ARBITRATION AND CONCILIATION
AT THE PERMANENT COURT OF ARBITRATION

MEETING OF THE STATES PARTIES TO UNCLOS
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HISTORY AND FUNCTION OF THE PCA
Historic Trends: Inter-State Arbitrations
(1801-1900)

Results of the Hague Peace Conference

The Conference adopts the 1899 Convention on the Pacific Settlement of Disputes

“With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times”

1899 Hague Convention, Article 16
Purpose of the PCA

- Permanent forum to assist the resolution of international disputes
- Originally focused on disputes between States
- Has come to include international disputes between States and private parties

The Peace Palace

- Andrew Carnegie created:
  
  "with the sum of one and one half million dollars … a foundation for the purpose of building, establishing and maintaining in perpetuity at the Hague a Court-House and Library (Temple of Peace) for the Permanent Court of Arbitration established by the Treaty of July 29th 1899."

- Completed in 1913
How the PCA Functions

- Independent intergovernmental organization
- Permanent administrative framework for dispute settlement proceedings
- Structure:
  - The Administrative Council (governing body)
  - The Members of the Court (list of arbitrators)
  - The International Bureau (provides registry support to arbitral tribunals and parties in PCA proceedings)
Current PCA Caseload
(as of May 2017)

- Investment Treaty Arbitrations (73)
- Arbitrations under Contracts involving States, State Entities, or International Organizations (40)
- Inter-State Arbitrations and Conciliations (6)

STATE-STATE ARBITRATION
Recent PCA Inter-State Cases

- Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea (1996)
- The Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands/France) (2000)
- Eritrea-Ethiopia Boundary Commission (2001)
- Eritrea-Ethiopia Claims Commission (2001)
- Ireland v. United Kingdom (OSPAR Arbitration) (2001)
- Iron Rhine Arbitration (Belgium/Netherlands, 2003)
- Barbados v. Trinidad and Tobago (2004)
- Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (2004)
- [Abyei Arbitration (The Government of Sudan / The Sudan People's Liberation Movement/Army) (2008)]
- [Confidential Case] (2009)
- Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India) (2010)
- Indus Waters Kishanganga (Pakistan v. India) (2011)
- Chagos Marine Protected Area Arbitration (Mauritius v. UK) (2011)
- The Republic of Ecuador v. The United States (2012)

Recent PCA Inter-State Cases

- Railway Land Arbitration (Malaysia/Singapore) (2012)
- The Arctic Sunrise Arbitration (Netherlands v. the Russian Federation) (2013) (pending)
- Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia) (2013)
- The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union) (2013)
- The Duzgit Integrity Arbitration (Malta v. São Tomé & Príncipe) (2013) (pending)
- The "Enrica Lexie" Incident (Italy v. India) (2015) (pending)
- Timor Sea Conciliation (Timor-Leste v. Australia) (2016) (pending)
PCA Inter-State Cases by Type

- Economic Disputes: 4
- Detention of Vessel: 3
- Jurisdiction and Immunity: 3
- Natural Resources: 2
- Environment and Water: 6
- Coastal State Rights: 3
- Armed Conflict: 1
- Maritime Boundaries: 8
- Land Boundaries: 2

PCA Inter-State Cases since 1996 by World Regions

- Europe, 20
- Africa, 9
- Americas, 7
- Asia, 12
- Oceania, 6

(Number of States from a particular region that appeared as parties in PCA State-State arbitrations)
13 Cases under UNCLOS Annex VII

- Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India) (2010) (award 2014)
- The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union) (2013) (settled 2014)
- The Arctic Sunrise Arbitration (Netherlands v. Russia) (2013) (pending)
- The Duzgit Integrity Arbitration (Malta v. São Tomé & Príncipe) (2013) (pending)
- The “Enrica Lexie” Incident (Italy v. India) (2015) (pending)
Timor Sea Conciliation (UNCLOS Annex V)
(Timor-Leste v. Australia)

Key Features of Conciliation

• May be initiated by agreement or through treaty provisions for (compulsory) conciliation (Annex V to UNCLOS)

• Objective may vary:
  – Assist the parties in reaching an agreement;
  – Provide the parties with a recommendation on an equitable solution;
  – In any event, no binding decision.

