked by Cameroon. The Court found that the 1919 declaration, despite having some technical imperfections, provided for a delimitation that was generally sufficient for demarcation.



Jurisdiction:

As a basis for the jurisdiction of the Court, Cameroon referred to the declarations made by the two States under Article 36, paragraph 2, of the Statute of the Court, by which they accepted that jurisdiction as compulsory.

Declarations recognizing the jurisdiction of the Court as compulsory

Cameroon

3 March 1994

[Translation from the French by the Registry]

On behalf of the Government of the Republic of Cameroon, I have the honour to declare that:

The Government of the Republic of Cameroon, in accordance with Article 36, paragraph 2, of the Statute of the Court, recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes.

This declaration shall remain in force for a period of five years. It shall subsequently continue to produce effect until contrary notification or written amendment by the Government of the Republic of Cameroon.

New York, 2 March 1994.

(Signed) Ferdinand Léopold OYONO,

Minister for Foreign Affairs.

ICJ's Jurisdiction

ICJ: JURISDICTION

Article 36 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any **time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court** in all legal disputes concerning:

a.the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

(…)

Boundary disputes

Dispute settlement:

1) **Sovereign equality (Art. 2 of the UN Charter: "***The Organization is based on the principle of the sovereign equality of all its Members.***"**
2) **A state cannot be subject to the jurisdiction of any court without its consent to the jurisdiction. States can accept the jurisdiction of a court before a dispute occurs or after it occurs.**

The UN Charter obliges states to settle their disputes peacefully.

Article 33 of the UN Charter:

- ***Negotiation*** (two parties trying to talk things through)
- ***Mediation*** (a third party is involved)
- ***Inquiry*** – a third party is entrusted with a fact-finding task
- ***Conciliation*** – a third party plays even more intensive role acting almost like a tribunal, earing evidence, reading memorials and presenting a recommendation based on the evidence. However, such recommendation is not binding.
- ***Arbitration***
- ***Judicial settlement (ICJ, ITLOS, WTO).***

Boundary disputes

ICJ / ITLOS

Arbitration (ad-hoc / arbitration centres)

PCA and State-State Arbitration

PCA: State – State Arbitration

The Permanent Court of Arbitration is an intergovernmental organization with 116 member states. Established in 1899 to facilitate arbitration and other forms of dispute resolution between states.

History:

INTER-STATE arbitration is largely influenced by two different traditions,

A) from the earliest times of nation-states, princes, and popes have resorted, upon request or at their own initiative, to ***different forms of arbitration to settle peacefully existing disputes between states (arbitration as an alternative to war)***

Example: in 1493, Pope Alexander IV decided the geographical dispute between Spain and Portugal over the division of their colonial empires; the Jay Treaty of 1796 between the USA and Britain, which provided for arbitration as a quasi-judicial means in response to the American Revolution. Its commissions produced more than 500 decisions over five years.

B) Commercial tradition: Transnational arbitration between merchants, before an impartial tribunal of the parties' choosing, under an established procedure, pre- dates the emergence of nation-states.

PCA: State – State Arbitration

Arbitration traditionally addressed only existing disputes. However, by the end of the nineteenth century it was becoming necessary to introduce an arbitration mechanism for future disputes between states, as existed for commercial arbitrations between merchants. Such an obligatory arbitration, agreed by states in advance of a dispute, was addressed at length by ***the Hague Peace Conferences of 1899 and 1907***.

It called for an international conference between states to ensure a true and stable peace and, above all, to put an end to the progressive development of modern armaments. ***It was thus to be primarily a peace conference at a time when several European states maintained standing forces measured in millions of soldiers and sailors, absorbing 25 per cent or more of state revenues***.

For such states, including Russia, these ruinous and ever-increasing costs threatened national security almost as much as armed conflict. The 1899 Conference was also to take place within living memory of Germany's victory in the Franco-Prussian War 1870–71, with France's lost territories in Alsace and Lorraine still unrecovered, the conflict between Chile and Peru in 1882, the Sino-Japanese War of 1894, the war between Greece and Turkey in 1897, the Spanish– American War of 1898 and, as regards incipient armed conflict, the 'Fashoda incident' between France and Britain also in 1898.

