

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# DISPUTE SETTLEMENT

GENERAL TOPICS

1.3 Permanent Court of Arbitration



**UNITED NATIONS**  
New York and Geneva, 2003

## NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

This module has been prepared by Mr. H.M. Holtzmann and Ms. B.E. Shifman at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed in this module are those of the authors and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL, the Advisory Center on WTO Law or the PCA. The authors wish to express their gratitude to the editorial staff of the Manual on International Courts and Tribunals, published in 1999 by the Project on International Courts and Tribunals (PICT) for permission to rely on the Manual's section on the PCA in preparing this module.

The designations employed and the presentation of the material do not imply an expression of any opinion whatsoever on the part of the United Nations concerning the legal status of any country, territory, city or areas or of its authorities, or concerning the delimitations of its frontiers or boundaries. In quotations from the official documents and the jurisprudence of international organizations and tribunals countries are designated as reported.

The United Nations holds copyright to this document. The course is also available in electronic format on the UNCTAD website ([www.unctad.org](http://www.unctad.org)). Copies may be downloaded free of charge on the understanding that they will be used for teaching or study and not for a commercial purpose. Appropriate acknowledgement of the source is requested.

UNCTAD/EDM/Misc.232/Add.26

Copyright © United Nations, 2003  
All rights reserved

## TABLE OF CONTENTS

<b>Note</b>	<b>ii</b>
<b>What you will learn</b>	<b>1</b>
<b>Objectives</b>	<b>3</b>
<b>1. Background</b>	<b>5</b>
<b>1.1 History</b>	<b>5</b>
<b>1.2 Non-State Parties</b>	<b>6</b>
<b>1.3 UNCITRAL Link</b>	<b>6</b>
<b>1.4 Iran-United States Claims Tribunal</b>	<b>7</b>
<b>1.5 Revitalization</b>	<b>7</b>
<b>1.6 Forum for Scholarly Discourse</b>	<b>8</b>
<b>2. Organizational Aspects</b>	<b>9</b>
<b>2.1 Headquarters</b>	<b>9</b>
<b>2.2 International Bureau</b>	<b>9</b>
<b>2.3 Administrative Council</b>	<b>9</b>
<b>2.4 Members of the Court</b>	<b>10</b>
<b>2.5 Basic Texts</b>	<b>10</b>
<b>2.6 The Tribunal</b>	<b>11</b>
<b>2.7 Range of Alternative Dispute Resolution Services Offered</b>	<b>12</b>
<b>2.8 Registry Services</b>	<b>12</b>
<b>2.9 Costs</b>	<b>13</b>
<b>2.10 Financial Assistance Fund</b>	<b>14</b>
<b>3. Jurisdiction</b>	<b>15</b>
<b>3.1 Jurisdiction of the Institution</b>	<b>15</b>
<b>3.2 Jurisdiction of the Arbitral Tribunal</b>	<b>15</b>
<b>3.3 Contentious/Advisory Jurisdiction</b>	<b>16</b>
<b>3.4 Subject Matter</b>	<b>16</b>
<b>3.5 Time Limits</b>	<b>16</b>
<b>4. Applicable Law</b>	<b>17</b>
<b>4.1 Procedural Rules</b>	<b>17</b>
<b>4.2 Substantive</b>	<b>17</b>
<b>5. Procedural Aspects</b>	<b>19</b>
<b>5.1 Institution of Proceedings</b>	<b>19</b>
<b>5.2 Constitution of the Tribunal</b>	<b>19</b>
<b>5.3 Challenge</b>	<b>20</b>
<b>5.4 Provisional Measures</b>	<b>21</b>
<b>5.5 Preliminary Objections</b>	<b>21</b>
<b>5.6 Place of Arbitration</b>	<b>22</b>
<b>5.7 Written Pleadings</b>	<b>22</b>
<b>5.8 Hearings</b>	<b>23</b>
<b>5.9 Confidentiality</b>	<b>24</b>
<b>5.10 Representation</b>	<b>24</b>
<b>5.11 Languages of the Proceedings</b>	<b>25</b>
<b>5.12 Third-Party Intervention</b>	<b>25</b>

---

<b>6.</b>	<b>Decision</b>	<b>27</b>
	<i>6.1 Award</i>	<i>27</i>
	<i>6.2 Interpretation and Revision</i>	<i>27</i>
	<i>6.3 Appeal</i>	<i>27</i>
	<i>6.4 Enforcement</i>	<i>27</i>
<b>7.</b>	<b>Representative Cases</b>	<b>29</b>
<b>8.</b>	<b>Suitability of PCA for International Trade, Investment and Intellectual Property Disputes</b>	<b>31</b>
	<i>8.1 Suitability of Arbitration</i>	<i>31</i>
	<i>8.2 Suitability of the PCA</i>	<i>32</i>
<b>9.</b>	<b>Test Your Understanding</b>	<b>35</b>
<b>10.</b>	<b>Further Reading</b>	<b>37</b>

## WHAT YOU WILL LEARN

This module gives an overview of the functioning of the over 100-year-old Permanent Court of Arbitration (“PCA”) in providing a wide range of dispute settlement mechanisms to various entities and persons, including States, international organizations and private parties.



## OBJECTIVES

After studying this module, the reader should be able to:

- Recognize the PCA's unique role in international dispute resolution;
- Identify the different types of dispute resolution mechanisms available under PCA auspices and assess their appropriateness or availability with respect to specific types of disputes; and
- Provide effectively for recourse to PCA dispute resolution, *inter alia*, by drafting dispute resolution clauses for existing as well as future disputes.



# 1. BACKGROUND

## 1.1 History

In July 1899, the sovereign Powers, meeting in The Hague at the first International Peace Conference, adopted a “Convention for the Pacific Settlement of International Disputes,”<sup>1</sup> which established a global institution for international dispute resolution: the Permanent Court of Arbitration. In the same way in which the 1899 Hague Peace Conference – the world’s first successful egalitarian assembly of a political character – can be said to have been a precursor of the League of Nations and the United Nations,<sup>2</sup> the PCA – as conceived by the drafters of the 1899 Convention – was a precursor of all present-day forms of international dispute resolution, including the International Court of Justice (“ICJ”).

The 1899 Convention was revised at the Second Hague Peace Conference in 1907, by the adoption of a second “Convention for the Pacific Settlement of International Disputes.”<sup>3</sup> Although the majority of States are parties to the 1907 Convention, both Conventions remain in force. There are currently 97 Contracting States.<sup>4</sup>

In 1913, construction was completed on the Peace Palace in The Hague. Originally built to serve as PCA headquarters, the Peace Palace now also houses the ICJ, the Carnegie Library and the Hague Academy of International Law.

In the first few decades of the PCA’s existence, a significant number of inter-State disputes were submitted to tribunals established under its auspices.<sup>5</sup> Because the PCA was established for the purpose of resolving disputes between States, all of its early tribunals were called upon to decide disputes involving issues of public international law, including territorial sovereignty, State responsibility, and treaty interpretation. Many of the principles laid down in the early PCA cases are still good law today, and are cited by other international tribunals, including the ICJ.<sup>6</sup>

<sup>1</sup> *Convention for the Pacific Settlement of International Disputes*, July 29, 1899, 32 Stat. 1799 [hereinafter, “1899 Convention”].

<sup>2</sup> Sharwood R. *The Hague Peace Conference of 1899: A Historical Introduction*. In: *International Alternative Dispute Resolution: Past, Present and Future – The Permanent Court of Arbitration Centennial Papers 170 (2000)* [hereinafter “PCA Centennial Papers”].

<sup>3</sup> *Convention for the Pacific Settlement of International Disputes*, Oct. 18, 1907, 36 Stat. 2199 [hereinafter, “1907 Convention”].

<sup>4</sup> *Although adherence to the Conventions is not a prerequisite for recourse to PCA dispute resolution, States continue to accede to the 1907 Convention, inter alia, in order to participate in the PCA’s Administrative Council (see Section 2, below). An up-to-date list of Contracting States can be found on the PCA’s website: <http://www.pca-cpa.org/CSAI>.*

<sup>5</sup> See, for example, Hamilton P et al., eds., *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution: Summaries of Awards, Settlement Agreements and Reports (1999)* [hereinafter “PCA Summaries”].

