The Permanent Court of Arbitration and its Role for the Settlement of Disputes under the Energy Charter Treaty

Presentation, Executive Training Programme, Astana 13 June 2014
1. History and Structure of the PCA

2. Activities of the PCA

3. The role of the PCA with regard to disputes under the ECT

4. Criteria for choosing between ICSID and non-ICSID arbitration under the ECT

5. Issues that have recently arisen in PCA-administered proceedings under the ECT
History and Structure of the PCA
What is the PCA?

- Founded in 1899
- International organization with currently 115 Member States
- Seated in the Peace Palace in The Hague
History of the PCA

- Founded in 1899 as a result of the First Hague Peace Conference (convened at the initiative of Czar Nicholas II)

- Participants: European States, China, Japan, Mexico, Persia, Siam, United States

- Principal outcome: 1899 Convention for the Pacific Settlement of International Disputes
Art. 16: “Arbitration is recognized ... as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.”

Art. 20: “With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times ...”
Building of the Peace Palace

- Peace Palace purpose-built for the PCA from 1907 to 1913
- Donation from Andrew Carnegie and gifts of various Member States
The PCA consists of three parts:

- Administrative Council
- Members of the Court
- International Bureau
Administrative Council

- Representatives of the 115 Member States, chaired by the Foreign Minister of the Netherlands

- Decides on all fundamental questions regarding the work of the PCA (in coordination with the Secretary-General)

- Controls the PCA’s administration and the PCA’s budget
Art. 23 of the 1899 Hague Convention:

... each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.

- List of potential arbitrators (parties to arbitral proceedings can appoint arbitrators that are not on the list)

- Appointed for a duration of 6 years (renewable)

- Additional functions: right to propose candidates for the Nobel Peace Prize; “national group” of Members has right to propose candidates to become Judges at the International Court of Justice
International Bureau

- Led by Secretary-General
- Team of approximately 40 people
- Carries out day-to-day work of the PCA
Activities of the PCA
Main activity: Support and administration of arbitral proceedings involving at least one State, State-controlled entity or International Organization

Originally intended to facilitate inter-State disputes – however today large share of “mixed arbitrations” with a State or State-controlled entity on one side and a private company on the other

Registry services

- Official channel of communication between arbitrators and parties
- Registration and archivation of relevant documents
- Cost administration
- Organisation of meetings and hearings
Evolution of the number of PCA Registry cases since 2002
Number of PCA Registry cases

Evolution of the number of PCA Registry cases since 1900

- 231 total cases
- 198 of which brought since the year 2000
PC A caseload in 2013

- Record number of 100 PCA-administered arbitrations, including 35 newly registered in 2013
- 9 inter-State disputes
- 30 arbitrations based on a contract with a State or State-controlled entity
- 61 arbitrations based on a Bilateral or Multilateral Investment Treaty
Current Registry cases of the PCA

  - Philippines v. China (maritime jurisdiction)
  - Mauritius v. UK (“Chagos Archipelago”)
  - Netherlands v. Russia (“Arctic Sunrise”)

- Other inter-State disputes
  - Croatia v. Slovenia (land and maritime boundaries)
    - ad hoc agreement (compromis)

- Investor-State disputes
  - Philip Morris v. Australia
    - Australia-Hong Kong BIT: Restrictions regarding the sale of tobacco products
Appointing Authority services offered by the PCA

Secretary-General of the PCA acts as:

- Designating Authority regarding the designation of an Appointing Authority (by default under the UNCITRAL Arbitration Rules)
- Appointing Authority if so agreed by the Parties or provided for under the applicable rules (e.g. PCA Arbitration Rules 2012)

The PCA has acted as Designating or Appointing Authority in over 500 cases and presently deals with approximately 40 such cases each year

The PCA’s Appointing Authority services are not limited to arbitrations involving States or State entities, but extend to purely commercial arbitrations between private parties
Role of the PCA with regard to disputes under the ECT
Settlement of Disputes Between an Investor and a Contracting Party

Article 26 ECT

“(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
(b) in accordance with any applicable, previously agreed dispute settlement procedure; or
(c) in accordance with the following paragraphs of this Article.”
Settlement of Disputes Between an Investor and a Contracting Party

Article 26 ECT (continued)

“(4) In the event that an investor chooses to submit the dispute to resolution under subparagraph (2)(c), the investor shall further provide its consent in writing for the dispute to be submitted to:

(a)(i) the International Centre for Settlement of Investment Disputes, established pursuant to the [ICSID Convention] if the Contracting Party of the investor and the Contracting Party party to the dispute are both parties to the ICSID Convention.

