



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

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INTRODUCTION

1. As you may be aware, the Permanent Court of Arbitration, or PCA, is an intergovernmental organization set up to facilitate arbitration and other modes of resolution of disputes between States, State entities, intergovernmental organizations and private parties. It was established in 1899 during the first Hague Peace Conference, which makes it the oldest intergovernmental institution dedicated to the resolution of international disputes.
2. In 2019, the PCA's International Bureau has provided registry support to 184 arbitration and conciliation proceedings involving, directly or indirectly, more than 50 different States. Proceedings administered by the PCA range from maritime and boundary disputes under the United Nations Convention on the Law of the Sea and disputes under other bilateral or multilateral treaties, to investor-State disputes under investment treaties, to contract cases involving State entities or intergovernmental organizations.
3. The topics before the Sixth Committee this year include several legal issues that have arisen in PCA-administered arbitrations. In particular, the PCA notes that the ILC has identified "general principles of law" as a specific issue on which comments would be of particular interest to the Commission. The Special Rapporteur has also identified the jurisprudence of international courts and tribunals and the practice of international organizations as relevant materials for the study of general principles of law.
4. PCA-administered tribunals have applied general principles of law in a wide range of contexts. While some PCA proceedings are confidential, others are public and result in arbitral awards and other materials published on the PCA's website. The PCA is thus pleased to assist with a review of the practice of PCA-administered tribunals on general principles of law and, more specifically, on the specific issues proposed for their study by the Special Rapporteur: the origins, identification and functions of general principles of law.

ORIGINS OF GENERAL PRINCIPLES

5. A first area where decisions in PCA-administered cases may be of illustrative value to the Commission is the origin of general principles as a source of international law.
6. The Special Rapporteur has already identified as relevant the awards of several early PCA tribunals that resorted to “principles of International Law and the maxims of justice”¹ in the absence of a more directly applicable rule of decision, including the 1902 *Pious Fund of the Californias* case,² the 1904 case concerning the *Preferential Treatment of Claims of Blockading Powers against Venezuela*,³ the 1910 *North Atlantic Coast Fisheries Case*⁴ and the 1912 *Russian Claim for Interest on Indemnities* case.⁵
7. These early cases provide valuable insight into the underpinnings of general principles. Amongst other things, these decisions derived the existence of general principles of law (such as the existence of an “international servitude”⁶, the principle of *res judicata*,⁷ or the obligation to pay compensatory interest⁸) from the domestic law of various States and from historical sources such as Roman law, thus suggesting that general principles are common to different legal traditions and have often stood the test of time to qualify as such.

¹ *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. 2.

² *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/>.

³ *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. 2.

⁴ *The North Atlantic Coast Fisheries Case (Great Britain / United States of America)*, PCA Case No. 1909-01 (Tribunal: H. Lammash; 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/>.

⁵ *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/>.

⁶ *The North Atlantic Coast Fisheries Case (Great Britain / United States of America)*, PCA Case No. 1909-01 (Tribunal: H. Lammash; 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. 9.

⁷ *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/>.

⁸ *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/>, p. 10.

8. This idea was echoed by the tribunal in the 1909 boundary delimitation *Grisbådarna Case* between Norway and Sweden. In its award, the tribunal identified certain “fundamental principles of the law of nations, both ancient and modern, according to which maritime territory is an essential appurtenance of land territory.”⁹
9. Aside from these examples, the tribunal in the 1905 *Muscat Dhows* case was explicit in identifying precise sources of general principles: the “principles of the law of nations,” it found, are an expression of “treaties existing at that time, [i]nternationally recognized legislation and [i]nternational practice.”¹⁰
10. A similar finding was made much more recently by the tribunal in the 2008 *Abyei Arbitration* between the Government of Sudan and the Sudan People’s Liberation Movement,¹¹ which has also been referenced by the Special Rapporteur. Faced with a “paucity of authority on what ‘excess of mandate’ concretely represents in law,” this tribunal decided to rely on “principles of review applicable in public international law and national legal systems, insofar as the latter’s practices are commonly shared,” which it deemed might be “relevant as general principles of law and practices.”¹²
11. The case law of the PCA thus lends support to Draft conclusion 3 in suggesting that general principles of law have a dual domestic and international origin.
12. I would also commend one PCA investment case to the attention of the International Law Commission—*Saluka v. the Czech Republic*.¹³ Faced with the issue of determining jurisdiction over a counterclaim brought by the respondent State, the tribunal referred to provisions in several international instruments, namely the UNCITRAL Arbitration Rules, the ICSID Convention and the Iran-US Claims Settlement Declaration, as reflections of “a general legal principle as to the nature of the close connection which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim.”¹⁴ It is noteworthy that, in identifying a principle of close connection of counterclaims, the *Saluka* tribunal referenced international sources alone. This decision may thus be relevant to the

⁹ *The Grisbådarna Case (Sweden / Norway)*, PCA Case No. 1908-01 (Tribunal: J.A. Loeff, F.V.N. Beichmann, K.Hj. L. Hammarskjöld), Award, 23 October 1909, available at: <https://pca-cpa.org/en/cases/77/>, p. 4.