<sup>6</sup> See J.G. Merrills, *The contribution of the Permanent Court of Arbitration to international law and to the settlement of disputes by peaceful means*, in *PCA Summaries*, supra note 5, at 3.

## 1.2 Non-State Parties

Initially conceived as an instrument for the settlement of disputes between States, the PCA was authorized, in the 1930s, to use its facilities for conciliation, and for the arbitration of international disputes between States and private parties, thus making it available for resolving certain commercial and investment disputes.<sup>7</sup> In 1962, the PCA elaborated a set of “Rules of Arbitration and Conciliation for settlement of international disputes between two parties of which only one is a State,” which undoubtedly inspired the subsequent adoption of the 1965 Agreement<sup>8</sup> establishing the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank.<sup>9</sup>

In subsequent years, however, following two world wars and the establishment of the International Court of Justice and its predecessor, the Permanent Court of International Justice, the PCA came to be underutilized by the international community.

## 1.3 UNCITRAL Link

The first stirrings of revitalization of the PCA began in the 1980s. In 1976, the United Nations Commission on International Trade Law (UNCITRAL),<sup>10</sup> adopted a set of non-institutional arbitration rules for use “in the settlement of disputes arising in the context of international commercial relations, particularly . . . commercial contracts.” Realizing that these rules would not be effective unless they included a “fall-back” method for appointing arbitrators and deciding challenges, the UNCITRAL drafters created an “appointing authority”, to be designated by agreement of the parties. It was felt that in cases in which the parties were unable to agree on the choice of an appointing authority, a trusted international institution was needed. The UNCITRAL Arbitration Rules therefore provide that:

*“[i]f no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator . . . either party may request the Secretary-General of the*

<sup>7</sup> The question arose in connection with an arbitration between the Chinese Government and Radio Corporation of America (RCA), see *PCA Summaries*, supra note 5, at 145. RCA had concluded an agreement for the operation of radio telegraphic communications between China and the United States. RCA claimed that a subsequent agreement entered into by China with a different entity constituted a breach of its agreement. The PCA agreed, at the request of the arbitral tribunal, to provide registry services.

<sup>8</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18, 1965, 575 U.N.T.S. 160.

<sup>9</sup> See M. Pinto, *Introductory statement by the Secretary-General of the Iran-United States Claims Tribunal*, in *PCA Centennial Papers*, supra note 2, at 179, 183.

<sup>10</sup> *UNCITRAL Arbitration Rules*, adopted April 28, 1976. *Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session*, 31 UN GAOR Supp. (No. 17) at paras. 56-57, *United Nations Document No. A/31/17* (1976), reprinted in 15 I.L.M. 701 (1976) [hereinafter, “UNCITRAL Rules”]. See generally Holtzmann HM, *The History, Creation and Need for the UNCITRAL Arbitration Rules*, in *Stockholm Symposium On International Commercial Arbitration* (1982).

*Permanent Court of Arbitration at The Hague to designate an appointing authority.”<sup>11</sup>*

## 1.4 Iran-United States Claims - Tribunal

In 1981 the Secretary-General was called upon for the first time to designate an appointing authority, not for a commercial arbitration, but for the Iran-United States Claims Tribunal.<sup>12</sup> The provision of physical facilities and diplomatically sensitive administrative assistance to that institution during its formative period also breathed new life into the PCA. Since 1981, nearly 200 requests for designation of an appointing authority have been submitted to the Secretary-General, the vast majority of them since the mid-1990s. This increase, as well as the increasing complexity of the cases in which requests are made, has brought the PCA squarely into the realm of international commercial arbitration. More and more frequently, the Secretary-General is asked to serve directly as the appointing authority, rather than merely designating another institution or individual.

## 1.5 Revitalization

The revitalization of the PCA began in earnest in the 1990s. In 1991, the PCA convened a working group of experts for the purpose of making recommendations on improving its functioning. Since then, the PCA has expanded and internationalized its staff, increased worldwide awareness of its facilities and services, and improved and modernized the functioning of its system of dispute settlement primarily by adopting several sets of procedural rules, nearly all of which are based closely on the comparable UNCITRAL texts. The PCA recognized that despite their commercial genesis, the UNCITRAL Rules reflect practices and principles accepted in worldwide arbitration culture and would

*“provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements although they were originally designed for commercial arbitration.”<sup>13</sup>*

Since 1990, the staff of the PCA has increased fivefold, and represents over 10 different nationalities. Its current caseload – the largest in its 100-year history – reflects the breadth of PCA involvement in international dispute resolution, encompassing territorial, treaty and human rights disputes between States; private claims against an intergovernmental organization; and commercial disputes, including disputes arising under bilateral investment treaties.

<sup>11</sup> See, for example, UNCITRAL Rules Arts. 6(2) and 7(2)(b).

<sup>12</sup> See Aldrich G, *The Iran-United States Claims Tribunal*, in: *PCA Summaries*, supra note 5, at 206.

<sup>13</sup> See, for example, *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States: Introduction (1992)*, available on the PCA website: <http://www.pca-cpa.org/BD/2stateeng.htm>.

## **1.6 Forum for Scholarly - Discourse**

In addition, the PCA's programme of research, publication and seminars ensures its place at the forefront of current developments in international dispute resolution. Its International Law Seminars, regularly held at the Peace Palace provide a venue for practitioners and academics to exchange views on topical issues of international law and dispute resolution. The seminar proceedings are published by Kluwer Law International in the series "*Peace Palace Papers*." The PCA further collaborates with Kluwer Law International in the editing of two influential arbitration journals, the development and maintenance of its arbitration database and CD-ROM, and is a co-sponsor of its internet portal: [www.kluwerarbitration.com](http://www.kluwerarbitration.com). Since 1997, the PCA has included among its staff the editorial staff of the International Council for Commercial Arbitration ("ICCA").

## 2. ORGANIZATIONAL ASPECTS

### 2.1 Headquarters

The Permanent Court of Arbitration (PCA) has its headquarters in The Hague. Dispute resolution proceedings conducted under its auspices may take place at any other location agreed upon by the parties to a case and/or the adjudicators.

### 2.2 International Bureau

The basic organizational structure of the PCA is set out in the 1899 and 1907 Conventions. It has often been observed that “Permanent Court of Arbitration” is a misnomer. It is not a true court with judges permanently in residence. Instead, a permanent secretariat, known as the International Bureau and headed by the Secretary-General, assists the parties by establishing and administering – for each case – an ad hoc tribunal. This structure must be viewed in the light of the world order prevailing at the time of the first Hague Peace Conference. Although a handful of delegates argued for the establishment of a true court, the majority of States, anxious to preserve their sovereignty, were reluctant to establish an institution with too much autonomy. The International Bureau serves as the operative secretariat of the PCA. It maintains the permanent roster of potential arbitrators, receives communications directed to the PCA (including requests for arbitration), and provides ongoing administrative services to the arbitral tribunals, including provision of the facilities of the PCA building. If the parties so wish, the Bureau acts as registry to a tribunal.

### 2.3 Administrative Council

Supervisory control of the PCA is vested in its Administrative Council, which is comprised of the diplomatic representatives accredited to the Netherlands of the parties to the 1899 and 1907 Conventions. The Council provides general guidance to the work of the PCA, and supervises its administration, budget and expenditure. The budget of the PCA is funded by contributions of the States parties, the amount of which is based on the system of units maintained by the Universal Postal Union (one of the few intergovernmental organizations in existence in 1899). Thus, for 2003, the highest contribution of an individual State is 24,450 euros (50 units) and the lowest is 244.50 euros (0.5 units). The Secretary-General reports annually to the Administrative Council on the activities of the PCA, the functioning of its administrative services and its expenditures.<sup>14</sup>

As the PCA’s period of revitalization has coincided with a pronounced governmental policy of zero nominal growth in international organizations,

<sup>14</sup> 1907 Convention, Art. 49. Recent annual reports are available on the PCA website: <http://www.pca-cpa.org/AR/annrep01.htm>.

much of its recent growth and expansion has been financed from extra-budgetary sources, including fees earned for services provided to arbitral tribunals.