PCA: State – State Arbitration

MARTENS´s Proposal:

For the conference, Martens had submitted a draft outline for a convention on obligatory arbitration of certain categories of dispute 'so far as they do not concern the vital interests nor national honor of the contracting states'.

Reason: no Government would consent in advance to adhere to a decision of an arbitral tribunal which might arise within the international domain, if it concerned the national honour of a state, or its highest interests, or its inalienable possessions.

Thanks to obligatory arbitration, states could more easily maintain their legitimate claims, and what is more important still, could more easily escape from unjustified demands. ***Obligatory arbitration would be of invaluable service to the cause of universal peace.***

Obligatory arbitration, resulting in absolving the interested states from all responsibility for any solution of the difference existing between them, seems to be fitted to contribute to the maintenance of friendly relations, and in that way to facilitate the peaceful settlement of the most serious conflicts which may arise within the field of their most important interests.

(disputes touching upon a state's dignity and vitally important interests would be excluded)

PCA: State – State Arbitration

The eventual result was a consensus in the form of The Hague Convention on the Peaceful Settlement of International Disputes, which entered into force on 19 September 1900 (the 1899 Hague Convention). It created ***the Permanent Court of Arbitration*** (PCA), which was ***neither a court nor an arbitration tribunal, still less a permanent court or arbitration tribunal***. It was nonetheless a permanent mechanism comprising a secretariat, a registry, and a chamber of senior jurists appointed by the contracting states as potential arbitrators. ***The issue of obligatory arbitration was, however, rejected.***

The Conference led to the replacement of the 1899 Convention with the 1907 Convention for the Pacific Settlement of International Disputes (the 1907 Hague Convention). The issue of obligatory arbitration was again raised by the delegations from the USA and Portugal supported by Martens (Russia) and Léon Bourgeois (France). ***It was again strongly opposed by Germany. There was to be no permanent international court and no obligatory arbitration.***

The Conference nonetheless confirmed the role of inter-state arbitration under Art. 37 of the 1907 Convention, as first recorded in Art. 15 of the 1899 Convention: ***'International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law.'***

PCA: State – State Arbitration

Between 1899 and 1914, under the 1899 and 1907 Hague Conventions, there were eight references to arbitration before the PCA, together with two commissions of inquiry.

There was also a change in the practice of several states agreeing bilateral treaties providing for obligatory arbitration in conformity with the Russian proposal at the first Hague Conference. For example, Art. 1 of the ***1911 Franco-Danish treaty*** provided that future differences of a juridical character shall be submitted to arbitration provided that 'they do not affect the vital interests, independence or honour of either of the contracting parties nor the interests of third Powers';

There were, however, indirect results from the Hague Conferences: the creation of the ***Permanent Court of International Justice*** (1925) and, after the Second World War, the ***International Court of Justice*** (1946), with their jurisdictions capable of agreement prior to a dispute under Art. 36 and 36(2) respectively.

As to the eventual agreement of many states to different forms of obligatory arbitration, between 1899 and 1999, 33 disputes were referred to the PCA and, from 1999 to 2016, a further 180 disputes. These included many obligatory arbitrations. Even where there exists a permanent international court as an alternative forum, several states have preferred inter-state arbitration under Annex VII of UNCLOS administered by the PCA, to inter-state litigation before ITLOS in Hamburg. The PCA's membership has increased from 71 contracting states in 1970 to 122 contracting states in 2020.

PCA: State – State Arbitration

MODEL ARBITRATION CLAUSES

FOR USE IN CONNECTION WITH THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO STATES

Future Disputes

Parties to a bilateral treaty or other agreement who wish to have any dispute referred to arbitration under these Rules may insert in the treaty or agreement an arbitration clause in the following form:[1]

1. *If any dispute arises between the parties as to the interpretation, application or performance of this [treaty] [agreement], including its existence, validity or termination, either party may submit the dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, as in effect on the date of this [treaty] [agreement].*

Parties may wish to consider adding:

2. *The number of arbitrators shall be . . .* [insert '*one*', '*three*', or '*five*'].[2]

3. *The language(s) to be used in the arbitral proceedings shall be . . .* [insert choice of one or more languages].[3]

4. *The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration.*

5. *The place of arbitration shall be . . .* [insert city and country].