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (… UNCITRAL); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.” (emphasis added)
Settlement of Disputes Between Contracting Parties

Article 27 ECT

“(1) Contracting Parties shall endeavor to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.

(2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may … upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.

(3) Such an ad hoc tribunal shall be constituted as follows:

(d) **Appointments** requested to be made in accordance with this paragraph **shall be made by the Secretary-General of the Permanent Court of International Arbitration** within 30 days of the receipt of a request to do so. …

…

(f) In the absence of an agreement to the contrary between the Contracting Parties, the **Arbitration Rules of UNCITRAL shall govern**, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators. …

…

(k) Unless the Contracting Parties parties to the dispute agree otherwise, the tribunal shall **sit in The Hague**, and **use the premises and facilities of the Permanent Court of Arbitration**.” (emphasis added)
UNCITRAL Arbitration Rules 1976

- Adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1976
- Recommended by the General Assembly of the United Nations for use in international commercial contracts
- Widely used in ad hoc arbitrations as well as administered arbitrations
- Cover all aspects of the arbitral process, including:
  - appointment of arbitrators
  - conduct of arbitral proceedings
  - form, effect and interpretation of arbitral awards
- Revised in 2010
UNCITRAL Arbitration Rules 2010

- Main changes to 1976 Rules:
  - Changes reflecting technological evolution
  - Extended role of appointing authorities
  - Provision for multi-party arbitrations
  - Requirement of reasonableness of arbitrators’ fees and review mechanism regarding costs of arbitration
  - More detailed provisions on interim measures
How does an ECT arbitration become a PCA Registry case?

- ECT arbitrations are often conducted under the UNCITRAL Rules
- PCA provides alternative to pure ad hoc arbitration
- Link between UNCITRAL Rules and the PCA: Secretary-General of the PCA by default competent to designate Appointing Authority in proceedings under the UNCITRAL Rules (Articles 6, 7 of 1976 UNCITRAL Rules, Article 6(2) of 2010 UNCITRAL Rules) and often selected to act as Appointing Authority
- Parties often choose to have their case administered by the PCA
Example of provision regarding Registry function of PCA (Philip Morris v. Australia, PO No. 1)

7.1 The Registry shall maintain an archive of filings and correspondence and handle Party deposits and disbursements. If needed, the Registry will make its hearing and meeting rooms in The Hague, Singapore, or other venues, available to the Parties and the Tribunal at no charge; costs of catering, court reporter, or other technical support associated with hearings or meetings shall be borne by the Parties.

7.2 PCA expenses (such as air courier costs and bank transfer fees) shall be paid in the same manner as Tribunal fees and expenses (see Section 5).

7.3 The Tribunal may appoint a member of the Registry to act as Administrative Secretary. The Administrative Secretary shall carry out administrative tasks on behalf of the Tribunal, and shall bill his or her time in accordance with the PCA Schedule of Fees. The primary purpose of such an appointment would be to reduce the costs that would otherwise be incurred in the Tribunal carrying out purely administrative tasks.
Criteria for choosing between ICSID and non-ICSID arbitration under the ECT
Comparison of ICSID and non-ICSID Regimes

Figure III.4. Known investor–State treaty-based disputes, 1987–2011

Source: UNCTAD.
Overview

- Jurisdictional hurdles
- Challenges to arbitrators
- Provisional measures
- Transparency
- Costs
- Annulment
- Enforcement
Jurisdictional hurdles under the ICSID Convention

- ICSID Convention may impose jurisdictional requirements in addition to those applicable under the relevant IIA

<table>
<thead>
<tr>
<th>ICSID Convention</th>
<th>UNCITRAL/SCC Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ notion of “investment” under Article 25(1) ICSID imposes jurisdictional requirements independent of the definition of “investment” under the relevant IIA (“Salini test”)</td>
<td>▪ ECT contains broad definition of “investment” as “every kind of asset”, without specifying criteria such as those commonly associated with the notion of “investment” under the ICSID Convention</td>
</tr>
<tr>
<td>▪ Art. 25(2) ICSID: requires investor to have nationality of a Contracting State to the ICSID Convention</td>
<td>▪ no corresponding limitations under UNCITRAL or SCC Rules, meaning that only the nationality requirements under the ECT apply.</td>
</tr>
<tr>
<td>▪ Art. 25(2)(a) ICSID: excludes ICSID jurisdiction with regard to double-nationals having nationality of the host State</td>
<td></td>
</tr>
</tbody>
</table>
Challenges to arbitrators

