

International Arbitration in the Energy Sector 2024



International Arbitration

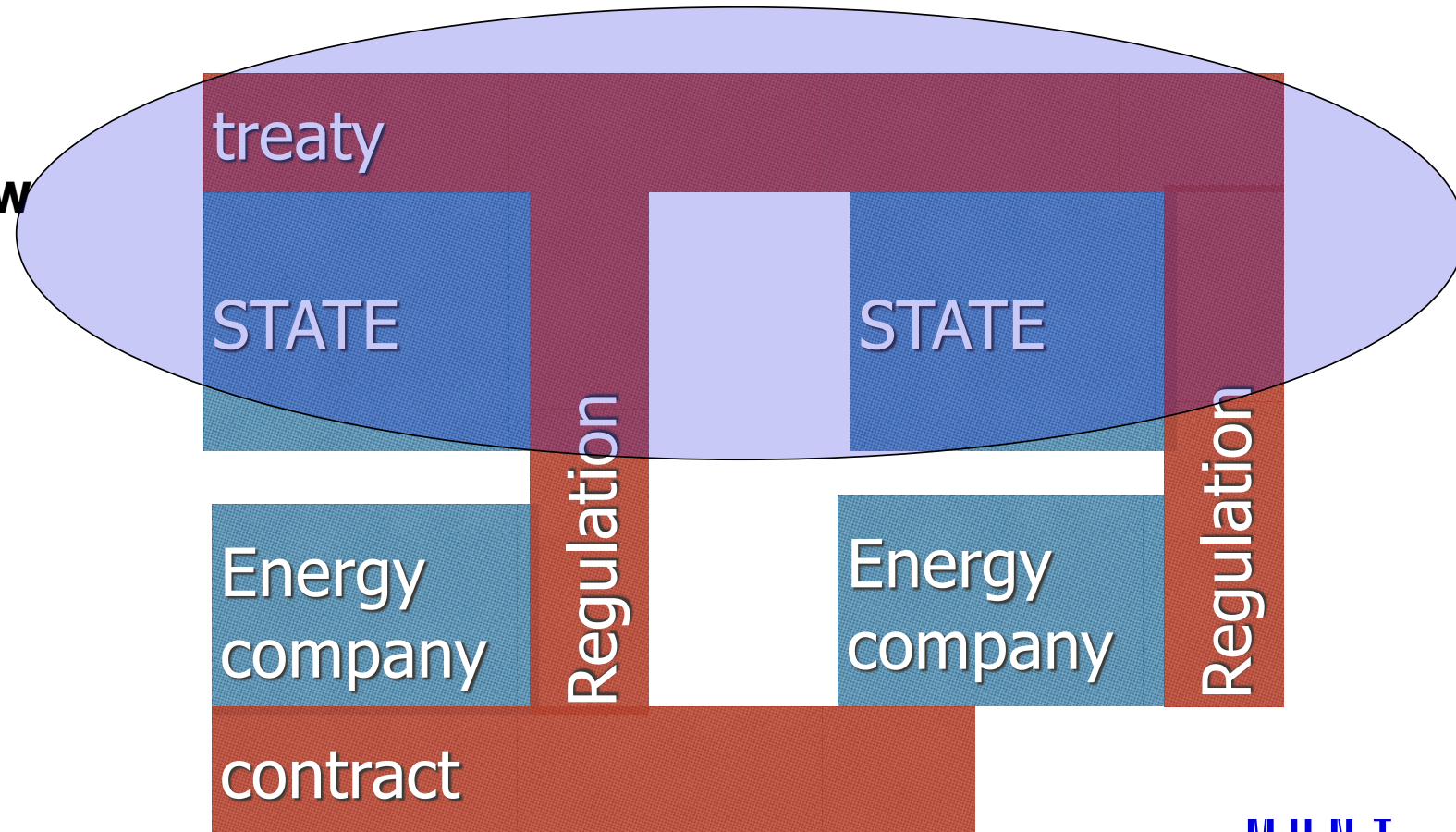
- A) State – State Arbitration**
- B) Commercial Arbitration**
- C) Investor – State Arbitration**

A: State - State Arbitration

State – State Arbitration

INTERNATIONAL LAW
dimension

NATIONAL LAW
dimension



Permanent Sovereignty over Natural Wealth and Resources (PSNR)