Existing Disputes

If the parties have not already entered into an arbitration agreement, or if they mutually agree to change a previous agreement in order to provide for arbitration under these Rules, they may enter into an agreement in the following form:

> *The parties agree to submit the following dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, as in effect on the date of this agreement: . . .* [insert brief description of dispute].

Parties may wish to consider adding paragraphs 2-5 of the arbitration clause for future disputes as set forth above.

PERMANENT COURT OF ARBITRATION
ARBITRATION RULES 2012

Energy Related Arbitrations

Energy Related Arbitrations

Sudan, a former British colony.
North Sudan – Sudanese Arabs
South Sudan – ethnically African Christians and tribes with traditional religious beliefs in the south.

Since 1956, when the British left Sudan, ethnic differences led to many years of civil war.
In 1970s the south was given regional autonomy.

However, after the discovery of oil reserves there, civil war erupted again.
In 2005, the Comprehensive Peace Agreement was signed – nonetheless, the demarcation of Abyie – an oil-rich area was disputed.

Energy Related Arbitrations

The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration)

On July 11, 2008, the Government of Sudan and the Sudan People's Liberation Movement deposited an Arbitration Agreement with the ***PCA***. Dispute over the boundaries of the oil-rich Abyei area. (Oil makes up 98% of South Sudan's revenues)

The dispute focused on ***whether a commission of experts, the 'Abyei Boundaries Commission' (ABC Experts), exceeded their mandate in determining the region's borders***. The area was important for the 2011 referendum on independence of South Sudan under the 2005 Comprehensive Peace Agreement.

On 22 July 2009, the tribunal delivered its ***Final Award***. It found that the ABC Experts had not exceeded their mandate in adopting a "tribal" interpretation but had exceeded the mandate by failing to give sufficient reasons for their conclusions regarding the Northern shared boundary and the Eastern and Western boundaries***. Based on scholarly, documentary and cartographic evidence, the tribunal delimited the regions new borders. It reduced the size of the region and gave greater territorial control to the Government of Sudan to the areas containing oil fields***.

*Abyei is situated within the **Muglad Basin, a large rift basin which contains a number of hydrocarbon accumulations**. Oil exploration was undertaken in Sudan in the 1970s and 1980s. A period of significant investment in Sudan's oil industry occurred in the 1990s and Abyei became a target for this investment. By 2003 Abyei contributed more than one quarter of Sudan's total crude oil output. Production volumes have since declined and reports suggest that Abyei's reserves are nearing depletion. An important oil pipeline, the Greater Nile Oil Pipeline, travels through the Abyei area from the Heglig and Unity oil fields to Port Sudan on the Red Sea via Khartoum. The pipeline is vital to Sudan's oil exports which have boomed since the pipeline commenced operation in 1999.*

Energy Related Disputes

Raw Materials related disputes (WTO panels and Appellate body)

DS394: China — Measures Related to the Exportation of Various Raw Materials
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm

DS431: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm

Both cases concern certain measures imposed by China affecting the exportation of certain forms of raw materials.

Hydropower related disputes

Water related disputes ***HYDROPOWER***

214 world river systems are shared by at least 2 countries (many of these states have entered into agreements to govern the use of these shared water bodies)

Water conflict: last 50 years – over 50 hostile acts, but none resulted in war.

Example: India v. Pakistan (hydroelectric facility) – Indus Waters Treaty (1960)

Energy Related Arbitrations: Hydropower

The Indus Waters Treaty 1960 (concluded with the help of the World Bank)

The Indus Waters Treaty is an international agreement signed by India and Pakistan in 1960 that ***regulates the use by the two States of the waters of the Indus system of rivers***. Seen as one of the most successful international treaties, it has survived frequent tensions, including conflict, and has provided ***a framework for irrigation and hydropower development for more than half a century***.

