

# REGIONAL INTERNATIONAL ARBITRATION CONFERENCE

## DAWN OF INTERNATIONAL ARBITRATION IN THE SOUTH PACIFIC

12 & 13 February 2018

Westin Denarau Island, Nadi, Fiji



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## CLIMATE CHANGE: A RISING SEA OF DISPUTES?

Judith Levine, PCA

13 February 2018



United Nations  
UNCITRAL

# Peace through arbitration?



“It’s clear that climate change poses a threat to lives, livelihoods and **peace** and security.”

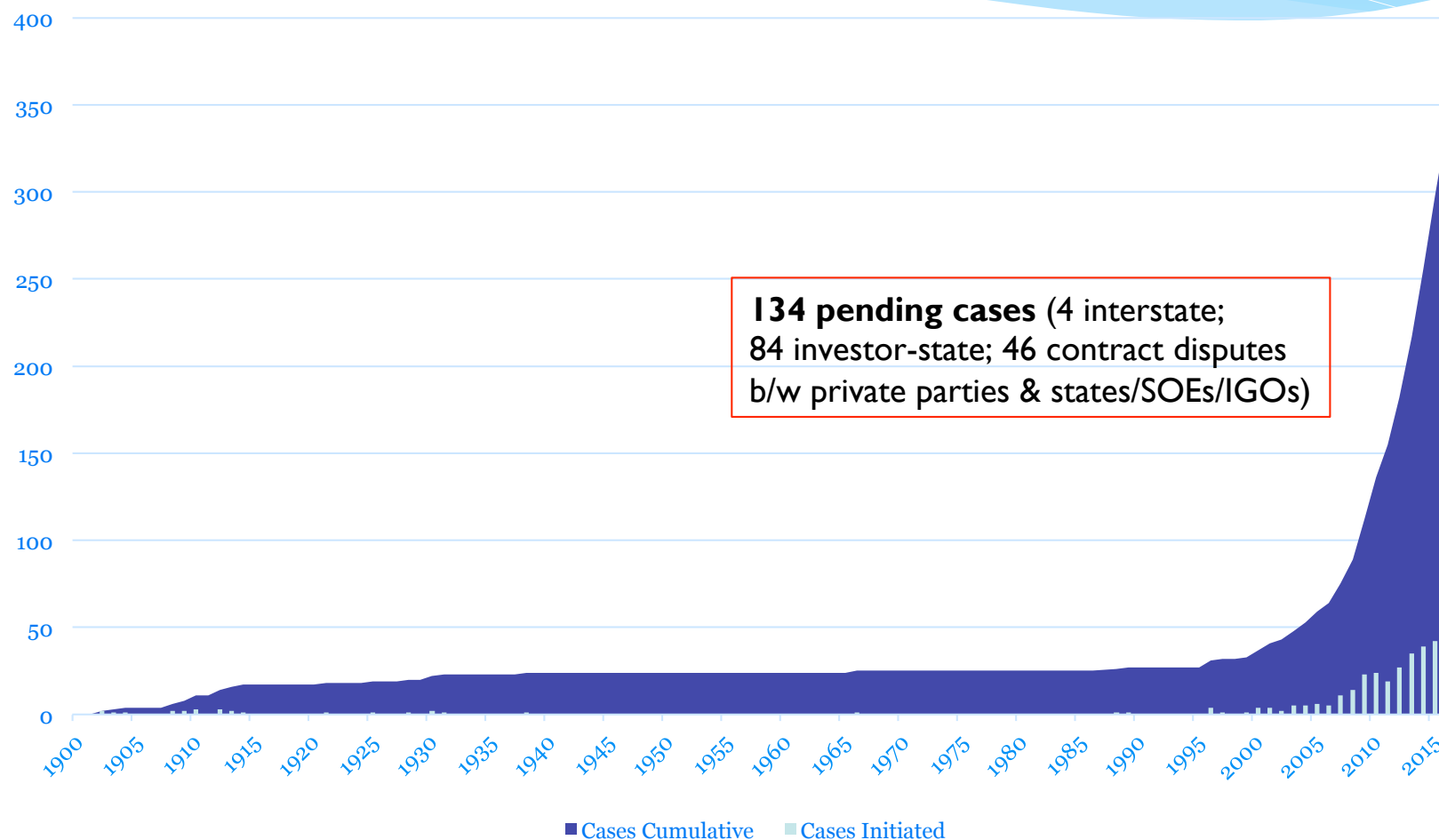


## 1899 Hague Convention

- recognized arbitration as ‘effective’ & ‘equitable’ means of settling disputes
- defined key features of arbitration and established Permanent Court of Arbitration