- ICSID Convention may make it more difficult to challenge an arbitrator

<table>
<thead>
<tr>
<th>ICSID Convention</th>
<th>UNCITRAL/SCC Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Art. 57 ICSID: Challenges “on account of any fact indicating a <strong>manifest lack of the qualities</strong> required by Art. 14(1)”</td>
<td>▪ Art. 10(1) of the 1976 UNCITRAL Rules, Art. 15(1) of the SCC Rules: Challenge possible if circumstances “give rise to <strong>justifiable doubts</strong> as to the arbitrator’s impartiality or independence”</td>
</tr>
</tbody>
</table>
| ▪ Art. 58 ICSID: Challenges in the first place decided by **co-arbitrators** | ▪ Art. 12(1) of the 1976 UNCITRAL Rules: Challenges decided by **Appointing Authority**  
▪ Art. 15(4) of the SCC Rules: Challenges to be decided by **Board** |
### Possibility to obtain provisional measures

- ICSID Convention may not allow investor to obtain provisional measures before the domestic courts

<table>
<thead>
<tr>
<th>ICSID Convention</th>
<th>UNCITRAL/SCC Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Article 26 ICSID: Consent to ICSID arbitration “shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy”</td>
<td></td>
</tr>
<tr>
<td>▪ Rule 39(6) Arbitration Rules: Nothing shall prevent parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures</td>
<td>▪ Article 26(3) of 1976 UNCITRAL Rules, Article 32(5) of the SCC Rules: A request for interim measures to a judicial authority shall not be deemed incompatible with the agreement to arbitrate</td>
</tr>
</tbody>
</table>
## Comparison of ICSID and non-ICSID Regimes

### Transparency regimes

- ICSID proceedings may have higher degree of publicity compared to proceedings under the current UNCITRAL regime or the SCC Arbitration Rules

<table>
<thead>
<tr>
<th>ICSID Convention</th>
<th>UNCITRAL/SCC Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Administrative and Financial Regulations, Reg. 22: requests for arbitration are published by ICSID Secretariat</td>
<td>▪ UNCITRAL Rules silent on publication of requests for arbitration, but parties may agree to publish details</td>
</tr>
<tr>
<td>▪ Rule 37(2) of Arbitration Rules: non-disputing party submissions allowed under certain conditions after consultation of the parties</td>
<td>▪ UNCITRAL Rules silent on non-disputing parties, but tribunals have allowed submissions by <em>amici curiae</em> under general power to determine proceedings in Article 15 of 1976 Rules (e.g. <em>Methanex v. USA</em>, <em>AWG v. Argentina</em>)</td>
</tr>
<tr>
<td>▪ Rule 32(2) of Arbitration Rules: non-parties may be admitted to observe hearings unless either party objects</td>
<td>▪ Article 25(4) of 1976 UNCITRAL Rules: hearings to be held <em>in camera</em> unless parties agree otherwise</td>
</tr>
<tr>
<td>▪ Article 48(5) ICSID, Rule 48(4) of Arbitration Rules: excerpts of legal reasoning underlying award to be published even in the absence of consent of parties with regard to publication of award itself</td>
<td>▪ Article 32(5) of 1976 UNCITRAL Rules: awards to be made public only with consent of both parties</td>
</tr>
<tr>
<td></td>
<td>▪ Article 46 of the SCC Rules: SCC and tribunal shall maintain the confidentiality of the arbitration and the award</td>
</tr>
</tbody>
</table>
Comparison of ICSID and non-ICSID Regimes

Costs

<table>
<thead>
<tr>
<th>ICSID Convention</th>
<th>SCC Rules</th>
<th>UNCITRAL Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ ICSID charges annual administrative fees as well as charges for special services</td>
<td>▪ SCC charges administrative fee based on amount in dispute</td>
<td>▪ No administrative fees in case of pure <em>ad hoc</em> proceedings under the UNCITRAL Rules</td>
</tr>
<tr>
<td>▪ Fees of arbitrators in principle based on fixed daily rates, but higher rates may be requested through Secretary-General</td>
<td>▪ Fees of arbitrators based on amount in dispute</td>
<td>▪ Fees of arbitrators to be agreed between tribunal and parties (subject to control of the appointing authority under Article 41 of 2010 Rules)</td>
</tr>
<tr>
<td>▪ Article 61(2) ICSID: tribunal has broad discretion regarding the allocation of costs between the parties</td>
<td>▪ Articles 43(5), 44 of the SCC Rules: apportioning of costs “having regard to the outcome of the case and other relevant circumstances”</td>
<td>▪ Art. 40(1) of 1976 Rules, Article 42 of 2010 Rules: principle that loser pays costs, subject to discretionary adjustment by tribunal</td>
</tr>
</tbody>
</table>
Comparison of ICSID and non-ICSID Regimes