All the waters of the ***Eastern Rivers*** shall be available for the unrestricted use of ***India***.
Pakistan shall receive for unrestricted use all waters of the ***Western Rivers*** which India is under obligation to let flow. India shall be under an obligation to let flow all the waters of the Western Rivers, and shall not permit any interference with these waters, except for the following uses (***Generation of hydro-electric power***, as set out in Annexure D (constrains).

The Treaty sets out a mechanism for cooperation and information exchange between the two countries regarding their use of the rivers, known as the ***Permanent Indus Commission***, which has a commissioner from each country. The Treaty also sets forth distinct procedures to handle issues which may arise: "***questions***" are handled by the Commission; "***differences***" are to be resolved by a ***Neutral Expert***; and "***disputes***" are to be referred to a seven-member arbitral tribunal called the "***Court of Arbitration***."

Energy Related Arbitrations: Hydropower

The Indus Waters Treaty 1960 (concluded with the help of the World Bank)

(1) <u>INDUS WATERS KISHENGANGA ARBITRATION (2013)</u>

Decided by the Court of Arbitration as specified in the Indus Waters Treaty, The Permanent Court of Arbitration (PCA) acted as Secretariat to the Court of Arbitration.

A dispute between Pakistan and India under the Indus Waters Treaty involving the Kishenganga Hydro-Electric Project (the "KHEP") located on the Kishenganga/Neelum River. Pakistan challenged, in particular, the permissibility of the planned diversion by the KHEP of the waters of the Kishenganga/Neelum into the Bonar Nallah and the effect that this diversion would have on Pakistan's Neelum-Jhelum Hydro-Electric Project (the "NJHEP"), also currently under construction on the Kishenganga/Neelum downstream of the KHEP.

On February 18, 2013, the Court had issued a Partial Award, in which it unanimously decided that the KHEP is a Run-of-River Plant within the meaning of the Indus Waters Treaty and that *India may accordingly divert water from the Kishenganga/Neelum River for power generation*. However, the Court also decided that India is under *an obligation to construct and operate the KHEP in such a way as to maintain a minimum flow of water in the Kishenganga/Neelum River, at a rate to be determined subsequently*.

In its Final Award dated December 20, 2013, which is binding upon the Parties and without appeal, the Court of Arbitration unanimously decided the question of the minimum flow that was left unresolved by the Partial Award. ***The Court decided that India shall release a minimum flow of 9 cbm per second into the Kishenganga/Neelum River below the KHEP at all times***.

Energy Related Arbitrations: Hydropower

The Indus Waters Treaty 1960 (concluded with the help of the World Bank)

(2) DISAGREEMENT ABOUT THE CONSTRUCTION OF THE KISHENGANGA AND RATLE HYDROELECTRIC POWER PLANTS (SINCE 2016)

India and Pakistan again disagree about the construction of the Kishenganga (330 megawatts) and Ratle (850 megawatts) hydroelectric power plants being built by India. The two countries disagree over whether the technical design features of the two hydroelectric plants contravene the Indus Waters Treaty.

The Indus Water Treaty provides for following dispute settlement mechanism (Article IX of the Indus Waters Treaty):

a) ***Court of Arbitration*** (at the request of either Party to the other, a Court of Arbitration shall consist of seven arbitrators) See ANNEXURE G-Court OF ARBITRATION of the Indus Waters Treaty
b) ***Neutral Expert***, See ANNEXURE F-NEUTRAL EXPERT (Article IX (2))

Pakistan asked the World Bank to facilitate the setting up of a Court of Arbitration to look into its concerns about the designs of the two hydroelectric power projects. India asked for the appointment of a Neutral Expert for the same purpose.

On December 12, 2016, World Bank Group President Jim Yong Kim announced that the World Bank would pause before taking further steps in each of the two processes requested by the parties. Both India and Pakistan stated that processing the requests regarding the Neutral Expert and Court of Arbitration simultaneously presented a substantial threat to the Treaty, since it risked contradictory outcomes and worked against the spirit of goodwill and friendship that underpins the Treaty. The announcement by the Bank to pause the processes was taken to protect the Treaty in the interests of both countries.

Since late 2016, the World Bank has sought an amicable resolution to the most recent disagreement and to protect the Treaty.


Thank you for your attention.
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