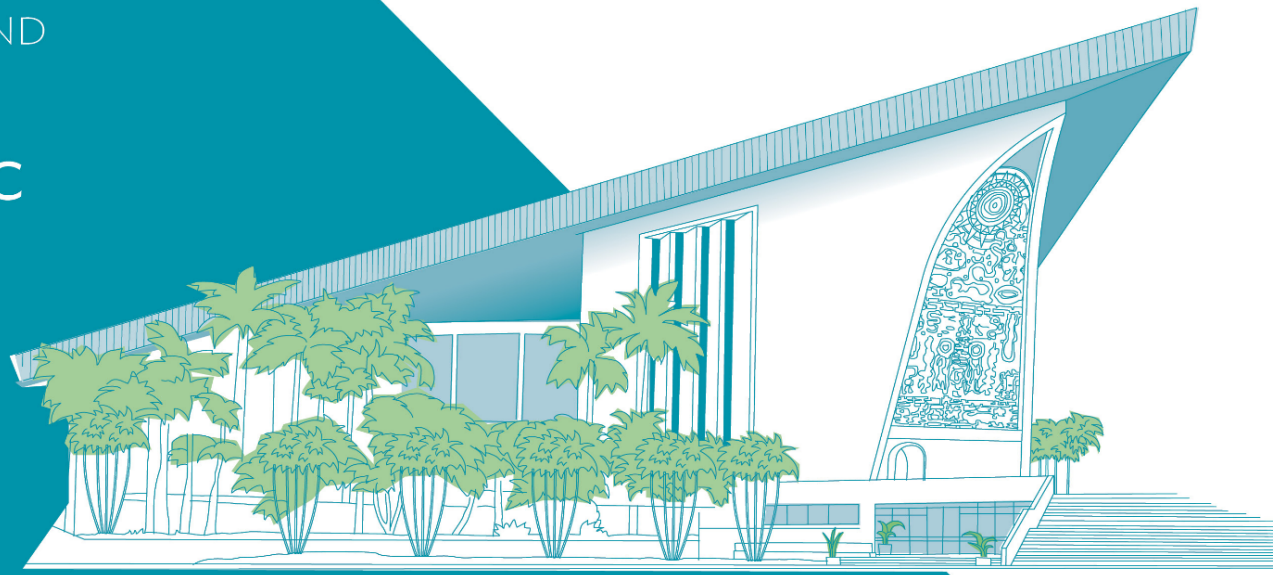
INTERNATIONAL MEDIATION AND ARBITRATION CONFERENCE

2nd South Pacific International Arbitration Conference

25–26 March 2019
Stanley Hotel, Port Moresby
Papua New Guinea



CONSENT TO ARBITRATION IN INTER-STATE AND "MIXED" DISPUTES

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26 March 2019

Overview:

- **Forms of State consent to arbitration**
- **Introduction to the PCA Arbitration Rules 2012: model clause and additions to consider**

Image: tribunal site visit of October 2013 to relevant areas of the Bay of Bengal in the Bangladesh v. India arbitration, which concluded in 2014.

Inter-State cases

Consent by special agreement

***e.g. Island of Palmas (USA v. Netherlands)* (1925)**

Article I

The United States of America and Her Majesty the Queen of the Netherlands hereby agree **to refer the decision of the above-mentioned differences to the Permanent Court of Arbitration at The Hague**.

The arbitral tribunal shall consist of one arbitrator. The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory.

The two Governments shall designate the Arbitrator from the members of the Permanent Court of Arbitration. If they shall be unable to agree on such designation, they shall unite in requesting the President of the Swiss Confederation to designate the Arbitrator.

Inter-State cases

The Government of Malaysia and the Government of the Republic of Singapore (the "Parties")

Recalling the Points of Agreement on Malayan Railway Land in Singapore entered into between the Parties on 27 November 1990 (the "POA");

Considering the subsequent events as outlined in the Annex;

Recognising that both Parties have different views relating to the development charges payable on the three POA land in Tanjong Pagar, Kranji and Woodlands;

Desiring to settle this issue amicably through arbitration under the auspices of the Permanent Court of Arbitration;

Have agreed as follows:

Article 1
Submission of dispute

1. The Parties hereby submit the following question to final and binding arbitration under the auspices of the Permanent Court of Arbitration in accordance with this Agreement:

> "Whether in all the circumstances, including the agreed matters set out in the Annex, M-S Pte Ltd would have been liable to pay development charges on the three land parcels referred to below (the amount of which had been determined as S$1.47 billion) if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the lands in accordance with the proposed land uses set out in the Annexes of the POA as particularized below:

Consent by special agreement

e.g.