# PCA case activity



# PCA case examples with climate element



- **Interstate Arbitration under 1960 Bilateral Treaty**  
*Indus Waters Kishenganga (Pakistan v. India)*



- **Investor-State Arbitration under ECT/BITs**  
*Natland et al. v. Czech Republic [among 10+ solar cases]*
- **Contract dispute b/w company & State agency**  
[methane leaks in gas pipeline; ERUs under Kyoto Protocol]

# International climate change regime

## 1992 - Rio



United Nations



Framework Convention on Climate Change

- Ratified by 194 States
- Framework convention (structure for future agreements)
- Aim: stabilise global greenhouse gas emissions at levels that avoid dangerous climate change, enable sustainable development

## 1997 - Kyoto

### Kyoto Protocol (2008-2020)

- Focus on reducing greenhouse gas emissions of **developed** country parties to UNFCCC
- Emission reductions to be achieved within “commitment periods” which expire in 2020
- Established mechanisms for projects to **mitigate** climate change [and related emissions trading schemes]

## 2015 - Paris



### Paris Agreement (2020-)

- Aims to hold increase in global temperature to “well below 2°C above preindustrial levels”
- Commitments by **all** states (via “nationally determined contributions”)
- Envisages projects not just for **mitigation**, but also **adaptation**, etc
- Recognises **finance flows** needed to achieve aims





# Climate Change and Disputes?

- **National litigation**
- **Human rights commissions**
- **Fraud investigations**

→ **Role for arbitration?**



# Interstate arbitration?

## UNFCCC, Article 14 [mirrored in Paris Art. 24]:

1. In the event of a dispute... Parties shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.
2. When ratifying... a Party... may declare.. that it recognizes as compulsory... [ICJ] and/or **arbitration** in accordance with procedures to be adopted ... in an annex on arbitration.

### 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."

also Tuvalu, Netherlands

→ Rise in arbitration **more likely** at level of disputes between States & **private parties**; or amongst private parties

New **green economy** will create a web of cross-border contractual relationships for projects for **mitigation** (and **adaptation** → all require **finance...**

# Climate Finance

**Paris Agreement:** **Art. 2** includes as a key aim: *“making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development”*.

**Art. 9** urges developed countries to take the lead in “[mobilising] climate finance from a wide variety of sources, instruments and channels.”

## How much?

\$6.3 trillion needed annually until 2030 to meet global climate goals [OECD 2017]  
So far, governments have committed US\$100 billion per year  
→ **Private sector** is essential to bridging the climate finance gap.



**GCF:** A financial mechanism under the UNFCCC, helps fund climate finance investment in low-emission, climate-resilient development



# Climate Finance Disputes?

## 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.

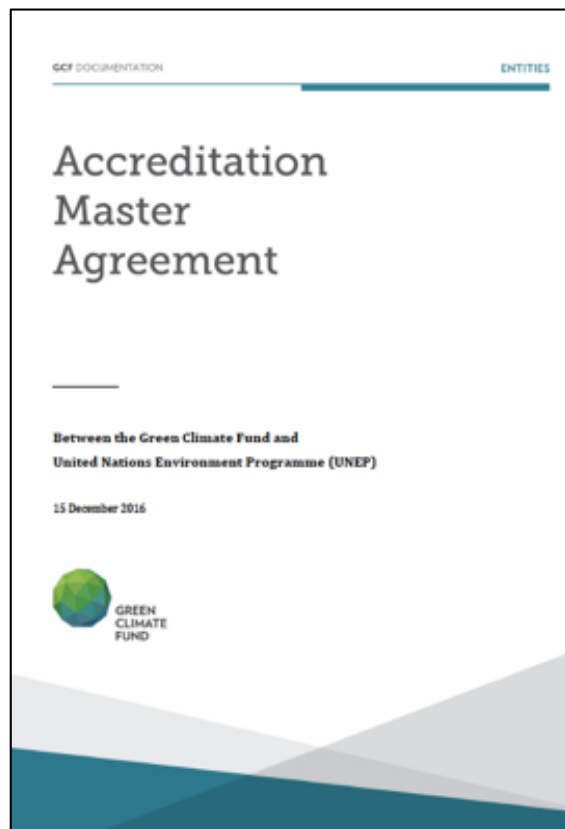
*[extract from Norway's contribution agreement]*

