



**Statement of the Permanent Court of Arbitration  
to the Sixth Committee of the United Nations' General Assembly at its Seventy-Third  
Session: Report of the International Law Commission**

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## INTRODUCTION

1. The topics before the Sixth Committee this year include several legal issues in which the Permanent Court of Arbitration, or PCA, is closely involved.
2. As the delegates may be aware, the PCA is an intergovernmental organisation established in 1899 in order to facilitate arbitration and other modes of peaceful dispute resolution between States, State entities, intergovernmental organisations and private parties.
3. In 2018, the PCA's International Bureau has provided registry support to 174 arbitration and conciliation proceedings involving, directly or indirectly, more than 50 different States. These proceedings range from maritime and boundary disputes under the United Nations Convention on the Law of the Sea and disputes under other bilateral and multilateral treaties, to investor-State disputes under investment treaties, to contract cases involving State entities or intergovernmental organizations.
4. While some PCA proceedings are confidential, others are public and result in arbitral awards published on the PCA's website, which may be of interest to the ILC and the Sixth Committee. If this is the case, the PCA would be pleased to assist with a review of international arbitral practice on the topics considered for study or under study by the Commission.
5. Tribunals under the auspices of the PCA have, for example, dealt with questions relating to sea-level rise, general principles of law and the protection of the atmosphere.
6. **SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW**
7. The ILC has recommended the topic of "sea-level rise in relation to international law" for inclusion on its long-term programme of work. At the PCA, tribunals established under Annex VII of the Law of the Sea Convention have touched upon this topic.
8. For example, in the *Bay of Bengal Maritime Boundary Arbitration*<sup>1</sup> between Bangladesh and India, the tribunal addressed the relevance of sea-level rise to the delimitation of

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<sup>1</sup> *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, PCA Case No. 2010-16 (Tribunal: Rüdiger Wolfrum as President, Jean-Pierre Cot, Thomas Mensah, Pemmaraju Sreenicasa Rao, Ivan Shearer), Award, 7 July 2014, available at: <https://pca-cpa.org/en/cases/18/>.

maritime boundaries. In that case, Bangladesh had asserted that “recent predictions anticipate[d] major changes to the coastline by [the year] 2100.”<sup>2</sup>

9. While noting that the relevant coast of Bangladesh is unstable, the tribunal found that only the “physical reality at the time of the delimitation” needed to be considered.<sup>3</sup> If base points for the construction of an equidistance line could be identified at that time, the potential effects of climate change were irrelevant.<sup>4</sup> In other words, while maritime features used in the process of delimitation might be affected by sea-level rise, the boundary itself, identified by geodetic coordinates, would remain fixed. This conclusion reflected the importance that maritime boundaries, just as land boundaries, be, in the words of the tribunal, “stable and definitive to ensure a peaceful relationship between the States concerned in the long-term.”<sup>5</sup> Such stability was deemed “all the more essential when the exploration and exploitation of the resources of the continental shelf are at stake.”<sup>6</sup>
10. Notably, while the tribunal in the *Bay of Bengal* case considered that maritime boundaries between States are fixed, it made no findings regarding the possible ambulatory nature of baselines and outer limits of maritime zones, which would involve separate considerations.
11. Another case conducted under PCA auspices, the *South China Sea Arbitration* between the Philippines and China, raises questions regarding the legal effects of sea-level rise on the classification of maritime features and the corresponding maritime entitlements of coastal States. The Law of the Sea Convention provides that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>7</sup> The tribunal in the *South China Sea Arbitration* considered that human habitation should be assessed by reference to the “natural capacity” of the maritime feature and not to any obstacles to habitation generated by humankind, such as “[w]ar, pollution, and environmental harm.”<sup>8</sup>
12. These observations give rise to the question of whether the gradual submersion of maritime features as a result of climate change ought to be viewed as a natural or man-made change, with consequences for the status of the feature and its ability to give rise to maritime entitlements. Should the Commission take up the topic of sea-level rise, it may wish to consider this question.

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<sup>2</sup> Ibid, para. 215.

<sup>3</sup> Ibid, paras. 215, 399.

<sup>4</sup> Ibid, paras. 212-215, 248.

<sup>5</sup> Ibid, para. 216.

<sup>6</sup> Ibid, para. 218.

<sup>7</sup> United Nations Convention on the Law of the Sea (signed 10 December 1994, entered into force 16 November 1994), 1833 U.N.T.S. 397, Article 121(3).

