

Kluwer Arbitration Blog

State-to-State Arbitration at the Permanent Court of Arbitration

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The Permanent Court of Arbitration (“PCA”) has played key role in the resolution of international disputes for well over a hundred years now. Over the past decade, however, the PCA’s importance and activities have significantly increased. Thirty-five investor-state arbitrations under bilateral or multilateral investment treaties or investment laws are currently pending at the PCA, in addition to twenty commercial arbitrations involving states, state entities, or international organizations. Moreover, several important and now completed state-to-state disputes have recently been arbitrated under the auspices of the PCA, including the Abyei Arbitration between Sudan and the Sudan People’s Liberation Movement/Army, the Eritrea-Ethiopia Claims Commission, the Eritrea-Ethiopia Boundary Commission, and arbitrations under the United Nations Convention on the Law of the Sea (“UNCLOS”) between Guyana and Suriname and between Barbados and Trinidad and Tobago. All of these arbitrations involved international maritime or land boundary disputes with the exception of the Eritrea-Ethiopia Claims Commission which addressed violations of international law arising out of an armed conflict (over a disputed boundary no less).

Currently, the PCA is administering seven active state-to-state arbitrations. Public information is available on five of these arbitrations, four of which involve some sort of boundary dispute: (1) a maritime and territorial dispute between Croatia and Slovenia; (2) a maritime dispute between Mauritius and the United Kingdom; (3) a dispute over the diversion of a river between Pakistan and India; (4) a maritime dispute between Bangladesh and India; and (5) a dispute over an “effect means” provision in a bilateral investment treaty between Ecuador and the United States. Brief background on these cases and their current procedural posturing follows below.

Croatia-Slovenia

The maritime boundary between Croatia and Slovenia in the Piran Bay has been disputed since the dissolution of the former Yugoslavia in 1991. Because Slovenia has a relatively small coast, its territorial waters are boxed off from international waters by Croatian and Italian territorial waters, and Slovenia seeks a direct corridor from its own territorial waters to international waters. In addition, there are several disputed aspects of the land boundary between the two states. The dispute has had implications with respect to Croatia’s bid to join the European Union as Slovenia, a member of the European Union, blocked Croatia’s accession talk for several years out of a concern that the accession process could prejudice a solution to the boundary dispute between the two countries. In November 2009, however, Croatia and Slovenia signed a bilateral agreement submitting the dispute to arbitration before a five-member ad hoc tribunal, and Croatia signed the European Union-accession treaty in December 2011. Under Article 4(b) of the arbitration treaty, the tribunal is to apply principles of “international law, equity and the principle of good

neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances.” Article 6(2) provides that the PCA’s Optional Rules for Arbitrating Disputes between Two States are to be the procedural rules for the proceedings.

The tribunal was constituted earlier this year after the parties mutually agreed on three members of the tribunal: Judge Gilbert Guillaume, a French national; Professor Vaughan Lowe, a British national; and Judge Bruno Simma, a German national. In addition, Croatia appointed Professor Vudislav Vukas, a Croatian national, and Slovenia appointed Dr. Jernej Sekolec, a Slovenian national, to the tribunal. The tribunal held a procedural meeting with the parties in April 2012. The parties are scheduled to exchange memorials in February 2013 and counter-memorials in November 2013. A hearing is expected to be held in early-2014.

Mauritius-United Kingdom

Mauritius commenced an arbitration against the United Kingdom in December 2010 under UNCLOS over a dispute involving the United Kingdom’s establishment of a Marine Protected Area (“MPA”) around the Chagos Archipelago, a group of atolls in the Indian Ocean, the largest of which is Diego Garcia, the location of a major U.S. military base. The MPA, which the United Kingdom established in April 2010, prohibits fishing and other activities within 200 nautical miles of the Chagos Archipelago. Mauritius maintains that the MPA violates UNCLOS and other rules of international law and seeks a declaration regarding the MPA’s legality.

The tribunal consists of five members: Professor Ivan Shearer, the President and a Australian national appointed by the President of the International Tribunal for the Law of the Sea (“ITLOS”); Judge Albert Hoffmann, a South African national appointed by the President of ITLOS; Judge James Kateka, a Tanzanian national appointed by the President of ITLOS; Judge Rüdiger Wolfrum, a German national appointed by Mauritius; and Judge Sir Christopher Greenwood, a British national appointed by the United Kingdom. Mauritius challenged Judge Greenwood on the basis of his longstanding professional relationship with the U.K. Government. The other members of the tribunal issued a decision in November 2011 dismissing the challenge.