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

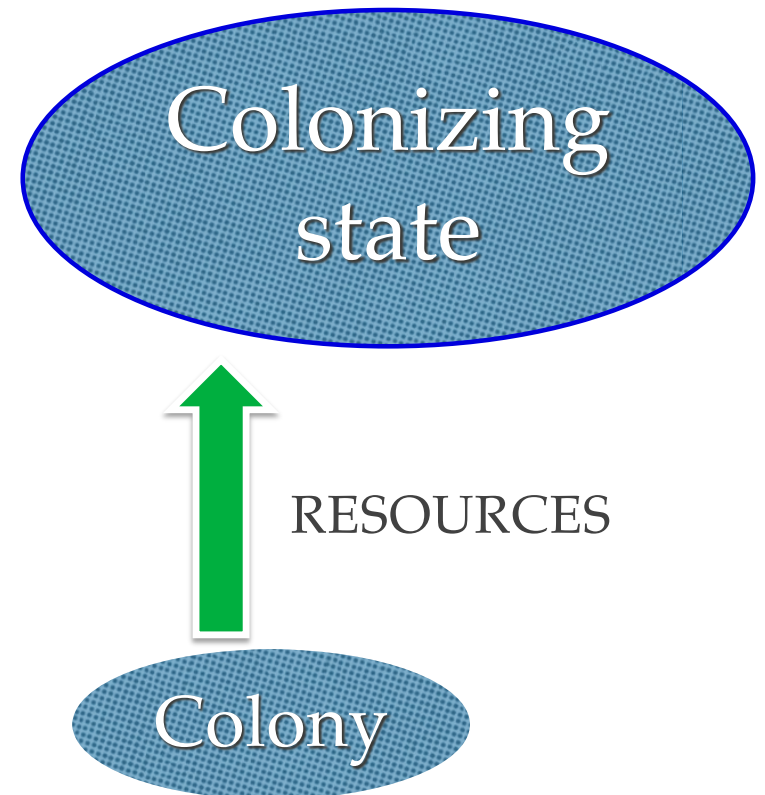
Determination of borders

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 led to **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



- 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.**

International Boundary Disputes and Natural Resources

The UN Charter obliges states to settle their disputes peacefully.

Article 33 of the UN Charter:

Non - legally binding

- **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, hearing evidence, reading memorials and presenting a recommendation based on the evidence. However, such recommendation is not binding.

**Legally
binding**

**Judicial settlement
Arbitration (ad-
hoc/arbitration
centres)**

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.



**Judicial
settlement**

Oil-rich Bakassi Peninsula (Cameroon v. Nigeria)

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 ...



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.