¹⁰ *The Muscat Dhows Case (France / Great Britain)*, PCA Case No. 1904-01 (Mr. H. Lammasch, Mr. M. W. Fuller, Jonkheer A.F. de Savornin Lohman), Award, 8 August 1905, available at: <https://pca-cpa.org/en/cases/93/>, p. 2.

¹¹ *The Abyei Arbitration (Republic of Sudan / Sudan People’s Liberation Movement)*, PCA Case No. 2008-07 (Tribunal: Pierre-Marie Dupuy as President, Awn Al-Khasawneh, Gerhard Hafner, W. Michael Reisman, Stephen Schwebel), Award, 22 July 2009, available at: <https://pca-cpa.org/en/cases/92/>.

¹² *Ibid.*, para. 401.

¹³ *Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-03 (Tribunal: Arthur Watts as President, L. Yves Fortier, Peter Behrens), available at: <https://pca-cpa.org/en/cases/101/>.

¹⁴ *Ibid.*, Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004, para. 76.

Commission's ongoing discussion regarding the appropriateness of a self-standing category of general principles formed within the international legal order.

IDENTIFICATION OF GENERAL PRINCIPLES

13. The PCA also notes that the Special Rapporteur expects to dedicate his third report to the identification of general principles of law, including the question of the requirement of recognition set forth in Article 38, paragraph 1 (c) of the Statute of the International Court of Justice.
14. Amongst other examples, PCA-administered tribunals have found that the requirement of recognition is satisfied with regard to the principles of unjust enrichment,¹⁵ estoppel by representation,¹⁶ judicial estoppel,¹⁷ abuse of rights,¹⁸ and *uti possidetis iuris*.¹⁹
15. As an example of lack of recognition, PCA-administered tribunals in the investor-State context have rejected the existence of a "clean hands" principle on the basis that it fails to rise to the level of recognition and consensus traditionally required for general principles of law. In this connection, the Tribunal in the *Yukos* arbitrations noted that no "single majority decision" had been brought to its consideration "where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim."²⁰

¹⁵ Ibid, Partial Award, 17 March 2006, para. 449

¹⁶ *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/11/>, para. 435.

¹⁷ *1. Chevron Corporation and 2. Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (Tribunal: Mr. V.V. Veeder QC as President; Dr. Horacio Grigera Naón; Prof. Vaughan Lowe QC), Second Partial Award on Track II of 30 August 2018, available at <https://pca-cpa.org/en/cases/49/>, paras. 7.105-7.114.

¹⁸ *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/>, para. 539.

¹⁹ *Arbitration between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04 (Tribunal: Gilbert Guillaume as President, Rolf Einar Fife, Prof. Vaughan Lowe QC, Nicolas Michel, Bruno Simma), Final Award, 29 June 2017, available at: <https://pca-cpa.org/en/cases/3/>, para. 256.

²⁰ *See, inter alia, Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. 2005-03/AA226 (Tribunal: L. Yves Fortier PC CC OQ QC as President, Charles Poncet, Stephen Schwebel), Final Award, 18 July 2014, available at: <https://pca-cpa.org/en/cases/62/>, para. 1362.

16. This finding was echoed in *South American Silver v. Bolivia*,²¹ where the Tribunal noted that most of the investment jurisprudence that had been invoked to support the existence of the clean hands doctrine had rejected investor claims “based on the appropriate treaty provisions or the applicable national law without basing their decisions on the clean hands doctrine or advancing it as a general principle of international law.”²²
17. These observations give rise to the question of whether recognition of certain general principles of law must be specifically proved for such principles to be applied, and, if so, what sort of materials may serve as proper evidence of recognition. The Special Rapporteur may wish to consider this question in one of his forthcoming reports.