<sup>8</sup> *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-09 (Tribunal: Thomas Mensah as President, Jean-Pierre Cot, Stanislaw Pawlak, Alfred Soons, Rüdiger Wolfrum), Award, available at: <https://pca-cpa.org/en/cases/7/>, para. 589.

## GENERAL PRINCIPLES OF LAW

13. The PCA also notes that the Commission has included the topic of “general principles of law” in its programme of work. In examining this topic, the Commission may wish to review certain PCA awards rendered in both inter-State and investor-State arbitrations.
14. The Commission has already identified<sup>9</sup> the 1912 *Russian Loans* arbitration<sup>10</sup> and 1902 *Pious Fund of the Californias* arbitration<sup>11</sup> as relevant to the topic. The *Pious Fund* arbitral award, which applied the principle of *res judicata*, is notable because it was used as an example during the drafting of the provision of the Statute of the Permanent Court of International Justice concerning sources of international law.<sup>12</sup>
15. Apart from these two examples, several early PCA tribunals identified and applied general principles of law such as good faith<sup>13</sup> and equity.<sup>14</sup>
16. Much more recently, in the *Chagos Marine Protected Area Arbitration*,<sup>15</sup> the tribunal noted that estoppel comes into play in the “grey area of representations and commitments whose original legal intent may be ambiguous or obscure, but which, in light of the reliance placed upon them, warrant recognition in international law.”<sup>16</sup>
17. In the investor-State context, the tribunal in the *Yukos* arbitrations recently considered the existence of a “clean hands” principle and found that there is no “general principle of law recognized by civilized nations” within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because [the investor] has so-called ‘unclean hands.’”<sup>17</sup>

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<sup>9</sup> Report of the International Law Commission (sixty-ninth session), A/72/10, pp. 252-253.

<sup>10</sup> *Russian Claim for Interest on Indemnities (Russia / Turkey)*, PCA Case No. 1910-02 (Tribunal: C.E. Lardy, Michael von Taube, André Mandelstam, Herante Abro Bey, Ahmed Réchid Bey), Award, 11 November 1912, available at: <https://pca-cpa.org/en/cases/89/>.

<sup>11</sup> *The Pious Fund Case (United States of America v. Mexico)*, PCA Case No. 1902-01 (Tribunal: Edward Fry, F. de Martens, T.M.C. Asser, A. F. de Savornin Lohman, Henning Matzen), Award, 14 October 1902 available at: <https://pca-cpa.org/en/cases/75/>.

<sup>12</sup> Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, Permanent Court of International Justice, 16 June – 24 July 1920, available at: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_proceedings\\_of\\_committee\\_annexes\\_16june\\_24july\\_1920.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf), p. 316.

<sup>13</sup> *Preferential Treatment of Claims of Blockading Powers against Venezuela (Germany, Great Britain and Italy v. Venezuela)*, PCA Case No. 1903-01, Award, 22 February 1904 (Tribunal: N.V. Mourawieff, H. Lammasch, F. de Martens), available at: <https://pca-cpa.org/en/cases/76/>, p. 4; *The North Atlantic Coast Fisheries Case (Great Britain / United States of America)*, PCA Case No. 1909-01 (Tribunal: H. Lammasch; A. F. de Savornin Lohman; G. Gray; Luis M. Drago; Charles Fitzpatrick), Award, 7 September 1910, available at: <https://pca-cpa.org/en/cases/74/>, p. 15; *Boundaries in the Island of Timor (The Netherlands v. Portugal)*, PCA Case No. 1913-01, Award, 25 June 1914, (Tribunal: C.E. Lardy), available at: <https://pca-cpa.org/en/cases/87/>, p. 7.

<sup>14</sup> *The Orinoco Steamship Company Case (United States, Venezuela)*, (Tribunal: H. Lammasch; A. M. F. Beernaert; G. de Quesada), PCA Case No. 1909-02, Award, 25 October 1910, available at: <https://pca-cpa.org/en/cases/78/>, p. 238; *Norwegian Ship-owners' claims (Norway v. USA)* PCA Case No. 1921-01 (Tribunal: Chandler Anderson, Benjamin Vogt, James Valloton), Award, 13 October 1922, available at: <https://pca-cpa.org/en/cases/88/>.

<sup>15</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03 (Tribunal: Ivan Shearer, Sir Christopher Greenwood, Albert Hoffman, James Kateka, Rüdiger Wolfrum), Award, 18 March 2015, available at: <https://pca-cpa.org/en/cases/111/>.

