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Thank you.



# A View from the Bench

Training Workshop Program 2022 on  
Third Party Settlement of Boundary and  
Sovereignty Disputes

Professor Sean D. Murphy

# Most Common Courts & Tribunals for Boundary/Sovereignty Disputes

- Permanent Courts
  - International Court of Justice
  - International Tribunal for the Law of the Sea
- Ad Hoc Arbitration
  - Arbitration under Annex VII of the UN Convention on the Law of the Sea (LOSC)
  - Arbitration under some other bilateral or multilateral treaty (e.g., Pact of Bogota)
  - Arbitration based on a bilateral *compromis*
- Less common but possible
  - Conciliation Tribunal (e.g., under LOSC Annex V)

# International Court of Justice

**The Peace Palace**



**The Large Courtroom**



# Current ICJ Judges

- President -- Joan E. Donoghue (United States)
- Vice President -- Kirill Gevorgian (Russian Federation)

## Judges

- Abdulqawi Ahmed Yusuf (Somalia)
- Peter Tomka (Slovakia)
- Ronny Abraham (France)
- Mohamed Bennouna (Morocco)
- Julia Sebutinde (Uganda)
- Dalveer Bhandari (India)
- Patrick Lipton Robinson (Jamaica)
- Xue Hanqin (China)
- Nawaf Salam (Lebanon)
- Yuji Iwasawa (Japan)
- Georg Nolte (Germany)
- Hilary Charlesworth (Australia)
- Leonardo Nemer Caldeira Brant (Brazil)

# Examples of Boundary/Sovereignty Cases from Current ICJ Docket

*Question of the Delimitation of the Continental Shelf  
between Nicaragua and Colombia beyond 200 nautical  
miles from the Nicaraguan Coast (Nicaragua v.  
Colombia)*

*Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*

*Guatemala's Territorial, Insular and Maritime Claim  
(Guatemala/Belize)*

*Land and Maritime Delimitation and Sovereignty over  
Islands (Gabon/Equatorial Guinea)*

# Tribunal for Law of the Sea

Based in Hamburg

Established in 1996

21 judges (plus possible ad hoc judges)

Handles requests for interim protection & prompt release if selected tribunal not yet formed

29 cases to date



# Ad Hoc Arbitration

Usually a panel of 1, 3, 5 or 7 arbitrators

Unless the Parties agree otherwise, the panel decides on its own rules of procedure

Registry is often a standing body, such as the Permanent Court of Arbitration (PCA) in The Hague





# Ad Hoc Conciliation Commission Iceland/Norway on Continental Shelf Dispute Re Jan Mayen Island

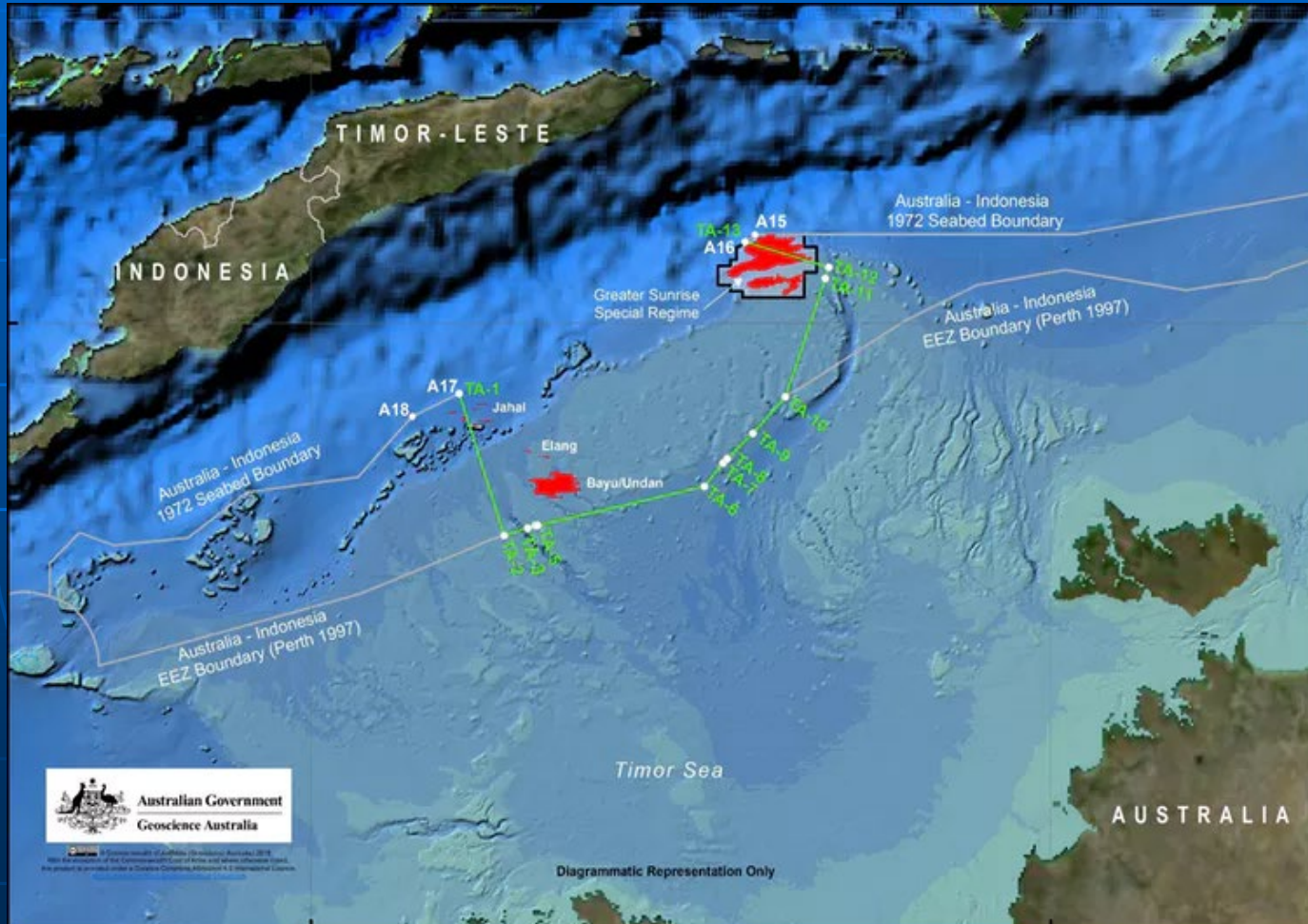
1980 Iceland & Norway  
create 3-person  
Conciliation  
Commission