Malaysia/Singapore *Railway Land Arbitration* (2012)

Inter-State cases

Advance consent in bilateral treaty

e.g. Kishenganga (Pakistan/India) (2013)

The Indus Waters Treaty 1960

(5) A Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G

(a) upon agreement between the Parties to do so; or

(b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation; or

(c) at the request of either Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party comes to the conclusion that the other Government is unduly delaying the negotiations.

Inter-State cases

Advance consent in a multilateral treaty: e.g. United Nations Convention on the Law of the Sea (1982)

PART XV – Section 2 – Compulsory Procedures Entailing Binding Decisions

Art. 287 – Choice of Procedure

(1) ... a State shall be free to choose ... one or more of the following means for the settlement of disputes ...
(a) the International Tribunal for the Law of the Sea [...];
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex VII...

(3) ... a State … not covered by a declaration… shall be deemed to have accepted [Annex VII] arbitration…

(5) If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

14 cases at the PCA under the United Nations Convention on the Law of the Sea (1982)

Arbitrations under Annex VII

Malaysia v. Singapore, *Land reclamation, Settled 2005*

Barbados v. Trinidad, *Maritime delimitation, Award 2006*

Guyana v. Suriname, *Maritime delimitation, Award 2007*

Ireland v. UK ("Mox Plant"), *Settled 2009*

Argentina v. Ghana, *Settled 2013*

Bangladesh v. India, *Award 2014*

Denmark v. EU ("Atlanto-Scandian Herring"), *Settled 2014*

Mauritius v. UK ("Chagos Archipelago"), *Award 2015*

Philippines v. China, ("South China Sea") *Award 2016*

Netherlands v. Russia *("Arctic Sunrise")*, *Award 2015*

Malta v. Sao Tome e Principe *("Duzgit Integrity"), Award 2016*

Italy v. India ("*Enrica Lexie*"), *hearing scheduled July 2019*

Ukraine v. Russia (coastal rights), *bifurcated 2018, jurisdiction objections to be heard 2019*

Conciliation under Annex V

Timor Leste and Australia, *Treaty and Commission Report, 2018*

PCA "mixed" arbitrations: contracts

Consent in a contract between private party and State

e.g. the Channel Tunnel fixed link

Concession contract between UK and France (Principals), the Channel Tunnel Group Ltd and France Manche SA (Concessionaires), Clause 40

Clause 40: Settlement of Disputes

40.1 Any dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty at the request of any party.

ARTICLE 19

Arbitration

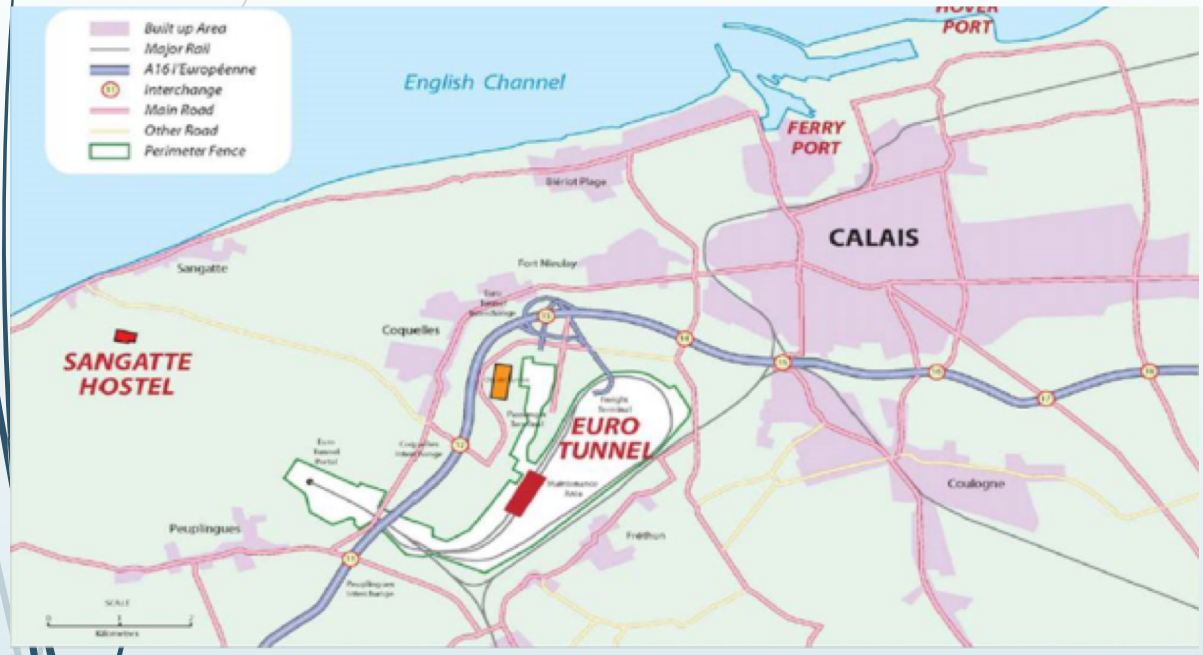
(1) An arbitral tribunal shall be constituted to settle:

