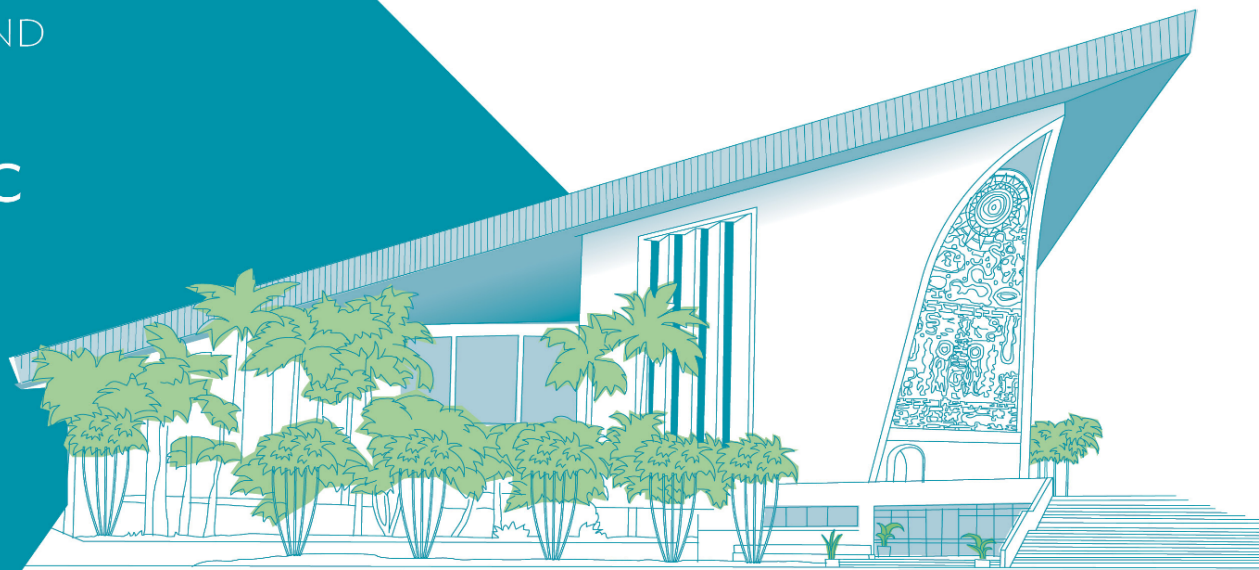


INTERNATIONAL MEDIATION AND  
ARBITRATION CONFERENCE

# 2nd South Pacific International Arbitration Conference

25–26 March 2019  
Stanley Hotel, Port Moresby  
Papua New Guinea



## EMERGING PUBLIC CLIMATE FINANCE DISPUTES: A ROADMAP FOR SHIFTING SANDS?

**Fedelma C. Smith**  
**Permanent Court of Arbitration**  
26 March 2019

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# PCA cases with **public climate finance** element: inter-State disputes

## **Iron Rhine (Belgium/Netherlands)**

Consent to arbitration by special agreement:  
*Arbitration Agreement concluded on 22 and 23 July 2003*



## **Rhine Chlorides (Netherlands v. France)**

*1976 Convention on the Protection of the Rhine against Pollution  
by Chlorides and 1991 Protocol*



## **OSPAR (Ireland v. United Kingdom)**

*1992 “OSPAR” Convention for the Protection of the Marine  
Environment of the North-East Atlantic*



# PCA cases with **public climate finance** element: “mixed” disputes

## **Investor-State disputes**

### **Natland et al v. Czech Republic**

(among more than 10 solar energy cases)

*Arbitrations under bilateral investment treaties and the Energy  
Charter Treaty*