## 2.4 Members of the Court

The drafters of the 1899 and 1907 Conventions contemplated the use of a “closed” panel from which parties would select their arbitrators. The Conventions therefore provide that each Contracting State to the Conventions may designate up to four “Members of the Court”: persons of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator (1907 Convention, Art. 44). Although the Conventions require that arbitrators be chosen from this list of “Members” (1907 Convention, Art. 45), it became clear, early in the history of the PCA, that parties preferred to have the autonomy to appoint arbitrators from outside that list. This proved to be easily accomplished by having recourse to Article 47 of the 1907 Convention, which authorizes the International Bureau

*“to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.” As there is no definition of the expression “special Board of Arbitration”, this article has been invoked to authorize PCA involvement in arbitration involving non-State parties (including the adoption of various sets of procedural rules therefor) and to enable parties to select whomever they wish as arbitrators, by characterizing the proceedings as a “special Board of Arbitration pursuant to Article 47 of the 1907 Convention.”*

In addition to forming a panel of potential arbitrators, the members of the PCA from each Contracting State constitute a “national group”, which is entitled to nominate candidates for election to the ICJ.<sup>15</sup>

## 2.5 Basic Texts

The 1899 and 1907 Conventions form the constituent documents of the PCA, particularly with respect to its organizational aspects. While the Conventions also provide a procedural framework for the various types of dispute resolution available under the auspices of the PCA, a series of new procedural rules have been put in place in recent years. These have been based in large part on UNCITRAL texts, in order to reflect modern-day international consensus on dispute resolution procedure. The following sets of rules are currently in effect:

- Optional Rules for Arbitrating Disputes between Two States (1992);

<sup>15</sup> ICJ Statute, Art. 4. *The Permanent Court of Arbitration is thus the only institution, other than the organs of the then-existing League of Nations and of the United Nations itself, mentioned by name in the UN Charter.*

- Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State (1993);
- Optional Rules for Arbitration involving International Organisations and States (1996) (encompassing, *inter alia*, arbitration between two international organisations);
- Optional Rules for Arbitration between International Organisations and Private Parties (1996);
- Optional Conciliation Rules (1996);
- Optional Rules for Fact-finding Commissions of Inquiry (1997);
- Rules of Procedure for Arbitrating Disputes Relating to Natural Resources and/or the Environment; and
- Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment.

According to the introduction to the 1992 Optional Rules for Arbitrating Disputes between Two States:

*“Experience in arbitrations since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally designed for commercial arbitration.”*

In addition to applying its own UNCITRAL-based rules, the PCA often administers arbitrations conducted under the UNCITRAL Arbitration Rules, or under ad hoc rules developed by the parties for purposes of the arbitration concerned.

Thus, with respect to the discussion of PCA procedure, below, it should be borne in mind that there is no single set of procedural rules applicable to all cases. Because of the predominance of arbitration as a method of international dispute resolution within the PCA system, the discussion of procedure in this volume is limited to arbitral proceedings. In addition, because parties rarely have recourse to the somewhat antiquated, and less detailed, procedural rules set forth in the 1899 and 1907 Conventions, it focuses primarily on the provisions of the various modern sets of PCA Rules. As the article references tend to be identical for all sets of PCA Rules, they will, in most instances, be referred to only once or in a more general manner, in order to avoid excessively long citations.

## 2.6 The Tribunal

By the same token, there is no tribunal per se. A tribunal or other dispute resolution body is established for each dispute submitted, and its method of constitution will depend on the applicable rules.

## 2.7 Range of Administrative Dispute - Resolution Services Offered

The dispute resolution mechanisms provided for in the 1899 and 1907 Conventions are “good offices,” mediation, inquiry, and arbitration. The Conventions deal with the first two mechanisms concurrently, and contemplate primarily “the good offices or mediation of one or more friendly Powers.”<sup>16</sup>

In 1939, the Administrative Council authorized the PCA to put its offices and organization at the disposal of conciliation commissions. Three such commissions have been held under the auspices of the PCA.<sup>17</sup> The Introduction to the PCA’s 1996 Optional Conciliation Rules expressly provides that the rules envision a single process, which may be referred to as either “conciliation” or “mediation.”

Inquiry is a means of facilitating the settlement of disputes by the creation of an international commission to make an impartial investigation of the facts.<sup>18</sup> There have been five such commissions in PCA history, the most prominent of which was the 1905 Dogger Bank case between Great Britain and Russia.<sup>19</sup>

In terms of the resolution of disputes likely to endanger the maintenance of international peace and security, the PCA makes available four of the dispute settlement methods expressly listed in the UN Charter: enquiry, mediation, conciliation and arbitration.<sup>20</sup> In the fields of international trade, investment and intellectual property, all of the PCA’s modern procedural rules are capable of being used in resolving disputes, depending on the identity of the parties involved. An important aspect of the PCA’s flexibility is that cases involving multiple parties, including perhaps States, IGOs and private parties, can also be submitted to PCA arbitration. Even purely private disputes can be submitted to PCA-administered arbitration, by using the UNCITRAL Arbitration Rules and designating the PCA as the administering authority.<sup>21</sup>

## 2.8 Registry Services

The PCA’s secretariat – the International Bureau – consists of an experienced, multilingual team of legal and administrative staff. It can provide full registry services and legal support to tribunals and commissions, serving, for example,

<sup>16</sup> 1899 Convention, Art. 2; 1907 Convention, Art. 2.

<sup>17</sup> Hamilton et al. (eds.), *PCA Summaries*, supra note 5, at 285-291.

<sup>18</sup> Merrills, in *PCA Summaries*, supra note 5, at 22.

<sup>19</sup> *PCA Summaries*, supra note 5, at 297.

<sup>20</sup> UN Charter, Art. 33.

<sup>21</sup> See *Permanent Court of Arbitration Procedures for Cases under the UNCITRAL Arbitration Rules*, available on the PCA website: <http://www.pca-cpa.org/BD/pcaproceduresuncitral.htm>; see also, *Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations under the UNCITRAL Arbitration Rules*, United Nations document no. A/CN. 9/230 (1982). Other common names for administering authority are “secretariat” and “registry”.

as the official channel of communications and ensuring safe custody of documents, using both traditional and state-of-the-art electronic facilities, including encryption. The two official working languages of the PCA are English and French, but proceedings may be conducted in any language agreed by the parties. The International Bureau can also arrange the provision of services such as legal research, financial administration, logistical and technical support for meetings and hearings, travel arrangements, and general secretarial and linguistic support. There is great flexibility as to the scope of the secretariat's involvement, which is determined on a case-by-case basis in consultation with the arbitrators and the parties.

The Hague Peace Palace, headquarters of the PCA, has spacious and well-appointed hearing rooms and retiring rooms. Research facilities include the PCA's own research and publications department, with access to electronic databases, and the Peace Palace International Law Library. The PCA can also provide services to tribunals meeting or holding hearings elsewhere in the world, arranging, if necessary, for the services of an ad hoc local registrar.

The PCA secretariat assists the Secretary-General in the designation of appointing authorities and appointment of arbitrators, and provides information and advice to parties contemplating dispute resolution, for example, with respect to the drafting of arbitration clauses and submission agreements.

## 2.9 Costs

The costs of PCA arbitration include the fees and expenses of the arbitrators, which are to be determined by the tribunal. They also include the costs of expert advice and other assistance provided to the tribunal, fees and expenses of the appointing authority, and the expenses of the Secretary-General and the International Bureau, including hearing expenses. In principle, parties to proceedings in which the PCA acts as registry may use the hearing rooms and other physical facilities of the Peace Palace free of charge.

Normally, under the Optional Rules and the 1899 and 1907 Conventions, each party bears its own costs in respect of legal representation and assistance, and one-half of the common costs of arbitration. Under the Optional Rules, however, the tribunal may apportion the costs between the parties in any other reasonable manner warranted by the circumstances, including holding the unsuccessful party responsible for all costs.

