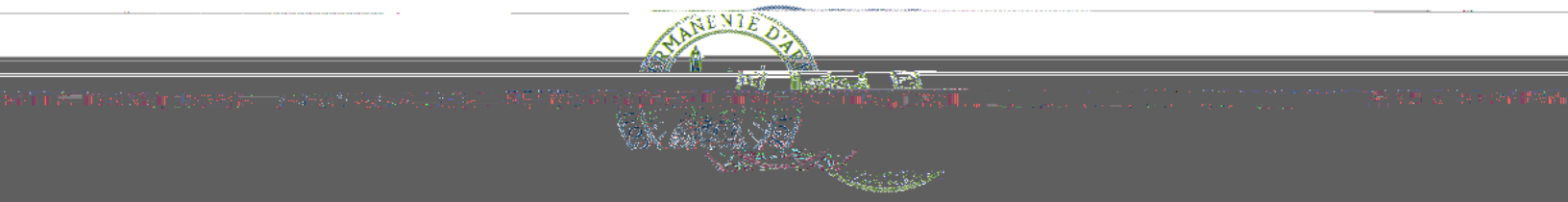

admissibility in one set of cases,[1] for example, a PCA tribunal summarized the legal opinions prepared by dozens of leading jurists, which had been submitted in the arbitration by both sides, the claimants and the respondent State.

6. Beyond the particular points at issue in those arbitrations, that expert discussion highlights the purpose of provisional application; the nature of a State's consent to provisionally apply a treaty; distinctions between a treaty's application, legal force and effectiveness; the rationale of some carve-outs from provisional application that are typically found in treaties; and the stances taken by various domestic legal systems.

7. The awards to which I have just referred are publicly available on the PCA's online Case Repository, in case this is of interest to delegates.[2]

Protection of the Atmosphere

8. Turning to the topic "Protection of the Atmosphere", I note that the Special Rapporteur explores in his FoTd [(w []TJ 0.009 Tw 04.44 0 Td [(th R2.6(e)10.6(spr)-6(c)4.3( ))-6.6(he)10.5( ))2.6(

considerations. The tribunal also affirmed that “lawmakers in Canada and the other NAFTA parties set environmental standards as demanding and broad as they wish.”[7]

11. I would commend two other PCA investment cases to the attention of the International Law Commission—*Chemtura v. Canada*[8]

referred to the *neminem laedere* principle of customary international law, affirming that "no State has the right to use its territory in a manner as to cause damage to the territory of another." Specifically, the court referred to Principle 21 of the 1972 Stockholm Declaration on the Human Environment, which states that "States must ensure that activities within their jurisdiction or control do not cause damage to the environment."[17]

15. The court of arbitration further held that States are required to take environmental protection into consideration when planning infrastructure projects, such as hydroelectric dams. The court sided with the ICJ's finding in the *Pulp Mills Case* that States are to undertake international environmental impact assessments when "there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context."[18] The court also reiterated that there is a need to "reconcile economic development with the protection of the environment,"[19] as established in the ICJ case of *Gabcikovo-Nagymaros.* The court of arbitration clarified that for its review of the consistency of a hydroelectric project with the Indus Waters Treaty "[h]ydrologic, geologic, social, economic, environmental and regulatory considerations are all directly relevant".[20]

16. The recent case law at the PCA would thus seem to lend further support to the principle of "mutual supportiveness", as enshrined in "Draft Guideline 10." Reference to international environmental law in proceedings under other international treaties is already a reality in many arbitral proceedings. In its final work product, the International Law Commission may wish to consider discussing some of the case law just mentioned, most of which does not yet appear to be reflected in the Special Rapporteur's Report.[21]

24. I note that the ILC has provisionally identified as a concern that international rules of

evidentiary record, or only to obtain a visual impression and a better understanding of the subject-matter of the dispute. Site visits have occurred in several PCA inter-State and investor-State arbitrations. In the *Indus Waters Kishenganga* case,[33] for example, the tribunal inspected hydro-electric projects on both sides of the line of control in Cashmere during the dry season and returned to the same places a second time during the wet season. The notes and photographs taken during the two visits were used in the internal deliberations of the Tribunal. In the *Bay of Bengal Maritime Boundary Arbitration,*[34] the Tribunal decided to conduct a site visit, stating that the site visit helped confirm the "location, visibility and protuberance of the base points located on the respective coastlines of Bangladesh and India identified by the Parties."

30. In *Guyana v. Suriname*,[35] finally, the tribunal dispatched its hydrographic expert on-site to examine the condition and coordinates of a historic boundary marker on the tribunal's behalf.

31. These are only some examples of the recent practice in respect of evidence-taking by PCA tribunals. We would be pleased to elaborate on this practice in a more systematic manner, should this be of assistance to the ILC. In particular, the PCA would be ready to give a presentation to the ILC at any future session in Geneva.

The Work of UNCITRAL with respect to ISDS Reform

32. Allow me to close by returning, briefly, to a topic that was on the agenda of the Committee under item No. 79—the work of UNCITRAL, a UN Commission with which the PCA has enjoyed a longstanding working relationship. As delegates will be aware, UNCITRAL will look into possible reform proposals to the present system of investor-State arbitration. The PCA's docket of cases between the early 20th century and today exemplifies various elements of historical continuity and change in the system of international dispute settlement, which may help put that discussion into perspective.

33. Some of the PCA's earliest proceedings extended to inter-State cases relating to the treatment of foreign investors. The *Japanese House Tax*[36] *case* of 1902, for example, involved facts that bear a striking resemblance to modern investment disputes. Early PCA cases also show the potential for arbitration to assist diplomatic relations where investment disputes might otherwise hinder them. The *Orinoco Steamship Corporation*[37] arbitration