<sup>16</sup> *Ibid.*, para. 446.

<sup>17</sup> *Ibid.*, para. 1358.

18. Other principles applied in PCA cases include, among others, unjust enrichment,<sup>18</sup> the precautionary principle,<sup>19</sup> abuse of rights,<sup>20</sup> and *pacta sunt servanda*,<sup>21</sup> as well as principles specifically relevant to dispute settlement, such as those concerning the evaluation of evidence,<sup>22</sup> and those governing the award of interest<sup>23</sup> or costs.<sup>24</sup>
19. These are only some examples of the practice in respect of the use and function of general principles of law by PCA tribunals. The PCA would be pleased to elaborate on this practice in a more systematic and comprehensive manner, should this be of assistance to the Commission.

#### PROTECTION OF THE ATMOSPHERE

20. Turning to the topic of “Protection of the Atmosphere,” I note that the Special Rapporteur has proposed a draft guideline on dispute settlement—Draft Guideline 12—in his Fifth Report.<sup>25</sup>
21. The PCA welcomes the addition of this guideline, which highlights, first, the importance of the peaceful resolution of disputes relating to the protection of the atmosphere, and, second, their distinctive fact-intensive and science-dependent character. In view of this distinctive character, the Draft Guideline recommends that due consideration be given to the use of technical and scientific experts.
22. This recommendation conforms to the PCA’s experience. First, we have observed that arbitration and conciliation have an increasingly important role to play in the resolution of disputes relating to the environment, as seen for example in Article 14 of the UN Framework Convention on Climate Change, which is mirrored in Article 24 of the Paris Agreement and provides that, upon ratification, States may make declarations

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<sup>18</sup> *Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-03 (Tribunal: Arthur Watts as Chairman, L. Yves Fortier, Peter Behrens), Partial Award, 17 March 2006, available at: <https://pca-cpa.org/en/cases/101/>, para. 450.

<sup>19</sup> *Ireland v. United Kingdom (OSPAR Arbitration)*, PCA Case No. 2001-03 (Tribunal: Michael Reisman as President, Gavan Griffith, Lord Michael Mustill), Final Award, 2 July 2003, available at: <https://pca-cpa.org/en/cases/34/>, fn. 46.

<sup>20</sup> *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12 (Tribunal: Karl-Heinz Böckstiegel as President, Gabrielle Kaufmann-Kohler, Donald McRae), Award on Jurisdiction and Admissibility, 17 December 2015, available at: <https://pca-cpa.org/en/cases/5/>, paras. 538-554.

<sup>21</sup> *Venezuela US, S.R.L. (Barbados) v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-14 (Peter Tomka as President, L. Yves Fortier, Marcelo Kohen), Interim Award, 26 July 2016, available at: <https://pca-cpa.org/en/cases/136/>, para. 102.

<sup>22</sup> *Island of Palmas (or Miangas) (The Netherlands / The United States of America)*, PCA Case No. 1925-01, (Sole Arbitrator: Max Huber), Award, 4 April 1928, available at: <https://pca-cpa.org/en/cases/94/>, p. 10.

<sup>23</sup> *Murphy Exploration & Production Company - International v. The Republic of Ecuador*, PCA Case No. 2012-16 (Tribunal: Bernard Hanotiau as President, Georges Abi-Saab, Kaj Hobér), Final Award, 10 February 2017, available at: <https://pca-cpa.org/en/cases/39/>, para. 518.

<sup>24</sup> *Indian Potash Ltd (India) v Agricultural Inputs Co. (Nepal)*, PCA Case No. 2015-17 (Tribunal: Kamal Hossain as President, S.N. Jha, Raghav Lal Vaidya), Award, 2 December 2016, available at: <https://pca-cpa.org/en/cases/116/>, para. 278; *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13 (Tribunal: James Crawford as President, Ola Mestad, August Reinisch), Award, 27 June 2016, available at: <https://pca-cpa.org/en/cases/118/>, para. 330.

<sup>25</sup> Fifth report on the protection of the atmosphere, United Nations General Assembly, International Law Commission Seventieth session (8 February 2018, Prepared by Shinya Murase, Special Rapporteur, A/CN.4/711), available at: <http://legal.un.org/docs/?symbol=A/CN.4/711>.

recognizing as compulsory various dispute settlement mechanisms, including arbitration.<sup>26</sup> Over the last two decades, many proceedings under PCA auspices have touched upon environmental issues.