Under the various Optional Rules, the tribunal or the International Bureau may request the parties to deposit funds in advance at the commencement of the proceedings; and it may require additional deposits at a later stage of the proceedings.

Unlike some arbitral institutions, the PCA does not have a schedule of arbitrators' fees. These fees are determined by agreement with the parties, and the PCA often assists in this process. The PCA maintains a schedule of fees for

its services, including the designation of, or acting as, an appointing authority.<sup>22</sup> In certain circumstances, this fee may be adjusted by agreement with the parties.

## 2.10 Financial Assistance Fund

In 1995, the PCA established a Financial Assistance Fund,<sup>23</sup> aimed at helping developing countries meet the costs involved in PCA dispute settlement. The Fund comprises voluntary financial contributions by States, international organizations, NGOs and natural or legal persons. Only States (or State-controlled entities) are eligible to receive financial support, provided that they meet the following requirements:

- They are signatory to either the 1899 or 1907 Hague Conventions;
- They have concluded an agreement to refer a dispute (or disputes) to PCA dispute settlement; and
- They are listed on the Development Assistance Committee (DAC) List of Aid Recipients regularly prepared by the Organisation for Economic Co-operation and Development (OECD).

A request for financial assistance in order to facilitate recourse to PCA dispute settlement is to be submitted by the requesting State to the Secretary-General. The request should include:

- A copy of the dispute settlement agreement (in the case of a general agreement, a brief description of the dispute);
- An estimate of costs for which financial assistance is sought; and
- An undertaking to submit an audited statement of account on the expenditures made with the funds received.

The Fund is administered by the International Bureau, with the supervision of an independent, external Board of Trustees, which must approve every request for assistance. The Secretary-General reports periodically to the Administrative Council on the activities of the Fund. Although the Fund has yet to receive large-scale contributions, a number of grants of financial assistance have been made since its inception.

---

<sup>22</sup> Available on the PCA website:

<http://www.pca-cpa.org/GI/scheduleofcosts.htm>.

<sup>23</sup> The terms of reference of the Financial Assistance Fund can be found on the PCA website:

<http://www.pca-cpa.org/BD/torfundenglish.htm>.

## 3. JURISDICTION

### 3.1 Jurisdiction of the Institution

As pointed out above, although the PCA was originally established for inter-State arbitration, the Hague Conventions allow considerable flexibility in the constitution of a “special Board of Arbitration.”<sup>24</sup>

Pursuant to the various Optional Rules, the following parties may, in principle, agree to bring a case before the PCA:

- Any two or more States;
- A State and an international organization (i.e. an intergovernmental organization);
- Two or more international organizations;
- A State and a private party; and
- An international organization and a private party.

The PCA Rules of Procedure for Arbitrating Disputes Relating to Natural Resources and/or the Environment and the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment contain no requirement that one of the parties be a State or organization of States. Private parties may agree to use the administrative and other facilities of the PCA in arbitrations conducted under the UNCITRAL Rules, and the PCA is contemplating adopting its own institutional version of the UNCITRAL Rules for this purpose.<sup>25</sup>

There is no requirement that a State agreeing to PCA dispute resolution be a party to the 1899/1907 Conventions, and accession to the Conventions does not establish any type of compulsory jurisdiction.

### 3.2 Jurisdiction of the Arbitral Tribunal

The cornerstone of all types of arbitral jurisdiction is agreement of the parties. This agreement can be made by way of a separate agreement covering an existing dispute (often referred to as a “submission agreement”) or through a clause in a treaty, contract, or other legal instrument, which is usually more general, covering any future disputes “arising under” or “in connection with” the instrument concerned.

The various PCA Rules follow the UNCITRAL Rules in empowering the arbitral tribunal to decide on any objections to its jurisdiction,<sup>26</sup> and providing

<sup>24</sup> 1899 Convention, Art. 26; 1907 Convention, Art. 47.

<sup>25</sup> See United Nations document no. A/CN. 9/230 (1982), *supra*, note 22.

<sup>26</sup> Art. 21(1).

that, for purposes of determining jurisdiction, an arbitration agreement shall be considered separable from the instrument in which it is contained.<sup>27</sup> Thus, the invalidity of the contract, agreement or instrument does not *ipso facto* deprive the arbitral tribunal of jurisdiction.

Under the two sets of PCA Rules providing for the involvement of a private party with either a State or an international Organization, agreement to arbitrate under the rules constitutes a waiver of sovereign immunity from jurisdiction on the part of the State or international organization concerned.<sup>28</sup>

### 3.3 Contentious/Advisory Jurisdiction

PCA practice, unlike that of the ICJ, knows no distinction between contentious and advisory jurisdiction. Arbitration is virtually always contentious, and can be distinguished from other forms of non-judicial dispute resolution by the final and binding nature of the resulting arbitral award. The PCA's non-binding methods of dispute resolution, including mediation, conciliation and inquiry or fact-finding, might therefore be more appropriate for parties seeking an advisory – or non-binding – declaration of their mutual rights and obligations.

### 3.4 Subject Matter

The potential subject-matter jurisdiction of PCA arbitral tribunals is unlimited. In each case however, the scope of jurisdiction is governed by the wording of the applicable arbitration agreement. The PCA Rules of Procedure for Arbitrating Disputes Relating to Natural Resources and/or the Environment expressly provide that

*“The characterization of the dispute as relating to the environment or natural resources is not necessary for jurisdiction, where all the parties have agreed to settle a specific dispute under these rules.” (Art. 1)*

### 3.5 Time Limits

The various rules of procedure do not place any temporal limits upon the referral of disputes to PCA arbitration. Such restrictions may be found in the arbitration agreement.

<sup>27</sup> Art. 21(2).

<sup>28</sup> Any waiver of sovereign immunity from execution, however, must be express; see, for example, *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, Introduction*, <http://www.pca-cpa.org/BD/2stateeng.htm>.

## 4. APPLICABLE LAW

### 4.1 Procedural Rules

The law applicable to the proceedings is that chosen by the parties, in the first instance by agreeing to the application of a particular set of procedural rules.

Modern procedural rules, such as the various PCA Rules (and the UNCITRAL Rules from which they are derived), leave a great deal of procedural flexibility in the hands of the parties and the arbitral tribunal. There are few mandatory provisions, meaning that the parties may, by mutual agreement, deviate from or modify the procedural rules. All of the PCA Rules contain the general provision that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that, at any stage of the proceedings, each party is given a full opportunity of presenting its case.<sup>29</sup> In purely private commercial cases, and conceivably in certain other cases as well, the arbitral tribunal might be likely to apply, or in any event, have reference to, the arbitration law of the place of arbitration (*lex loci arbitrii*) to fill gaps in the applicable rules. In inter-State arbitration, the arbitration agreement or ad hoc rules drawn up by the parties generally give the arbitral tribunal the express power to fill such gaps without reference to municipal law.

### 4.2 Substantive

Here again, arbitration gives the parties the flexibility to stipulate the law applicable to the substance of their dispute.

The various PCA rules provide that the arbitral tribunal shall apply the law chosen by the parties; in the absence of an agreement, the tribunal will apply either the applicable rules of general international law or another body of law prescribed by choice of law rules.<sup>30</sup>

In cases involving international organizations, the tribunal is directed to take due account of the rules of the organization concerned and to the law of international organizations; and in cases involving private parties, the tribunal is directed to pay attention to the terms of the contracts or agreements in question and take into account the relevant trade usage. Finally, only with the agreement of the parties may the tribunal decide the dispute *ex aequo et bono*.<sup>31</sup>

<sup>29</sup> Art. 15.

<sup>30</sup> Art. 33.

<sup>31</sup> Art. 33(2).

The 1899 and 1907 Conventions contain a more general reference to settlement “on the basis of respect for law.”<sup>32</sup>

---

<sup>32</sup> 1899 Convention, Art. 15; 1907 Convention, Art. 37.

