Overview

1. Previous sets of PCA arbitration rules
2. Adoption of the PCA Arbitration Rules 2012
3. Features of the PCA Arbitration Rules 2012
   - PCA Secretary-General as Appointing Authority
   - PCA Administration
   - Provisions tailored to disputes involving States and IGOs

Previous sets of PCA Arbitration Rules

1. 1899. First PCA procedural rules for State/State arbitration:
   - 1899 Convention for the Pacific Settlement of International Disputes

   Article 16: “(...) arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.”

   Chapter III on arbitral procedure.

   - rules revised in the 1907 Hague Convention

2. 1962. First PCA procedural rules for “mixed” arbitration
Previous sets of PCA Arbitration Rules

(3) 1990s. 4 Sets of Party-Specific Rules for arbitration between:

- States (1992)
- States and non-State parties (1993)
- States and IGOs (1996)
- IGOs and private parties (1996)

Agreement signed in Algiers on Dec. 12, 2000 by Eritrea and Ethiopia
(the December Agreement)

Article 4: Creation of Boundary Commission

1. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States. Filing deadlines for the parties’ written submissions shall be simultaneous rather than consecutive. All decisions of the Commission shall be made by a majority of the commissioners.

Article 5: Creation of Claims Commission

7. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States. All decisions of the Commission shall be made by a majority of the commissioners.
Previous sets of PCA Arbitration Rules

(4) 2000s. Sector-specific Rules for arbitration of disputes relating to:
- natural resources and the environment (2001)
- outer space activities (2011)

Adoption of the 2012 PCA Arbitration Rules

2010: Revision of the UNCITRAL Arbitration Rules

May 2012: PCA Administrative Council approves constitution of a Drafting Committee:

Professor Jan Paulsson (Chairman)  Ms. Lise Bosman
Mr. Brooks W. Daly  Mr. Alvaro Galindo
Professor Alejandro Garro  H.E. Judge Sir Christopher Greenwood
Mr. Michael Hwang  Professor Gabrielle Kaufmann Kohler
Mr. Salim Moollan  Professor Dr. Michael Pryles AM
Judge Seyed Jamal Seifi  Mr. Jernej Sekolec

May 2012: Draft submitted to PCA Administrative Council

December 2012: PCA Administrative Council adopts the Rules
Key Features of the 2012 PCA Arbitration Rules

Excerpts from the Introduction

“These Rules are for use in arbitrating disputes involving at least one State, State-controlled entity, or intergovernmental organization.”

The Rules “add a new option for arbitration of disputes under the auspices of the . . . PCA . . . without replacing the previously adopted PCA Rules, which remain valid and available.”

“The Rules are . . . based on the 2010 UNCITRAL Arbitration Rules with changes made in order to

(i) Reflect the public international law elements that may arise in disputes involving a State, State-controlled entity, and/or intergovernmental organization;

(ii) Indicate the role of the Secretary-General and the International Bureau of the PCA; and

(iii) Emphasize flexibility and party autonomy.”

PCA Secretary-General as Appointing Authority

Article 6

“The Secretary-General of the Permanent Court of Arbitration shall serve as appointing authority.”

The PCA Secretary-General may, upon request from a party:

• appoint arbitrators (Arts. 7-10)
• decide challenges to arbitrators’ independence/impartiality (Art. 13(4))
• in exceptional circumstances, directly appoint substitute arbitrators (Art. 14(2))
• review and adjust the tribunal’s determination of its fees and expenses (Art. 41(2))
Arbitrators’ Fees and Expenses

Light control:
• 2010 UNCITRAL Rules: The appointing authority reviews the tribunal’s determination of fees & expenses at the request of a party

Strong control:
• Some arbitral institutions fix the fees of arbitrators in accordance with a pre-determined scale (e.g. ICC) or impose an hourly rate (e.g. ICSID)

Middle ground:
• 2012 PCA Rules: The PCA Secretary-General reviews the tribunal’s determination of fees & expenses as a matter of course before the final decision/award is rendered (Article 41(3)(b))
  - Main criterion: reasonableness
  - PCA Secretary-General also reviews the fees and expenses of tribunal-appointed experts

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PCA Administration

Article 1(3):
“The International Bureau of the [PCA], . . shall serve as registry for the proceedings and provide secretariat services.”

First members of the International Bureau, circa 1899

Bureau staff, circa 2013
PCA Administration

- Registry services and support to parties and tribunals
  - official channel of communications and archive of documents
  - logistical and technical support
  - organization of meetings/hearings (in Peace Palace or elsewhere)

- IB allowed to extend certain time limits under the Rules (prior to constitution of Tribunal) (Arts. 4(1), 8(2)(b), 9(3))

- Financial administration (Art. 43)
  - IB requests, holds, and disburses the parties’ deposits for the costs of arbitration
  - IB renders accounting at the end of the case

Constitution of Five-member Tribunals

Eritrea–Ethiopia Claims Commission

Abyei Arbitration (Government of Sudan v. Sudan People’s Liberation Army/Movement)

Guyana v. Suriname
Constitution of Five-member Tribunals

Article 9

(1) If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. If five arbitrators are to be appointed, the two party-appointed arbitrators shall choose the remaining three arbitrators and designate one of those three as the presiding arbitrator of the tribunal.

Site Visits

Article 27(3): “The arbitral tribunal may also, after consultation with the parties, perform a site visit.”

Indus Waters Kishenganga Arbitration (Pakistan v. India)
2 site visits to the Neelum Valley
(June 2011 and February 2012)
Applicable Law

Article 35
(1) The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall:

(a) In cases involving only States, decide such disputes in accordance with international law by applying:

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- International custom, as evidence of a general practice accepted as law;
- The general principles of law recognized by civilized nations;
- Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(b) In cases involving only States and intergovernmental organizations . . .

(c) In cases involving intergovernmental organizations and private parties . . .

(d) In all other cases . . . [e.g. investor-State arbitrations, arbitrations between a State and a private party arising under a commercial contract]

Information requirement

Article 34(7)

In cases involving only States, the parties shall communicate to the International Bureau the laws, regulations, or other documents evidencing the execution of the award.
Other provisions tailored to States and IGOs

• Explicit waiver of immunity from jurisdiction for States and IGOs (Art. 1(2))
• Representation of State parties by agents (Art. 5)
• Model arbitration clause for inclusion in treaties (Annex)

Questions?