• Flexible procedure:
  – Commission can meet with parties ex parte;
  – May involve political and legal considerations (“interests” in addition to “rights”);
  – Profile of commissioners may involve diplomatic expertise, as well as legal.
ASPECTS OF ARBITRAL PROCEDURE

Basis for Jurisdiction in PCA Cases

- Dispute settlement provision in bilateral or multilateral treaty
- Agreement to arbitrate a particular dispute (*compromis*)
- Treaties providing for general jurisdiction

Example: UNCLOS provides for the compulsory settlement of disputes relating to the Convention
  - Includes arbitration pursuant to Annexes VII and VIII
  - Default option is arbitration under Annex VII
  - Jurisdiction may not extend to all elements of a dispute
Article 287 - Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex VII;
(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

[...]

Basis of UNCLOS Annex VII arbitration – three possibilities

– Both States have made declarations accepting arbitration
– One State has made a declaration accepting arbitration, and the other State has not
– Neither State has made any declaration, or there is no acceptance of same procedure

=> All three possibilities have materialized in PCA arbitration

Article 287 - Choice of procedure

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.
Unity of Jurisdiction under UNCLOS Art. 288

- UNCLOS Article 288 circumscribes jurisdiction identically for all three possible mechanisms (ITLOS, ICJ, arbitration)
- Arbitral Tribunals habitually refer to ICJ and ITLOS decisions as persuasive authority

Article 288 - Jurisdiction
1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith. [...]
Tribunal will consult the parties in respect of:

- Schedule of submissions and the timing of the hearing
- Bifurcation *vel non* of jurisdictional objections
- Venue of the hearing
- Languages used
- Procedure for evidence (incl. witness and expert evidence)
- (Degree of) confidentiality or publicity of the proceedings
- [...]
In *Guyana v. Suriname*, a hydrographic expert (appointed by the tribunal) conducted a site visit to Guyana, accompanied by the registrar and party representatives.

### Site Visits

- Site visits appear more common in arbitration proceedings
  - *Grisbådarna Arbitration*
  - *Indus Waters Kishenganga Arbitration* (twice)
  - *Bay of Bengal Arbitration*
- Easier to arrange the visit of a smaller tribunal
- Greater role for tribunal experts
- Procedure can be adapted to suit the needs of the case
Site Visits

In the Bay of Bengal Maritime Boundary Arbitration, the full tribunal conducted a site visit to the coasts of Bangladesh and India.
Third States and *Amici Curiae*

- **Observer status for, and intervention of, third States**
  - In *South-China Sea arbitration*, upon request and having consulted the parties, the tribunal permitted:
    - Viet Nam, Malaysia and Indonesia to receive copies of the pleadings;
    - Brunei Darussalam to receive copies of documents (transcripts and other relevant documents);
    - Australia, Indonesia, Japan, Malaysia, Singapore, Thailand and Viet Nam to attend the hearing as observers.
  (The tribunal recognized Viet Nam’s *note verbale* and written statement reserving the right to intervene, and included it in the record; the tribunal also stated that it would address the permissibility of intervention upon a formal written request; Viet Nam ultimately did not apply to intervene.)

- **Amicus curiae submissions**
  - Not excluded by usual rules of procedure, could include non-State entities
  - No example in UNCLOS context

### Costs

- Counsel and costs of representation appear to constitute substantial majority of total costs of dispute settlement
  - Commercial arbitration: costs of tribunal and institution less than 20%
  - Investment arbitration: costs of tribunal and institution around 10%
  - Similar proportion likely to apply in UNCLOS arbitration

- Costs of tribunal and registry borne by the parties in arbitration, usually in equal shares

- PCA Financial Assistance Fund may permit defraying costs of dispute settlement