## 5. PROCEDURAL ASPECTS

### 5.1 Institution of Proceedings

Under the various PCA Rules, the party initiating arbitration (the “claimant”) initiates arbitration by serving the other party (the “respondent”) with a notice of arbitration, which must contain the following information:

- (a) A demand that the dispute be referred to arbitration;
- (b) Names and addresses of the parties;
- (c) Reference to an arbitration clause or arbitration agreement;
- (d) Reference to the treaty, agreement, contract or other legal instrument (e.g., constituent instrument or decision of an international organization) out of which, or in relation to which the dispute arose;
- (e) General nature of the case and indication of the amount involved;
- (f) Relief or remedy sought; and
- (g) Proposal as to the number of arbitrators.<sup>33</sup>

These provisions are taken nearly verbatim from the UNCITRAL Arbitration Rules, which, because they are intended for commercial disputes, tend to assume that arbitration will be based on a future-disputes clause contained in a commercial contract, and that there will, therefore, be an identifiable claimant and respondent. In the case of arbitration initiated by means of a submission agreement, particularly involving States, neither party may wish to be designated as claimant or respondent. It is therefore recommended that parties drafting a submission agreement include specific language setting forth the agreed deviation from, or alternative to, those provisions that presuppose a claimant-respondent relationship, such as those concerning initiation of proceedings, appointment of arbitrators, and filing of written submissions.

### 5.2 Constitution of the Tribunal

The parties may, by agreement, stipulate the method of constituting the arbitral tribunal. As pointed out above, the 1899 and 1907 Conventions originally contemplated that, in appointing arbitrators, parties would be limited to the list of “Members” of the PCA, but this has long ago fallen out of practice.

The basic method of constituting a tribunal, reflected in the 1899 and 1907 Conventions and the various sets of PCA Rules, involves an appointment by each party, with the party-appointed arbitrators then selecting a presiding arbitrator.<sup>34</sup> The parties may agree on the number of arbitrators (sole arbitrator,

<sup>33</sup> Art. 3.

<sup>34</sup> Art. 7.

three arbitrators, or – usually only in inter-State cases – five arbitrators); if they fail to do so, the tribunal will be composed of three arbitrators.<sup>35</sup> In the absence of agreement on the third arbitrator, or upon failure on the part of one of the parties to appoint an arbitrator, the appointment will be made by the appointing authority agreed upon by the parties or, as in the UNCITRAL Rules, designated by the Secretary-General of the PCA.<sup>36</sup>

If the parties agree to arbitrate their dispute before a sole arbitrator, they may select that arbitrator by mutual agreement, or delegate this to the appointing authority, either expressly or as a consequence of their failure to agree. According to the various sets of PCA Rules, in appointing a sole or presiding arbitrator, the appointing authority is to use a “list procedure,” whereby the parties receive identical lists containing at least three names, and are requested to return the lists to the appointing authority after having deleted the name or names to which they object, and numbering the remaining names on the list in their order of preference.<sup>37</sup>

The parties may, however, provide for a different method of selecting arbitrators, including direct appointment by an appointing authority of their choice. They may also stipulate any special expertise or characteristics (such as linguistic ability) of the arbitrators, and impose restrictions on their nationality. The question of nationality is particularly important in politically sensitive cases, and the various sets of PCA Rules expressly provide that, in making the appointment, the appointing authority must have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.<sup>38</sup>

For example, the 2001 PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment provide for the establishment of a panel of arbitrators with experience and expertise in environmental law or conservation of natural resources, nominated by the member States and the Secretary-General, but there is no requirement that arbitrators be selected from this panel.<sup>39</sup>

### 5.3 Challenge

Under the various PCA Rules, a party may institute a challenge directed against an arbitrator, if it becomes aware of circumstances that raise justifiable doubt as to the impartiality or independence of that arbitrator.<sup>40</sup> If the other party agrees to the challenge, or the arbitrator withdraws from office, a new arbitrator will be appointed in the same manner as the original arbitrator was appointed.<sup>41</sup>

<sup>35</sup> Art. 5.

<sup>36</sup> Art. 7.

<sup>37</sup> Art. 6(3).

<sup>38</sup> Art. 6(4).

<sup>39</sup> Art. 8(3). *The same list may also be made available to parties appointing conciliators under the PCA Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, Art. 4(4).*

<sup>40</sup> Art. 10.

<sup>41</sup> Art. 11.

Otherwise, the challenge is decided by the tribunal's appointing authority, again, as mutually agreed upon by the parties or designated by the Secretary-General of the PCA.<sup>42</sup>

Challenge decisions, and the reasons underlying them, are rarely published or even provided to the parties, as most institutions, including the PCA, treat them as administrative decisions. Notable exceptions are the challenge decisions of the appointing authority of the Iran-United States Claims Tribunal<sup>43</sup> and two decisions rendered pursuant to the UNCITRAL Arbitration Rules in the 1990s by appointing authorities designated by the Secretary-General of the PCA.<sup>44</sup>

## 5.4 Provisional Measures

Under the various PCA Rules, the tribunal may, at the request of a party, order interim measures of protection that it deems necessary to preserve the respective rights of the parties or the subject matter of the dispute, and may do so in the form of an interim award.<sup>45</sup> As with most provisions of the PCA Rules, the parties are free to restrict this power of the tribunal by mutual agreement. In commercial disputes, such measures may include the deposit of goods with third parties or the sale of perishable goods.<sup>46</sup> For example, the PCA Environmental/Natural Resource Rules empower the tribunal to issue any "provisional orders with respect to the subject matter of the dispute it deems necessary to preserve the rights of any party or to prevent serious harm to the environment falling within the subject matter of the dispute."<sup>47</sup>

The tribunal may, in all cases, require from the requesting party security for the costs associated with the interim measures.

Because of the potential difficulty in enforcing interim measures ordered by an arbitral tribunal, all of the PCA Arbitration Rules follow the UNCITRAL Rules in providing that a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

## 5.5 Preliminary Objections

The various sets of PCA Rules provide for a preliminary procedure to establish the arbitral tribunal's jurisdiction. A plea alleging lack of jurisdiction of the

<sup>42</sup> Art. 12.

<sup>43</sup> See, for example, *Decision of the Appointing Authority of 26 September 1991 concerning the Challenge to Gaetano Arangio-Ruiz*, 17 Y.B. Com. Arb. 446 (1992).

<sup>44</sup> See *Challenge Decision of 15 April 1993*, 22 Y.B. Com. Arb. 222 (1997); and *Challenge Decision of 11 January 1995*, 22 Y.B. Com. Arb. 227 (1997).

<sup>45</sup> Art. 26.

<sup>46</sup> Art. 26.

<sup>47</sup> Art. 26.

tribunal must be raised no later than the statement of defence, or in the reply to a counter-claim. The tribunal should normally rule on a plea concerning its jurisdiction as a preliminary matter, but may defer its decision to the final award by joining the jurisdictional challenge to the merits.<sup>48</sup>

## 5.6 Place of Arbitration

It is customary to provide for an official place of arbitration, sometimes referred to as the “seat.” This is particularly important in commercial arbitration, as the award is deemed to be rendered at the place of arbitration, which may have repercussions for its ultimate enforcement, for example, under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the “New York Convention”).<sup>49</sup>

According to the various PCA Rules, unless the parties have agreed otherwise, the place where the arbitration is to be held shall be The Hague, The Netherlands. There remains, however, great flexibility for both the parties and the arbitral tribunal in determining the exact venue for hearings, meetings and deliberations, both within and outside of the place of arbitration.<sup>50</sup> As indicated above, the place of arbitration may, in certain cases, influence the applicable procedural law.

## 5.7 Written Pleadings

The various sets of PCA Rules contemplate the filing of a statement of claim by the claimant, followed by a statement of defence by the respondent. The statement of claim must include the following information:

- (a) Names and addresses of the parties;
- (b) statement of facts supporting the claim;
- (c) The points at issue; and
- (d) Relief or remedy sought.

It is to be accompanied by all relevant documents, including those supporting the jurisdiction of the tribunal, and may indicate further documents or evidence that the claimant intends to submit in the future.<sup>51</sup>

In reply, the statement of defence must address particulars (b), (c) and (d) of the statement of claim, be accompanied by supporting documents, and make reference to additional documents or evidence the respondent intends to submit.<sup>52</sup> It may also include a counter-claim arising out of the same treaty, agreement, contract or other legal instrument, or a claim for set-off, both of

<sup>48</sup> Art. 21.