1980-81 Commission  
investigates and  
proposes dividing line  
and creative sharing

1981 Iceland & Norway  
incorporate its  
proposal into a treaty



# 2016-2018 LOSC Conciliation Commission (Timor-Leste v. Australia) Results in Agreement on New Maritime Boundary



# Who Are the Judges/Arbitrators?

Former government officials/diplomats  
with legal training

Professors of international law

Other legal practitioners (former officials  
at international organizations)

-- do they come from backgrounds  
relevant to your dispute? Does that  
favor making particular arguments?

# Issues of Importance to Judges/Arbitrators in Boundary/Sovereignty Disputes I

## Opening Steps

- Show respect for the Court or Tribunal

- Show-up; participate

- Appoint ad hoc judges or arbitrators

- Accept even-handed treatment from the Court

- Demonstrate some flexibility; don't always fight

## Maintain Credibility Throughout

- Role of the agent/counsel

- Double-check everything before presented

- Correct any errors

- Avoid conflicting arguments/evidence – the “story” must be coherent

# Issues of Importance to Judges/Arbitrators in Boundary/Sovereignty Disputes II

Do Not Assume Knowledge by Judges/Arbitrators

Explain geography of the dispute (maps)

Explain history of the dispute

Pre-colonial, colonial, post-colonial periods

Persuasive Advocacy

Identify any relevant burden of proof/persuasion

Identify the standard for evidence

Argue the facts and the law

Make known the equities (human dimension)

Clear presentation of arguments

Written – thorough/well-organized/supported

Oral – distilled/most important points

Respond to the other Party's arguments

Consider the language used for the pleadings

# Issues of Importance to Judges/Arbitrators in Boundary/Sovereignty Disputes III

Present clear and convincing evidence

Avoid “nationalist mythology”

Avoid self-serving evidence

Emphasize pre-dispute evidence (“critical date”)

Use other Party’s evidence against it

Use third-party evidence when available

Third States

International organizations

Non-governmental organizations

-- But consider what evidence the third-party is using

Where evidence is lacking, rely on legal principles of estoppel, acquiescence, good faith, “clean hands”, etc.

# Issues of Importance to Judges/Arbitrators in Boundary/Sovereignty Disputes IV

Avoid confronting well-settled legal rules/principles

Intertemporal law rule

*Uti possidetis* principle

*Effectivités* principle

Rules on treaty interpretation (VCLT)

Avoid Drama if Possible

Challenge judges/arbitrators judiciously

Avoid last-minute evidence

Minimize objections to the other Party's conduct

Judges Will Ponder Your Preferred Final Outcome

Is your outcome likely to endure? Be accepted?

Will it avoid armed conflict? human hardship?