(*a*) disputes between the two States relating to the interpretation or application of this Treaty which are not settled through consultations under Article 18 within three months;

(*b*) disputes between the Governments and the Concessionaires relating to the Concession;

(*c*) disputes between the Concessionaires relating to the interpretation or application of this Treaty.

PCA "mixed" arbitrations: contracts



Consent in a <u>contract</u>
between private party and State

e.g. the Eurotunnel arbitration (2010)

(1) The Channel Tunnel Group
(2) France Manche SA v. (1) the United Kingdom and (2) France

PCA "mixed" arbitrations: investor-State arbitration

Consent to arbitration of claims by foreign investors through a multilateral/bilateral investment treaty

e.g. the Hong Kong-Australia bilateral investment treaty

ARTICLE 10

Settlement of Investment Disputes

A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.

PCA "mixed" arbitrations: investor-State arbitration

Consent to arbitration of claims by foreign investors through a multilateral/bilateral investment treaty

e.g. Philip Morris (Hong Kong) v. Australia

PCA "mixed" arbitrations: investor-State arbitration

Consent in national investment law

e.g. Law on Investments in the Kyrgyz Republic (2003)
Article 18: Settlement of Investment Disputes

1. The investment dispute shall be settled in accordance with any applicable procedure preliminarily agreed upon by an investor and the authorized government bodies of the Kyrgyz Republic which does not preclude the investor from seeking other legal remedies in accordance with Kyrgyz laws.

2. Failing such agreement, the investment dispute between the authorized government bodies of the Kyrgyz Republic and the investor shall be settled by consultations between the parties. If the parties do not settle amicably within 3-month period from the day of the first written request for such consultation, any investment dispute between the investor and the government bodies of the Kyrgyz Republic shall be settled in judicial bodies of the Kyrgyz Republic, unless in case of a dispute between the foreign investor and the government body, one of the parties requests the dispute to be considered in accordance with one of the following procedures by submitting the dispute to:

a) [….]

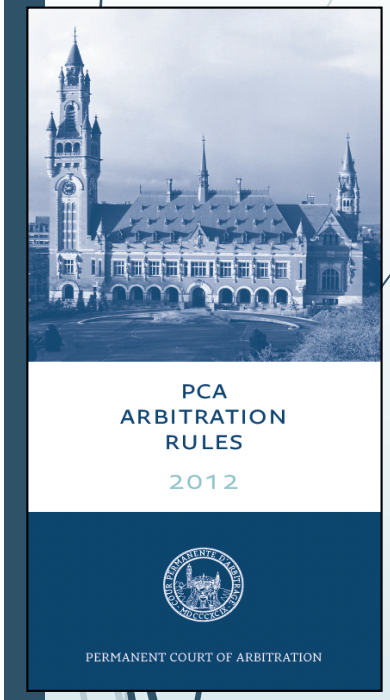
b) arbitration or an international temporary arbitral tribunal (commercial court) formed in accordance with the arbitration rules of the UN Commission on International Trade Law.