23. Second, the PCA's experience suggests that scientific and technical experts are often needed in environmental disputes and can be integrated into proceedings in different ways.
24. Experts may be appointed by the parties to the dispute or by the arbitrators or conciliators. For example, in the *South China Sea Arbitration* between the Philippines and China, which among other questions concerned allegations of harm to the marine environment, the tribunal appointed an expert hydrographer, three experts on coral reef systems and an expert on navigational safety issues.<sup>27</sup>
25. Technical and scientific experts may also be selected to sit themselves as arbitrators or conciliators. One example is found in the *Indus Waters Kishenganga Arbitration* between Pakistan and India, which concerned the construction of a hydroelectric project on the Kishenganga/Neelum River and its downstream environmental impact. The *Indus Waters Treaty* of 1960, under which the arbitral tribunal was constituted, provided that at least one member of the seven-member tribunal should be a "[h]ighly qualified engineer[]." In the event, such a technical expert was appointed by the Rector of Imperial College, London.<sup>28</sup>
26. The importance of technical and scientific expertise is also recognized in the PCA's specialized rules for the arbitration and conciliation of environmental disputes, adopted in the early 2000s. Pursuant to these rules, the PCA maintains a specialized list of arbitrators considered to have expertise in this area, as well as a list of scientific and technical experts who may be appointed as expert witnesses.<sup>29</sup> The PCA has

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<sup>26</sup> The Paris Agreement (12 December 2015), available at: [https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch\\_XXVII-7-d.pdf](https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf); United Nations Framework Convention on Climate Change (9 May 1992) available at: [https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch\\_XXVII\\_07p.pdf](https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf). In 2014, the IBA Taskforce on Climate Change Justice and Human Rights recommended the PCA as a preferred forum for arbitrating environmental disputes under the UNFCCC. International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption: Climate Change Justice and Human Rights Task Force Report* (July 2014) available at: <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>, Section 3.1.2(iii).

<sup>27</sup> *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, PCA Case No. 2013-19 (Tribunal: Thomas Mensah as President, Jean-Pierre Cot, Stanislaw Pawlak, Alfred H. Soons, Rüdiger Wolfrum), Award, 12 July 2016, available at: <https://pcacases.com/web/sendAttach/2086>, paras. 54-59, 84-86, 90.

<sup>28</sup> *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01 (Tribunal: Stephen M. Schwebel as Chairman, Sir Franklin Berman, Howard S. Wheeler, Lucius Cafilisch, Jan Paulsson, Bruno Simma, Peter Tomka), Partial Award, 18 September 2013, available at: <https://pcacases.com/web/sendAttach/1681>, para. 14; *The Indus Waters Treaty 1960 between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development* (signed 19 September 1960), 419 U.N.T.S. 126, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20419/v419.pdf>, Annexure G Paragraph 4(b)(ii) and 7.

<sup>29</sup> Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* (effective 19 June 2001), available at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and-or-Natural-Resources.pdf>, arts. 8(3), 27(5); Permanent Court of Arbitration, *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* (effective 16 April 2002), available at: <https://pca-cpa.org/wp->

administered several disputes under these rules, including disputes relating to the Kyoto Protocol's Clean Development Mechanism and emissions trading schemes.

27. In addition to the importance of experts, the PCA's experience with environmental disputes suggests that their distinctive character may also call for consideration of other features of dispute settlement.
28. Thus, the approach to be taken to evidence may require particular consideration in the context of environmental disputes. An illustration of the possible evidentiary difficulties is provided by the *Allard v. Barbados* investor-State arbitration, where the investor alleged that certain actions and inactions of the State had caused environmental harm to his wildlife sanctuary. In that case, the tribunal found that neither the alleged harm nor its causal link to the conduct of the State had been established, noting in particular the dearth of information regarding the initial ecological state of the sanctuary.<sup>30</sup>
29. In the *Indus Waters Kishenganga Arbitration*, mentioned a moment ago, the tribunal recognized that "a degree of uncertainty is inherent in any attempt to predict environmental responses to changing conditions" and accordingly stipulated that its determination of the minimum flow to be maintained in the Kishenganga/Neelum River would be subject to reconsideration within seven years.<sup>31</sup>
30. In this connection, consideration may be given to the use of site visits for evidence-gathering purposes. In the *Indus Waters Kishenganga Arbitration*, the tribunal travelled twice to the relevant region to observe the flow of the river during the wet and dry seasons. A site visit also took place in the *Bay of Bengal Maritime Boundary Arbitration* between Bangladesh and India, with the tribunal seeking to observe coastal and maritime features potentially affected by climate change. In that case, the PCA was tasked with creating a video and photo record of the site visit, which the parties could then submit into the record as evidence.<sup>32</sup> Site visits have also taken place in investor-State arbitrations such as *Chevron and Texaco v. Ecuador*, where the tribunal visited the locations of alleged environmental damage and remediation work.<sup>33</sup>
31. Finally, in environmental cases non-State actors and non-parties may have a stake in the outcome of the dispute, which raises questions of transparency and third-party participation. In the *South China Sea Arbitration*, the tribunal issued regular press