<sup>49</sup> *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>50</sup> Art. 16.

<sup>51</sup> Art. 18.

<sup>52</sup> Art. 19(2).

which must satisfy the procedural requirements applicable to an ordinary statement of claim.<sup>53</sup>

The parties may amend or supplement their written submissions at any time, unless the tribunal considers those amendments as inappropriate given the delay in their introduction, the prejudice they cause to the other party, or any other circumstances. In no case can the claim be amended in a manner that exceeds the jurisdiction of the tribunal.<sup>54</sup>

The tribunal is authorized to decide whether additional written submissions are to be required,<sup>55</sup> although, given the complexity of most PCA proceedings, there is usually a second round of written pleadings.

Although the PCA Rules provide the basic time frame for the submission of written pleadings, this is usually decided by the tribunal in consultation with the parties, often at an organizational meeting which, although not provided for in the Rules, usually takes place in practice. As discussed above, the PCA Rules reflect a process of consecutive pleading, which may not be appropriate in cases in which there is no identifiable claimant and respondent (usually cases between States, initiated by a joint submission). In such cases, there is often an agreement, either in the submission or other instrument, or at an organizational meeting, that written submission will be filed simultaneously.

Depending on how voluminous the written pleadings are expected to be, the parties generally consult with the tribunal and the registry in order to determine whether to transmit the pleadings directly to each other and the members of the tribunal, or to do so via the registry. Although filings generally consist of hard copies, a certain degree of electronic submission of evidence is becoming increasingly common, and the PCA is equipped to deal with electronic databases, particularly of documentary evidence in complex cases.

## 5.8 Hearings

The various PCA Rules entitle the parties to request a hearing, in the absence of which the tribunal will decide whether to hold hearings or to conduct the proceedings solely on the basis of written submissions, documents and other material.<sup>56</sup> It is, however, extremely rare in PCA proceedings that either the parties or the tribunal elect to forgo a hearing.

The specific details of hearing procedure are generally worked out between the parties and the arbitral tribunal, often in a pre-hearing conference. The Rules give the tribunal a great deal of flexibility in conducting the proceedings,

---

<sup>53</sup> Art. 19(3) and (4).

<sup>54</sup> Art. 20.

<sup>55</sup> Art. 22.

<sup>56</sup> Art. 15(2).

“provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.”<sup>57</sup>

The Rules also provide for the presentation of evidence by witnesses and experts. If witnesses are to be heard, the party presenting them must communicate to the tribunal and the other party at least 30 days in advance their names and addresses, as well as the subject upon, and the languages in which, they will testify.<sup>58</sup>

The registry may be requested by the tribunal, or by the parties jointly, to make arrangements for a record of the hearing.<sup>59</sup> In large or complex cases, court reporters are generally engaged to prepare daily verbatim transcripts.

## 5.9 Confidentiality

Hearings are conducted *in camera*, unless the parties agree otherwise.<sup>60</sup> The degree of confidentiality of the arbitration proceedings is generally a matter for agreement between the parties. Despite the absence of extensive provisions in the various PCA Rules, the basic premise is that all aspects of the proceedings, including the pleadings and the award, will be confidential. While the 1899 and 1907 Conventions assume that the award will be made public, the various PCA Rules provide that it will not be made public (unless the parties agree otherwise).<sup>61</sup> In several recent PCA cases, the parties have agreed that while the pleadings and hearing transcripts are to remain confidential, the awards may be published. In two recent arbitrations between Ireland and the United Kingdom, the parties agreed to hold public hearings, and to make all documents available to the public. To the extent that information concerning proceedings is not confidential, the PCA makes it available on its website.<sup>62</sup>

## 5.10 Representation

The parties may be assisted by persons of their choice, the names and addresses of whom must be communicated in writing to the other party, to the International Bureau, and to the arbitral tribunal.<sup>63</sup> In inter-State arbitration, each party is required to designate an agent.<sup>64</sup>

<sup>57</sup> Art. 15.

<sup>58</sup> Art. 25(2).

<sup>59</sup> Art. 25(3).

<sup>60</sup> Art. 25(4).

<sup>61</sup> Art. 32(5); 1899 Convention, Art. 53; 1907 Convention, Art. 80.

<sup>62</sup> See, <http://www.pca-cpa.org>, “Recent and Pending Cases”.

<sup>63</sup> Art. 4.

<sup>64</sup> *Id.*

## 5.11 Language(s) of the Proceedings

The language or languages of the proceedings may be agreed upon by the parties. In the absence of an agreement, it will be determined by the tribunal.<sup>65</sup> The tribunal may require that the parties produce translations of documents submitted into the language of the proceedings,<sup>66</sup> and the registry may be requested to make arrangements for the translation of oral statements made at a hearing.<sup>67</sup>

## 5.12 Third-Party Intervention

While third-party intervention is not generally provided for in PCA proceedings, disputes between more than two parties may, with the agreement of all parties, be submitted to PCA arbitration. The PCA has prepared guidelines for the adaptation of its various rules to multiparty proceedings.<sup>68</sup> These recommend that the parties make specific arrangements for such matters as the method of appointment of arbitrators and apportioning costs. The legal staff of the International Bureau is available to assist parties to a multiparty contract or dispute in drafting an arbitration agreement and adapting the rules appropriately.

In inter-State arbitration involving the interpretation of a multilateral treaty, the treaty itself may require the parties to the dispute to notify the other Contracting States, which will, in some cases, have the right to intervene in the proceedings. The 1899 and 1907 Hague Conventions in fact contemplate this,<sup>69</sup> but do not contain rules of procedure regulating such intervention.

There are no provisions governing the issue of *amicus curiae* briefs, but given the degree of party autonomy in PCA arbitration, and the general requirement of privity of contract between the parties to the arbitration agreement, it seems unlikely that a tribunal would accept *amicus curiae* briefs without the express agreement of both parties.

---

<sup>65</sup> Art. 17.

<sup>66</sup> *Id.*

<sup>67</sup> Art. 25(3).

<sup>68</sup> See, <http://www.pca-cpa.org>: *Basic Documents - Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising under Multilateral Agreements and Multiparty Contracts.*

<sup>69</sup> 1899 Convention, Art. 56; 1907 Convention, Art. 84.



## 6. DECISION

### 6.1 Award

The final decision of the tribunal is in the form of a written award decided by the majority of arbitrators.<sup>70</sup> The award must include the reasons for the decision, unless the parties have agreed that no reasons are to be provided.<sup>71</sup> While the 1899 and 1907 Conventions contemplate that awards will be made public, the PCA Rules require the agreement of the parties for this.<sup>72</sup>

The award is final and binding upon the parties and is to be executed without delay.<sup>73</sup>

If the parties reach a settlement before the end of the proceedings, they may request the tribunal to record their agreement in the form of an award on agreed terms.<sup>74</sup>

### 6.2 Interpretation and Revision

After the award has been rendered, either party may request from the tribunal an interpretation of the award, correction of errors in computation, clerical or typographical errors, or an additional award on claims presented during the proceedings but omitted from the award. The time limits for this are brief, and differ slightly among the various sets of rules.<sup>75</sup> The tribunal is also authorized to correct errors in the award on its own initiative within 30 days from the date of communication of the award.

### 6.3 Appeal

Awards are final and binding, and there is no right of appeal.

### 6.4 Enforcement

In agreeing to arbitration under the PCA Rules, the parties undertake to carry out the award without delay.<sup>76</sup>

Awards in cases involving private parties are generally enforceable in the same manner as any international commercial arbitration award, for

<sup>70</sup> Arts. 31-32; 1899 Convention, Art. 52, 1907 Hague Convention, Art. 78.

<sup>71</sup> Art. 32(3).

<sup>72</sup> Art. 32(5); 1899 Convention, Art. 53; 1907 Convention, Art. 80.

<sup>73</sup> Art. 32(2).

<sup>74</sup> Art. 34(1).

<sup>75</sup> Arts. 35)37.