Pakistan-India

In May 2010, Pakistan initiated an arbitration against India under the Indus Waters Treaty of 1960 over a dispute involving India’s Kishenganga Hydro-Electric Project in the Kashmir region. The dispute revolves around India’s plans to construct a 330-megawatt hydro-electric power project on the Kishenganga River, a tributary of the Indus River. Pakistan alleges that India’s plans will divert the course of the river, reducing its flow and making it infeasible for Pakistan to proceed with plans to construct its own hydro-electric project.

The tribunal for this arbitration – referred to as the Court of Arbitration under the treaty – was the first ever constituted under the Indus Waters Treaty, which the World Bank played a significant role in negotiating. The Court of Arbitration consists of seven members: Judge Stephen M. Schwebel, the Chairman and a U.S. national appointed by the U.N. Secretary-General pursuant to the treaty; Sir Franklin Berman, a British national appointed by the Lord Chief Justice of England pursuant to the treaty; Professor Howard S. Wheatler, an engineer and British national appointed by the Rector of the Imperial College of Science and Technology in London pursuant to the treaty; Professor Jan Paulsson, a Swedish national appointed by Pakistan; Judge Bruno Simma, a German national appointed by Pakistan; Professor Lucius Caflisch, a Swiss national appointed by India; and Judge Peter Tomka, a Slovakian national appointed by India.

The Court of Arbitration made two site visits to areas at issue in the dispute on June 15-21, 2011, and February 3-6, 2012. During these visits, the Court of Arbitration observed components of the Kishenganga and another hydro-electric project, a gauge-discharge observation site, and a water pumping installation.

The Court of Arbitration also issued an order on interim measures in September 2011. Pakistan had sought an interim order prohibiting India from proceeding with a planned diversion of water from the Kishenganga River until the legality of the diversion could be determined. The Court of Arbitration concluded that India could proceed with the hydro-electric Project, including construction of a temporary diversion tunnel and sub-surface foundations of a dam, except for “the construction of any permanent works on or above the . . . riverbed . . . that may inhibit the restoration of the full flow of that river to its natural channel.” (Order on the Interim Measures Application of Pakistan Dated June 6, 2011, dated September 23, 2011, para. 152(1)(c).) The Court of Arbitration plans to issue a final award in late-2012 or early 2013.

Bangladesh-India

In October 2009, Bangladesh instituted an arbitration against India under UNCLOS over the delimitation of the maritime boundary between the two countries in the Bay of Bengal. Bangladesh also arbitrated a dispute with Myanmar over their maritime boundary in the Bay of Bengal at ITLOS in Hamburg; ITLOS issued an award in that case in March 2012. The disputes are of some considerable political and economic importance given the presence of oil and gas resources in this area.

The tribunal consists of five members: Professor Dr. Rüdiger Wolfrum, the President and a German national appointed by ITLOS; Professor Ivan Shearer, an Australian national appointed by ITLOS; Professor Tullio Treves, an Argentinean national appointed by ITLOS; Judge Thomas A. Mensah, a Ghanaian national appointed by Bangladesh; and Dr. Pemmaraju Sreenivasa Rao, an Indian national appointed by India.

Ecuador-United States

Ecuador initiated arbitral proceedings against the United States in June 2011 concerning the interpretation and application of Article II(7) of the Ecuador-U.S. bilateral investment treaty, which provides that “[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.” Ecuador’s claim arises from an award issued by an arbitral tribunal in March 2010 that found Ecuador had violated Article II(7) through the failure of Ecuadorian courts to resolve several contractual disputes brought by a subsidiary of Chevron for over ten years.

Ecuador’s position is that the “effective means” language in Article II(7) simply incorporates customary international law relating to the prohibition against denial of justice and therefore sets a high standard. The tribunal in the underlying arbitration concluded that the “effective means” provision is an independent treaty standard subject to a less-stringent standard. (Of note, the tribunal in *White Industries Australia Ltd. v. Republic of India* recently relied on the award in the underlying arbitration in concluding that India had violated a similar “effective means” provision where the claimant was unable to enforce a commercial arbitral award for several years in Indian courts.) The United States maintains that the tribunal in the state-to-state dispute lacks jurisdiction because the United States has not taken a position on the interpretation of Article VII(2) and, therefore, no dispute exists between the parties.

The tribunal consists of three members: Professor Luiz Olavo Baptista, a Brazilian national and the Presiding Arbitrator; Professor Donald McRae, a Canadian national appointed by the United States; and Professor Raúl Emilio Vinuesa, an Argentinean national appointed by Ecuador.


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