Annulment and enforcement of awards

<table>
<thead>
<tr>
<th>ICSID</th>
<th>UNCITRAL/SCC Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Self-contained annulment system</strong> under Article 52 ICSID excludes review of awards by national courts</td>
<td><strong>Awards are subject to review by the courts at the seat of the arbitration</strong></td>
</tr>
<tr>
<td><strong>Articles 54 and 55 ICSID: Member States to enforce pecuniary obligations imposed by awards as if they were final judgments of their own courts, without prejudice to national laws relating to sovereign immunity from execution</strong></td>
<td><strong>Enforcement pursuant to the New York Convention (can be refused on limited grounds of serious procedural irregularities and violation of public policy)</strong></td>
</tr>
</tbody>
</table>
Issues that have recently arisen in PCA-administered proceedings under the ECT
The PCA is presently administering 11 investor-State arbitrations under the ECT.

Issues that have recently arisen in PCA-administered ECT arbitrations:

- Relevance of EU law
- Denial of benefits under Article 17 ECT
- Ex-ante consolidation (proceedings initiated by multiple claimants and/or under multiple legal instruments)
Relevance of EU law to proceedings under the ECT

- Question as to relationship between EU law and the ECT addressed in November 2012 decision in ICSID case Electrabel v. Hungary
  - European Commission was allowed to make submission as a non-disputing party
  - Commission argued that part of the claims brought by investor were directed at a measure attributable to the EU rather than Hungary and should therefore have been brought against the EU
  - Commission further argued that arbitral tribunals under Article 26 ECT lack jurisdiction over claims against the EU brought by EU investors
  - Commission contended that there was a presumption under the ECT that compliance with EU law on State aid could not be a breach of the ECT and that EU Member States had agreed inter se on the supremacy of EU law over the ECT
Tribunal in Electrabel v. Hungary held that, given the ECT’s historical genesis and its text, the ECT should, if possible, be interpreted in harmony with EU law.

Tribunal further held that, if there were an inconsistency between the ECT and EU law that could not be reconciled through a harmonious interpretation of the ECT, then EU law would prevail over the ECT in the context of a claim brought by an EU national against an EU Member State.

However, the Tribunal also held that the claims before it related to measures of Hungary rather than measures of the EU.

The Tribunal found that there was no inconsistency between the ECT’s provisions on investor-State dispute settlement and EU law.
Article 17(1) ECT provides: “Each Contracting Party reserves the right to deny the advantages of this Part [Part III, Investment Promotion and Protection] to: ... a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized” (emphasis added)

Tribunals have repeatedly held that Art. 17(1) ECT only applies if invoked by a host State and only prospectively from the date where it is being invoked (Plama v. Bulgaria, Jurisdictional decisions in PCA-administered UNCITRAL cases against Eastern European State, Liman Caspian Oil v. Kazakhstan, Stati v. Kazakhstan)
Can investors band together to sue a State with regard to similar measures in a single set of proceedings?

Question has previously arisen in particular in ICSID arbitrations brought by Argentine bondholders under Argentinian BITs (Decisions on Jurisdiction in Abaclat and Ambiente Ufficio)

Two recent cases involving the PCA:

- PCA-administered case brought by 16 investors from various European jurisdictions against Southern European State under the ECT with regard to investments in the solar energy sector
- PCA SG requested to act as Appointing Authority in case brought by 10 investors from various European jurisdictions against a Central European State under the ECT and various BITs with regard to investments in the solar energy sector
ECT proceedings against Southern European State

- PCA-administered case brought by group of investors against Southern European State under the ECT with regard to investments in the solar energy sector
- Claims relate to the introduction of legislative and regulatory changes affecting renewable energy projects
- State cooperated regarding establishment of the Tribunal
- State then argued before the Tribunal that had not agreed to “consolidated” proceedings with regard to “unrelated” claims
- The proceedings are ongoing, with the question of “ex-ante” consolidation still to be decided
ECT proceedings against Central European State

Case brought by group of investors from various European jurisdictions against Central European State under ECT and various BITs with regard to investments in the solar energy sector

- Claimants filed joint request for arbitration under the UNCITRAL Rules and appointed an arbitrator
- Respondent objected to Claimants’ bringing their claims in single arbitration and appointed various arbitrators with regard to what it saw as separate disputes
- Claimants applied to the SG of the PCA to act as Appointing Authority and appoint a single arbitrator on behalf of Respondent due to the latter’s failure to do so
- PCA SG rejected Claimants’ request
- Claimants are now pursuing their claims in 6 separate sets of proceedings, 3 of which are administered by the PCA
The Permanent Court of Arbitration and its Role for the Settlement of Disputes under the Energy Charter Treaty

Questions?