PCA "mixed" arbitrations: investor-State arbitration

Consent in <u>national investment law</u>

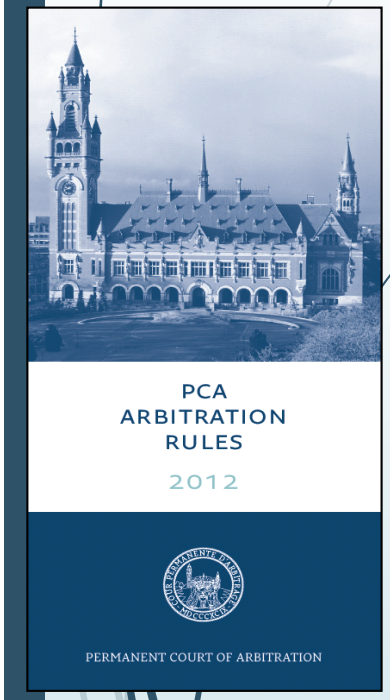
e.g. Centerra Gold (Canada) et al v. Kyrgyz Republic (2008)

PCA Arbitration Rules 2012
Model clause



Any dispute, controversy or claim arising out of or in relation to this [agreement] [treaty], or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012.

PCA Arbitration Rules 2012
Note on Model Clause



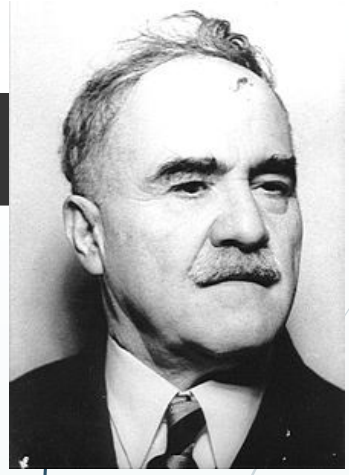
Parties should consider adding:

(a) The number of arbitrators shall be ... (one, three, or five);

(b) The place of arbitration shall be ... (town and country);

(c) The language to be used in the arbitral proceedings shall be ... .

Number of arbitrators



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e.g. submission of dispute to a sole arbitrator in Island of Palmas (1925)
Pictured: Judge Max Huber

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- *typical in modern investor-State arbitration*

e.g. pictured: Resolute Forest Products Inv. v. Canada (pending)

5

- *typical in inter-State arbitrations*

e.g. under Annex VII of the United Nations Convention on the Law of the Sea (1982)
Pictured: the tribunal in Philippines v. China (2015)

... and sometimes: **7**

e.g. the Court of Arbitration in Pakistan v. India (Kishenganga) under the Indus Waters Treaty (1960)

Place of arbitration

Place of arbitration

PCA Arbitration Rules 2012, Art. 18
(1) If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case…

e.g. (under UNCITRAL Rules): *Philip Morris v. Australia*, Procedural Order No. 3

39. … Indeed, if the Parties cannot agree, the choice of a place of arbitration in Europe for a dispute between two Parties in Asia and Australia could be seen as implying that no suitable place is available in that region of the world. Both Parties agree that Singapore is such a suitable place, though the Respondent expresses "a marginal preference" for London. In such circumstances … the Tribunal feels that the choice of Singapore is the more natural and logical one.

40. Some further considerations would seem to confirm this preference…the location of the subject matter in dispute and proximity of evidence, convenience and travel distances of the parties and costs of support services needed would seem to speak in favour of Singapore over London … Finally, the PCA, which is administering the present arbitration, has concluded a Host Country Agreement with Singapore, but not with the UK…

PCA Host Country Agreements

- Entered into with the PCA's Contracting Parties
- Mirror the framework of the Headquarters Agreement between the PCA and the Netherlands
- Allow the PCA to offer the full benefits of its services outside of The Hague, including hearing space, certain legal privileges and immunities for participants, and visa assistance

Language of arbitration

Language of arbitration

Art. 19
(1) Subject to an agreement by the Parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. …

- "language of the arbitration": applies to the statement of claim, statement of defence, any further written statements, and the language(s) to be used in any oral hearings
- Tribunal may order documents or exhibits annexed to the written statements to be accompanied by a translation into the language of the arbitration (PCA Rules 2012, Art. 19(2))
- Together, the staff of the International Bureau of the PCA speak a combined 18 languages, including the 6 official languages of the United Nations
- In 2018, the PCA administered cases in Arabic, Chinese, English, French, Korean, Portuguese, Russian, and Spanish

Thank you.

Image: signature of the new Maritime Boundaries Treaty between Timor-Leste and Australia in New York in the presence of the Secretary-General of the United Nations, H.E. Antonio Guterres, and the Conciliation Commission on 6 March 2018, following the first conciliation under Article V of the United Nations Convention on the Law of the Sea