FUNCTIONS OF GENERAL PRINCIPLES

18. Finally, the Commission has expressed an interest in having the Special Rapporteur address the functions of general principles in one of his future reports.
19. In this regard, several tribunals in PCA-administered proceedings have applied general principles of international law in circumstances where treaties or customary international law did not provide a rule of decision.
20. A first example is the *Indus Waters Kishenganga Arbitration* between Pakistan and India.²³ Within the context of a request for interim measures, Pakistan advanced the existence of a “proceed at own risk” principle that should apply in the event that India failed to cease work on the construction of the Kishenganga Hydro-Electric Project during the pendency of the arbitration. In particular, citing the International Court of Justice’s order in the *Passage through the Great Belt case*, Pakistan argued that, pursuant to the “proceed at own risk” principle, “a state engaged in works that may violate the rights of another state can proceed only at its own risk.” Noting that India had “specifically recognized” that the continuation of the construction of the project would proceed on the basis of the principle,²⁴ the tribunal allowed certain aspects of the construction of the dam to proceed undisturbed.²⁵

²¹ *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15 (Tribunal: Eduardo Zuleta Jaramillo as President, Prof. Francisco Orrego Vicuña, Osvaldo César Guglielmino), Award, 30 August 2018, available at: <https://pca-cpa.org/en/cases/54/>.

²² *Ibid*, para. 448.

²³ *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01 (Tribunal: Stephen M. Schwebel as President, Sir Franklin Berman, Howard S. Wheeler, Lucius Caflisch, Jan Paulsson, Bruno Simma, Peter Tomka), available at: <https://pca-cpa.org/en/cases/20/>.

²⁴ *Ibid*, Order on Interim Measures, 23 September 2011, available at: <https://pca-cpa.org/en/cases/20/>, para. 122

²⁵ *Ibid*, para.143.

21. Another example can be found in the boundary arbitration between Republic of Croatia and the Republic of Slovenia.²⁶ The tribunal noted the parties' agreement that the land boundary was not disputed in segments where each State's cadastral limits under municipal law were aligned, and thus determined that the aligned limits constituted the boundary.²⁷ It did so on the basis that "it is well-established in international law that tribunals should presume, in the absence of evidence to the contrary, that States act consistently with their legal obligations, and that steps that have been taken, and instruments that have been adopted by States are consistent with those obligations. This is sometimes expressed in the Latin maxim *omnia praesumuntur rite esse acta*: all acts are presumed to have been duly done."²⁸
22. In the PCA case of *Venezuela US, S.R.L. (Barbados) v. The Bolivarian Republic of Venezuela*, the tribunal was faced with the issue of whether to apply and enforce a most-favoured-nation clause in the relevant treaty allowing its application to investor-State dispute settlement. The Tribunal stated in its interim award that it had "no other choice than to apply and enforce the [disputed Treaty] provisions in accordance with their terms pursuant to the principle of *pacta sunt servanda*."²⁹
23. In the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, the tribunal noted that estoppel, as a "general principle of law", "does not distinguish between representations as to existing facts and those regarding promises of future action or declarations of law".³⁰ It explained that estoppel came 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".³¹
24. Aside from the gap-filling function of general principles of law, PCA tribunals have also considered whether specific obligations for States arise from some of these principles.

²⁶ *Arbitration between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, (Tribunal: Gilbert Guillaume as President, Rolf Einar Fife, Prof. Vaughan Lowe QC, Nicolas Michel, Bruno Simma), Final Award, 29 June 2017, available at: <https://pca-cpa.org/en/cases/3/>.

²⁷ *Ibid*, para. 350.

²⁸ *Ibid*, para 347; see also *1. Chevron Corporation and 2. Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (Tribunal: Mr. V.V. Veeder QC as President; Dr. Horacio Grigera Naón; Prof. Vaughan Lowe QC), Second Partial Award on Track II of 30 August 2018, available at <https://pca-cpa.org/en/cases/49/>, para. 8.41.

²⁹ *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 Kohén), Interim Award, 26 July 2016, available at: <https://pca-cpa.org/en/cases/136/>, para. 102.

³⁰ *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/11/>, para. 437.

³¹ *Ibid*, para. 446.

25. For example, in the *Russian Claim for Interest on Indemnities* case, mentioned a moment ago, the tribunal pointed to the existence of an obligation for States to pay compensatory interest in the event of late payment of a debt. According to this tribunal, “the general principle of the responsibility of States implies a special responsibility in the matter of delay in the payment of a monetary debt, unless the existence of a contrary international custom is established.”³²
26. Finally, PCA-administered tribunals have often applied general principles specifically relevant to dispute settlement and matters of procedure, such as those concerning burden of proof,³³ the evaluation of evidence,³⁴ and the award of interest³⁵ or costs.³⁶
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27. These are examples of the practice of PCA tribunals in respect of the specific issues proposed for the study of general principles of law by the Special Rapporteur. 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. All the cases mentioned today are available on the PCA’s website.
28. 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.

³² *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/>, p. 3.

³³ *Copper Mesa Mining Corporation (Canada) v. The Republic of Ecuador*, PCA Case No. 2012-02 (Tribunal: V.V. Veeder as President, Bernardo Cremades, Bruno Simma), Award, 15 March 2016, available at: <https://pca-cpa.org/en/cases/140/>, para. 7.22.

³⁴ *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.

³⁵ *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.

³⁶ *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.