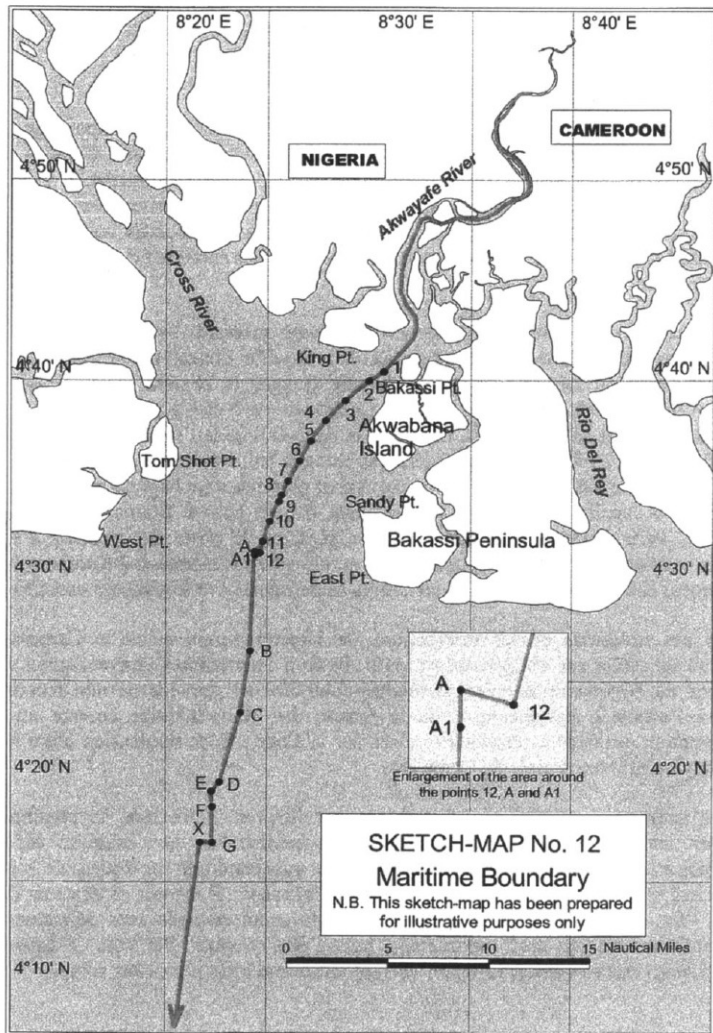
**Bakassi
Peninsula**

Oil-rich Bakassi Peninsula (Cameroon v. Nigeria)

Cameroon referred the matter to the ICJ requesting that it determine *the question of sovereignty over the oil-rich Bakassi Peninsula*. 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 in Bakassi, the Court decides that the boundary is delimited by the Anglo-German Agreement of 11 March 1913 (Arts. XVIII-XX) and that sovereignty over the Bakassi Peninsula lies with Cameroon.





Bakassi Peninsula



PCA and State-State Arbitration

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**.

The logo for the Permanent Court of Arbitration (PCA) is displayed in a bold, blue, sans-serif font. The letters 'P', 'C', and 'A' are stacked vertically. The logo is centered within a rectangular area defined by a light blue dotted grid pattern.

Hague Peace Conferences

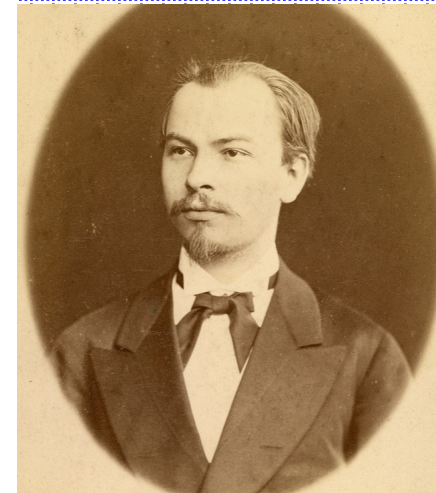
MARTENS' s Proposal:

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 of the contracting states.**

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, **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)



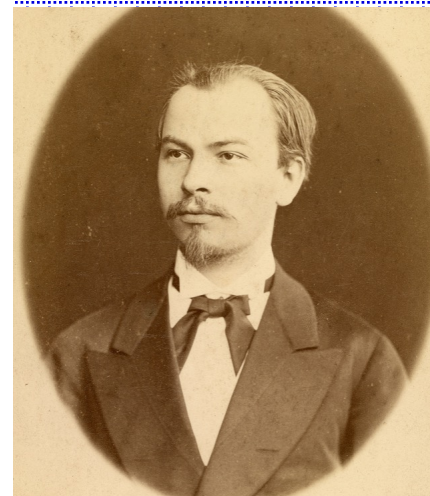
The Hague Convention on the Peaceful Settlement of International Disputes, which entered into force on 19 September 1900 (the 1899 Hague Convention).

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.'**

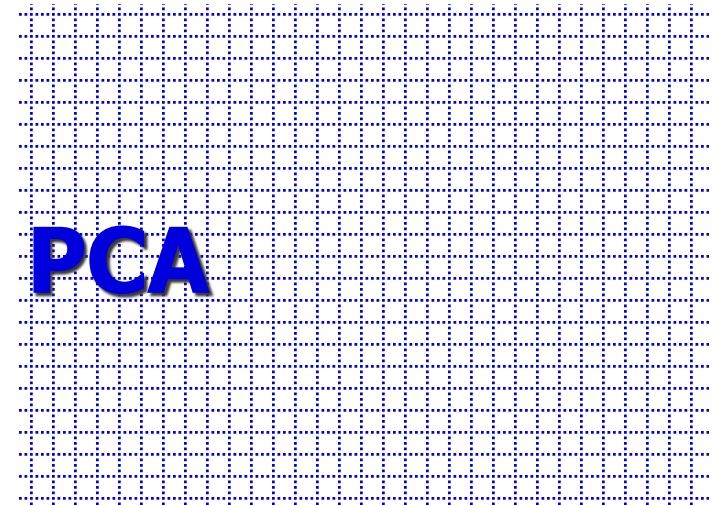
Hague Peace Conferences



Between 1899 and 1914, under the 1899 and 1907 Hague Conventions, there were **8 references to arbitration before the PCA.**

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.