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[content/uploads/sites/175/2016/01/Optional-Rules-for-Conciliation-of-Disputes-Relating-to-the-Environment-and-or-Natural-Resources.pdf](https://pcacases.com/web/uploads/sites/175/2016/01/Optional-Rules-for-Conciliation-of-Disputes-Relating-to-the-Environment-and-or-Natural-Resources.pdf).

<sup>30</sup> *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06 (Tribunal: Gavan Griffith as President, Andrew Newcombe, Michael Reisman), Award, 27 June 2016, available at: <https://pcacases.com/web/sendAttach/1955>, paras. 80-139, 140-166.

<sup>31</sup> *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01 (Tribunal: Stephen M. Schwebel as Chairman, Sir Franklin Berman, Howard S. Wheeler, Lucius Cafilisch, Jan Paulsson, Bruno Simma, Peter Tomka), Final Award, 20 December 2013, available at: <https://pcacases.com/web/sendAttach/48>, paras. 117-119, dispositif para. B.

<sup>32</sup> *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)*, PCA Case No. 2010-16 (Tribunal: Rüdiger Wolfrum as President, Thomas Mensah, Dr. Pemmaraju Sreenivasa Rao, Ivan Shearer, Jean-Pierre Cot), Award, 7 July 2014, available at: <https://pcacases.com/web/sendAttach/383>, paras. 18-26.

<sup>33</sup> 1. *Chevron Corporation and 2. Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (Tribunal: V.V. Veeder as President, Horacio Grigera Naón, Vaughan Lowe), Second Partial Award on Track II, 30 August 2018, available at: <https://pcacases.com/web/sendAttach/2453>, paras. 1.19-1.68.

releases during the proceedings and at the end of the case provided for the publication of documents such as pleadings and transcripts. The tribunal also admitted as observers to the hearing eight “interested States parties to the United Nations Convention on the Law of the Sea.”<sup>34</sup> Further, in the *Arctic Sunrise Arbitration* between the Netherlands and the Russian Federation, which concerned the arrest of a Greenpeace vessel following a “Save the Arctic” protest action, Greenpeace sought to make an *amicus curiae* submission to the tribunal.<sup>35</sup> In that case, the application was rejected, possibly because Greenpeace was not a third entity, but one directly involved in the case.

32. The recent case law of the PCA thus lends support to Draft Guideline 12, while also pointing to additional considerations arising from the distinctive nature of disputes related to the environment generally and protection of the atmosphere in particular. Should the Commission wish to develop upon these considerations in its final work product, the PCA would be pleased to provide further information. All the cases mentioned today, as well as the PCA’s specialized arbitration and conciliation rules, are available on the PCA website.

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33. Thank you for your attention. The PCA looks forward to supporting the work of the Committee and the ILC and remains available if any of the delegates have questions or require more information.

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<sup>34</sup> *The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China)*, PCA Case No. 2013-19 (Tribunal: Thomas Mensah as President, Jean-Pierre Cot, Stanislaw Pawlak, Alfred H. Soons, Rüdiger Wolfrum), Rules of Procedure, 27 August 2013, available at: <https://pcacases.com/web/sendAttach/233>, art. 16; *The South China Sea Arbitration*, Award, 12 July 2016, available at: <https://pcacases.com/web/sendAttach/2086>, paras. 50, 67-68.

<sup>35</sup> *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02 (Tribunal: Thomas Mensah as President, Henry Burmester, Alfred H. Soons, Janusz Symonides, Alberto Székely), Award on Jurisdiction, 26 November 2014, para. 35, available at: <https://pcacases.com/web/sendAttach/1325>.