<sup>76</sup> Art. 32(2).

example within the municipal court system of any court having jurisdiction, or pursuant to the New York Convention.<sup>77</sup>

To the extent that the arbitration law of the place of arbitration requires that the award be filed or registered, the pertinent rules prescribe that the tribunal shall do this.<sup>78</sup>

As pointed out above, the waiver of jurisdictional immunity by States and intergovernmental organizations that arises from an agreement to arbitrate under the PCA Rules does not amount to a waiver of immunity from execution.

---

<sup>77</sup> See *PCA Summaries*, *supra* note 51.

<sup>78</sup> Art. 32(7).

## 7. REPRESENTATIVE CASES

As pointed out above, the PCA's early cases involved exclusively State parties and issues of public international law. Several of these, however, were relevant to the fields of international trade, investment and intellectual property, in that they raised issues of state responsibility and involved various kinds of property claims on behalf of foreign nationals. Investment disputes are a classic example of State responsibility claims involving property or contracts.

The *Religious Properties* case,<sup>79</sup> *French Claims against Peru*,<sup>80</sup> and the *Norwegian Shipowners* case<sup>81</sup> involved expropriation of property by the respondent State. These early awards of the PCA, along with others decided at about the same time, support the principle that while expropriation itself is permitted, compensation is required if it takes place.<sup>82</sup>

Other early cases involved contract claims. In *Norwegian Shipowners*,<sup>83</sup> the tribunal held that contracts as well as physical property had been expropriated and awarded compensation accordingly. The *Radio Corporation of America*<sup>84</sup> and the *Turriff Construction Company*,<sup>85</sup> both involved breach-of-contract actions by a non-State claimant. The *Lighthouses* case involved the rights and obligations of Greece with regard to a concession acquired by State succession.

A common issue in some of these early cases was whether there was an "international minimum standard", or whether foreigners must be content with the same treatment as the local population.

The *Canevaro case*,<sup>86</sup> which involved debts incurred by the Peruvian Government, held in favour of national treatment, but most arbitral and judicial practice, including that of the PCA, supports the international minimum standard.<sup>87</sup>

In the mid- to late 1990s, the PCA administered several arbitrations involving investment and contract disputes, including *Technosystem SpA v. Nigeria*,<sup>88</sup> *Moiz Goh Pte. Ltd v. State Timber Corp. of Sri Lanka*,<sup>89</sup> and several others

<sup>79</sup> *Expropriated Religious Properties (Spain, France and Great Britain v. Portugal, 1913)*, excerpt in *PCA Summaries*, supra note 5, at 103.

<sup>80</sup> *French Claims against Peru (1914)*, excerpt in *PCA Summaries*, supra note 5, at 106.

<sup>81</sup> *Norwegian Claims Case (USA/Norway, 1921)*, excerpt in *PCA Summaries*, supra note 5, at 110.

<sup>82</sup> See *Merrills*, supra note 6, at 8.

<sup>83</sup> *Supra*, note 82.

<sup>84</sup> *Supra*, note 7.

<sup>85</sup> *Sudan v. Turriff Construction Co. (1970)*, excerpt in *PCA Summaries*, supra note 5, at 164.

<sup>86</sup> *Canevaro Claim (Italy/Peru, 1912)*, excerpt in *PCA Summaries*, supra note 5, at 76.

<sup>87</sup> See *Merrills*, supra note 6, at 9.

<sup>88</sup> 1996, excerpt in *PCA Summaries*, supra note 5, at 176.

<sup>89</sup> 1997, excerpt in *PCA Summaries*, supra note 5, at 182.

that reached a settlement or were terminated before the completion of the arbitration proceedings. A 1998 award between Italy and Costa Rica involved a US\$ 13 million loan for development cooperation.<sup>90</sup>

Currently pending PCA arbitrations in the relevant areas include a major claim under a bilateral investment treaty<sup>91</sup> and the Bank for International Settlements Arbitration,<sup>92</sup> which involves the compensation due to private shareholders for the repurchase of publicly traded shares in an international organization.

---

<sup>90</sup> Excerpt in *PCA Summaries*, *supra* note 5, at 202.

<sup>91</sup> *Saluka Investments B.V. v. Czech Republic*, see PCA website: <http://pca-cpa.org/ENGLISH/RPC>.

<sup>92</sup> See *id.*

## 8. SUITABILITY OF PCA FOR INTERNATIONAL TRADE, INVESTMENT AND INTELLECTUAL PROPERTY DISPUTES

### 8.1 Suitability of Arbitration

Before addressing the suitability of the PCA as a forum for the resolution of disputes involving international trade, investment and intellectual property, it is useful to examine the essential differences between judicial settlement and arbitration, and the factors that a party, particularly a State, might wish to take into account in choosing between the two.

A major difference is that judicial settlement proceedings are held in public, whereas arbitration has traditionally been held in camera, and the award may be kept confidential. This could be particularly relevant in intellectual property disputes, in which parties may wish to submit commercially sensitive evidence.

Other important factors include:

- *Timing.* This will, of course, depend to some degree on the will of the parties to have the case proceed. Most of the PCA's recent arbitrations have been concluded in one to two years. Typically, arbitration can produce a result – whether on jurisdiction or on the merits – more speedily than judicial proceedings, making it a more attractive proposition when time is, or may be, of the essence.
- *Enforceability and authoritativeness.* As indicated above, arbitral awards are final and binding, as are court judgements. Awards in commercial arbitration are easily enforceable under the New York Convention.<sup>93</sup>
- *Composition of the tribunal.* Permanent judicial bodies do not allow the parties to select the adjudicators (although it may be possible, as at the ICJ, to nominate an ad hoc judge). Arbitration allows the parties great freedom in selecting the adjudicators. This allows them to select persons who possess specific expertise, whether legal, scientific or technical.
- *Cost.* Although traditionally touted as more cost-effective than judicial settlement, arbitration, particularly in complex cases, may prove to be as expensive, if not more so. Unlike judicial settlement, in arbitration the parties pay not only the costs of preparing their own cases but also the fees of the arbitrators and the costs of the secretariat or registry, including even room hire. On balance, however, arbitration proceedings may be quicker, which may produce savings on a party's own costs.

<sup>93</sup> See *supra*, note 51 and accompanying text.

In drafting a dispute resolution clause in a contract or international agreement, it is important for parties to bear in mind that disputes are best avoided, and that formal adjudication should be a last resort. The importance of careful preparation and drafting, should not, however, be ignored.

Often, the mere possibility of recourse to a dispute resolution mechanism may be sufficient to bring about the resolution of a dispute. The mere existence of an institution that can be seized at the initiative of a single party unilaterally can be enough to bring the parties together into agreement. In the course of designation of appointing authorities, for example, the PCA has noted that the mere fact of contacting a recalcitrant respondent is often sufficient to cause him to cooperate in the establishment of the arbitral tribunal and further proceedings.

## 8.2 Suitability of the PCA

Although disputes relating to international trade, investment and intellectual property involve different categories of subject matter and are often governed by particular laws, the PCA is suitable for all of them, notwithstanding their specialized character.

With respect to disputes between a State and a non-State party, the PCA “Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State” provide an effective means for conducting arbitral proceeding to resolve a wide variety of cases. As noted above, those Optional Rules are based, in large part, on the UNCITRAL Arbitration Rules that were designed for all types of disputes, regardless of their subject matter. The versatility of the UNCITRAL Arbitration Rules is demonstrated by the experience of the United States-Iran Claims Tribunal whose rules – like the PCA Rules – are also largely based on the UNCITRAL Arbitration Rules, and which has conducted thousands of arbitrations, including claims related to international trade, investments and intellectual property. Parties that agree to arbitration under the PCA Rules have the benefit of being able to look for guidance to the procedural decisions of the Iran-United States Claims Tribunal. Those decisions, which are published in 28 volumes to date, are readily available to assist parties who use PCA Rules.

Similarly, the PCA “Optional Conciliation Rules,” based on the UNCITRAL Conciliation Rules, are also suitable for use in resolving all types of disputes, including those involving international trade, investment or intellectual property.

The PCA is widely experienced in administering all types of proceedings, regardless of the facts and laws involved.