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].*

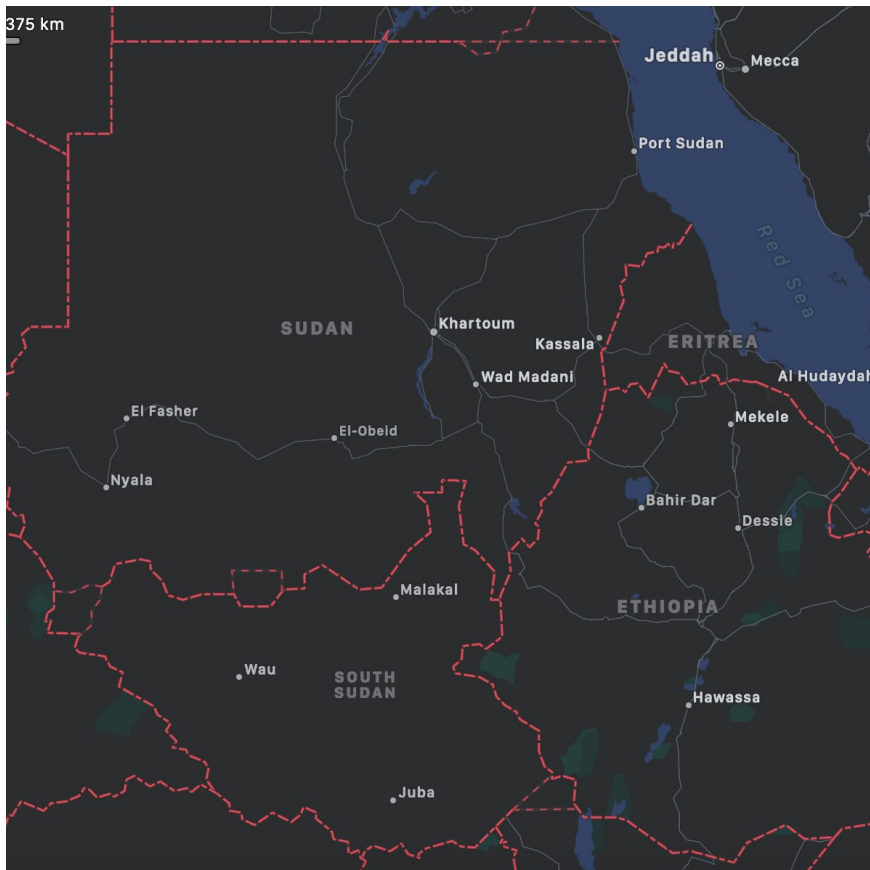
Existing Disputes

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.

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



Abyei Arbitration

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

A discovery of oil reserves led to civil war.

In 2005, the Comprehensive Peace Agreement was signed – nonetheless, the demarcation of Abyie – an oil-rich area was disputed.

Abyei Protocol – declared Abyei region's right to make the choice whether to join NS or SS, created a special administrative regime and included a wealth agreement about oil revenues.

Abyei Arbitration

Upon signing the peace agreement, Abyei will be accorded special administrative status, in which:

- 1.2.1 Residents of Abyei will be citizens of both Western Kordofan and Bahr el Ghazal, with representation in the legislatures of both states;
- 1.2.2 Abyei will be administered by a local Executive Council, elected by the residents of Abyei. Pending the election of the Executive Council, its initial members will be appointed by the Presidency;
- 1.2.3 Net oil revenues from Abyei will be divided six ways during the Interim Period: the National Government (50 percent); the Government of Southern Sudan (42 percent); Bahr el Ghazal region (2 percent); Western Kordofan (2 percent); locally with the Ngok

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**. **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.**

Announcements by both the SPLM and Government of Sudan that they would accept the ruling were hailed by the United States, European Union, and the United Nations.

PERMANENT COURT OF ARBITRATION
OPTIONAL RULES FOR ARBITRATING
DISPUTES BETWEEN TWO PARTIES
OF WHICH ONLY ONE IS A STATE

<https://www.youtube.com/watch?v=xUht3I2x088>