**GCF and Interim Trustee Agreement [Art. 10.2]**

# Climate Finance Disputes?

## Accreditation Agreements

(59 accredited organizations, extract from UNEP-GCF)



**29.03** Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, that is not been resolved through negotiation pursuant to Clause 29.02 above, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012, and:

- (a) the appointing authority shall be the Secretary-General of the PCA;
- (b) the number of arbitrators shall be three;
- (c) the place of arbitration shall be The Hague, the Netherlands;
- (d) the language to be used in the arbitral proceedings shall be English;
- (e) the arbitration decision shall be final and binding on the Parties and there shall be no appeal; and
- (f) the arbitration panel shall not award punitive damages.

# Climate Finance Disputes?

## Fiji Development Bank Accredited As Direct Access Entity To Green Climate Fund

November 2, 2017 | 🇫🇯 Fiji



FDB was nominated by the Government of Fiji to become a DAE as part of the Government's strategy to climate-proof infrastructure developments and boost the resilience of the economy / FDB Photo

In a significant achievement for the South Pacific nation of Fiji, the Fiji Development Bank (FDB) was among five new partner organizations which received accreditation as Direct Access Entities to the Green Climate Fund (CCF) in October, bringing the total number of GCF Accredited Entities globally to 59.

# Climate Finance Disputes?



GREEN  
CLIMATE  
FUND

Meeting of the Board  
27 February – 1 March 2018  
Seogwipo, Jeju, Republic of Korea  
Provisional agenda item 18

GCF/B.19/14  
4 February 2018

Status of accreditation matters

## Accreditation matters

Description of accreditation conditions	Status	Remarks
Develop a procurement policy for GCF-funded projects/programmes which is disclosed on the applicant's website, and mainstream the policy in the applicant's lending manuals to ensure that the procurement processes for all of the projects financed by the GCF are fair and transparent, promote efficient procurement and provide for a dispute resolution process and public disclosure of contract award	In progress	The entity has been requested to provide information on the efforts it is taking to address the condition. The AP is waiting for a response from the entity on the expected time frame for providing the information

# Climate Finance Disputes?

## Agreements for Projects

### GCF 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] Arbitration Rules 2012”

- **International financing involves multiple transactions (loans, equity... ) that can lead to disputes.**
- **Funded projects present a web of possible disputes between variety of players:** commercial, technical, legal and political disputes between financial entity and borrower or sponsor; or lenders and investors; borrower vs. contractor (or supplier or customer]; borrower vs. government or SOE; or borrower vs. sponsor or other creditors ...



# Adapting arbitration to climate change disputes

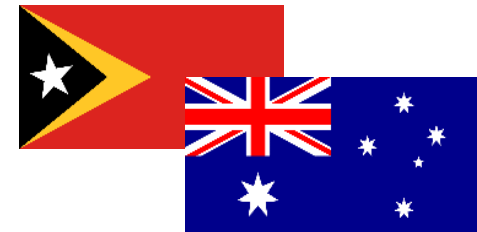
## 1. Greater Accessibility

transparency, voices of non-parties



## 2. Greater Flexibility

conciliation, treaty review mechanisms



## 3. Greater Technical Expertise



# Greater Expertise

- **Technical Experts**
  - Parties can pick arbitrators with relevant financial or scientific expertise
  - Institutions can develop specialist panels and rules (e.g. PCA Env't Rules)
  - Tribunal may appoint independent scientific experts (e.g. *South China Sea*)
  - Parties can provide for engineer as tribunal member (e.g. *Kishenganga*)



# Site Visits

- Kishenganga hydroelectric Project
- Investor-state case with alleged pollution