### **Mesa Power v. Canada**

### **Windstream Energy v. Canada**

*Arbitrations under the  
North American Free Trade Agreement (NAFTA)*



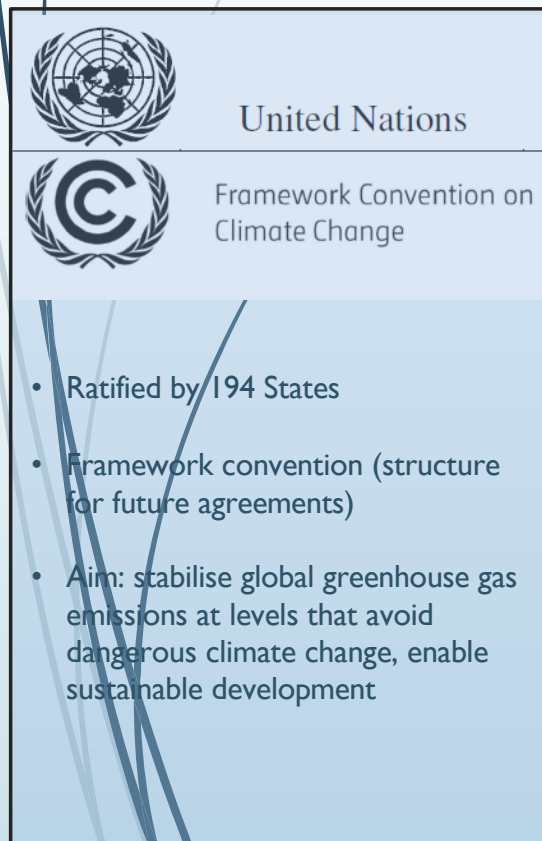
## **“Mixed” contractual disputes**

- e.g. **a company v. a State energy agency**  
*concerning purchase of Certified Emissions Reductions  
in respect of a wind energy farm*
- e.g. **a company v. a national environmental agency**  
*concerning award of Emissions Reduction Units  
in respect of a project to seal gas pipeline leaks*

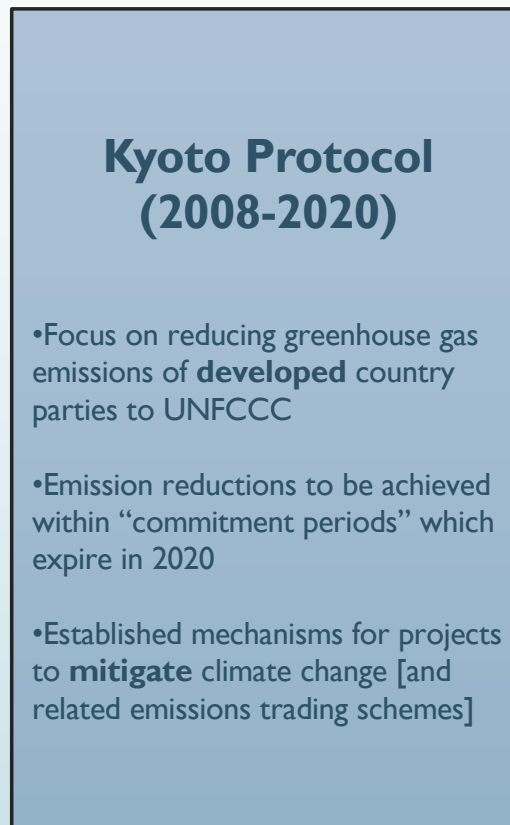


# International climate change regime

1992 - Rio



1997 - Kyoto



2015 - Paris





# Inter-State 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

### 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..."



# Paris Agreement and 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.

# Public 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]**

# Public Climate Finance Disputes

**Accreditation Agreement**  
(59 Accredited entities - extract from the Accreditation Agreement between Fiji Development Bank and 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 UNCITRAL Arbitration Rules, 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 Seoul, Republic of Korea;
- (d) the language to be used in the arbitral proceedings shall be English; and
- (e) the arbitration decision shall be final and binding on the Parties and there shall be no appeal.



# Public Climate Finance Disputes



Meeting of the Board  
27 February – 1 March 2018  
Songdo, Incheon, 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 ...

# Future public climate finance disputes?

Interpreting financial obligations under  
emerging environmental standards

*Iron Rhine*



Adapting financial regimes in a  
changing environment

*Rhine Chlorides*



Access to  
economic information  
on future projects  
*OSPAR*



Recalibrating regulatory  
regimes  
*Mesa, Windstream*



Navigating  
the green energy economy