In addition to being suitable for use in disputes between States and non-State parties, the PCA also provides valuable service in cases involving only non-State parties, particularly those governed by the UNCITRAL Arbitration Rules. Those Rules provide that if one party fails to designate an arbitrator, or if all of the parties are unable to agree upon the third arbitrator or upon an appointing arbitrator to designate the third arbitrator, the Secretary-General of the PCA shall designate an appointing authority. The PCA has worldwide contact with arbitration institutions and has the capacity to choose promptly an appointing authority that has experience in the particular type of dispute involved. The PCA receives a substantial number of requests to designate appointing authorities. In addition, the Secretary-General of the PCA acts on requests that he personally serve as an appointing authority.

***Contact information for the PCA is:***

Permanent Court of Arbitration,  
Peace Palace,  
Carnegieplein 2,  
2517 KG The Hague,  
The Netherlands.

Tel: +31 70 302 4165

Fax: +31 70 302 4167

E-mail: **bureau@pca-cpa.org**

Website: **<http://www.pca-cpa.org>**



## 9. TEST YOUR UNDERSTANDING

1. Under which conventions was the PCA established?
2. Give two reasons why the PCA has a unique role in international dispute resolution.
3. Identify two types of dispute resolution mechanisms available under PCA auspices? Which is the most common type of dispute resolution?
4. What are the UNCITRAL Arbitration Rules and why do they include a reference to the Secretary-General of the PCA?
5. What is the most common method of appointing arbitrators? What is a list procedure, and when is it most commonly applied?
6. Name two sets of PCA procedural rules. What rules might purely private parties use if they wish to have the arbitration administered by the PCA?
7. Which parties to proceedings may apply for financial assistance from the PCA Financial Assistance Fund?
8. Which of the following forms of dispute resolution result in a binding decision:
  - a) Mediation;
  - b) Fact finding;
  - c) Arbitration;
  - d) All of the above
9. Which of the following disputes can be submitted to PCA arbitration:
  - a) A dispute between a State and an international organization;
  - b) A dispute between two or more international organizations;
  - c) A dispute between an international organization and a private party;
  - d) All of the above.
10. Describe the two different types of arbitration agreements.
11. If there is a disagreement between the parties as to the applicable substantive law, who determines which substantive law should apply?
12. Are proceedings usually conducted by written submissions only or by written pleadings and a hearing?
13. Does an arbitral tribunal have to provide reasons for its decision?
14. Once an arbitration tribunal has rendered its award, are the parties entitled to appeal the decision?
15. Name three aspects of arbitration that distinguish it from judicial settlement.



## 10. FURTHER READING

- **Aldrich G** (1999). The Iran-United States Claims Tribunal. In: Hamilton P, et al. eds. (1999). *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution: Summaries of Awards, Settlement Agreements and Reports*. The Hague/London/New York, Kluwer Law International
- **Muller S and Mijs W** (1993). The flame rekindled: New hopes for international arbitration. *Leiden Journal of International Law*, No. 2(6) (Special Issue 1993). The Hague, Kluwer Law International.
- **Alford R** (2000). *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, American Society of International Law Proceedings, 94: 160. Saskatoon, Canada, University of Saskatchewan.
- **Hamilton P** (2001). *Permanent Court of Arbitration Draft Rules for the Resolution of Disputes Concerning Natural Resources and/or the Environment*, International Law Forum/Forum du Droit International 3: 143. The Hague, Kluwer Law International.
- **Hamilton P, Requena HC, van Scheltinga L and Shifman B**, eds (1999). *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution – Summaries of Awards, Settlement Agreements and Reports*. The Hague, Kluwer Law International.
- **Holtzmann, HM** (1982). The History, Creation and Need for the UNCITRAL Arbitration Rules. In: Stockholm Symposium on International Commercial Arbitration.
- **International Bureau, PCA**, ed. (1991) The Permanent Court of Arbitration: New directions. Report of the Working Group on Improving the Functioning of the Court. The Hague.
- **International Bureau, PCA**, ed. (2000). Institutional and procedural aspects of mass claims settlement systems. *PCA Peace Palace Papers Series*, The Hague.
- **International Bureau, PCA**, ed. (2000). international alternative dispute resolution: Past, present and future . *The Permanent Court of Arbitration Centennial Papers*, The Hague.
- **International Bureau, PCA**, ed. (2001). International Investments and Protection of the Environment : The role of dispute resolution mechanisms. *PCA Peace Palace Papers Series*, The Hague.
- **International Bureau, PCA**, ed. (2002). Arbitration in air, space and telecommunications law: Enforcement of regulatory measures. *PCA Peace Palace Papers Series*, The Hague.
- **International Bureau, PCA**, ed. (2003). Strengthening relations with Arab and Islamic countries through international law: E-Commerce, the World Trade Organization dispute settlement mechanism and foreign investment. *PCA Peace Palace Papers Series*, The Hague.

- **International Bureau, PCA**, ed. (2003). Resolution of international freshwater disputes. *PCA Peace Palace Papers Series*, The Hague.
- **International Bureau, PCA**, ed. (forthcoming). *Labor Law Beyond Borders: ADR and the Internationalization of Labor Disputes*. The Hague.
- **Jennings RY** (2002). The difference between conducting a case in the ICJ and in an ad hoc arbitration tribunal: An inside view. In: Ando N, McWhinney E and Wolfram R, eds., *Liber Amicorum Judge Shigeru Oda* 893. The Hague, Kluwer Law International.
- **Jonkman H and Shifman BE** (1995). The role of the Permanent Court of Arbitration in the United Nations Decade of International Law and the Peaceful Settlement of International Disputes: 1990-1999 and beyond. In: Al-Nauimi N and Meese R, eds., *International Legal Issues Arising under the United Nations Decade of International Law*. The Hague, Kluwer Law International.
- **Jonkman PJH** (1995). The role of the Secretary-General of the Permanent Court of Arbitration under the UNCITRAL Arbitration Rules. *Leiden Journal of International Law*, 8: 185. The Hague, Kluwer Law International.
- **Jonkman, PJH** (2000). The Role of the Permanent Court of Arbitration in International Dispute Resolution, *Recueil des Cours, Académie de Droit International*, 279:9. The Hague, Kluwer Law International.
- **Kwiatkowska B** (2001). The Eritrea-Yemen arbitration: Landmark progress in the acquisition of territorial sovereignty and equitable maritime boundary delimitation, *Ocean Development and International Law*, 32: 1.
- **Merrills JG** (1999). The contribution of the Permanent Court of Arbitration to International Law and to the settlement of disputes by peaceful means. In: Hamilton P et al., eds. *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution: Summaries of Awards, Settlement Agreements and Reports*. The Hague, Kluwer Law International.
- **Pinto M** (2000) Introductory statement by the Secretary-General of the Iran-United States Claims Tribunal. In: International Bureau, PCA, ed. *International Alternative Dispute Resolution: Past, Present and Future – The Permanent Court of Arbitration Centennial Papers (PCA Centennial Papers)*. The Hague.
- **Ratliff DP** (2001). The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. *Leiden Journal of International Law*, 14: 887.
- **Rest A** (1999). An international court for the environment: The role of the Permanent Court of Arbitration. *Asia Pacific Journal of Environmental Law*, 4: 107.
- **Rosenne S**, ed. (2001). *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*. The Hague, Kluwer Law International.

- **Sands P, Mackenzie R, and Shany Y**, eds. (1999). *Manual on International Courts and Tribunals*. London, Butterworths.
- **Sharwood R** (2000). The Hague Peace Conference of 1899: A historical introduction. In: International Bureau, PCA, ed., *International Alternative Dispute Resolution: Past, Present and Future – The Permanent Court of Arbitration Centennial Papers 170 (PCA Centennial Papers)*. The Hague.
- **Shifman BE** (1995). The revitalization of the Permanent Court of Arbitration. *International Journal of Legal Information*, 23: 284.
- **Van den Hout TT** (2000). The Permanent Court of Arbitration: Responding to a century of globalization. *International Law Forum/ Forum du Droit International*, 2: 235.
- **Wu CQ** (2002). A Unified Forum? The new arbitration rules for environmental disputes under the Permanent Court of Arbitration. *Chicago Journal of International Law*, 3: 263.