Judith Levine, PCA Senior Legal Counsel
INVESTOR-STATE and OTHER "MIXED DISPUTES" at the PCA
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OVERVIEW

1. Evolution of the PCA’s activities
2. Contract Disputes
3. Investor-State Disputes
4. Further Evolution: Other Disputes with Non-State Actors
   (intra-state, environment, IGOs)

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GROWTH IN PCA CASELOAD SINCE 1900

206 total cases
>150 of which commenced in last 10 years

CURRENT PCA DOCKET: 81 CASES

- Investor-State Arbitrations (49)
- Inter-State Arbitrations (8)
- Arbitrations under Contracts Involving States, State Entities, or IGOs (22)
- Other (2)
1. EVOLUTION OF THE PCA'S ACTIVITIES

First PCA “mixed case” 1934-35
Radio Corporation of America v. China

2. CONTRACT DISPUTES

Eurotunnel (2010)
2. CONTRACT DISPUTES
PCA has 22 pending (confidential) cases arising out of contracts between public and private entities

3. INVESTOR-STATE ARBITRATIONS ADMINISTERED BY THE PCA

Investor-State and other "Mixed" Arbitrations
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3. INVESTOR-STATE ARBITRATIONS

- Claim by a foreign investor against a host state
- Old days: resort to diplomatic protection or local courts
- Nowadays: investor sues state directly in arbitration if State consents (usually through an investment treaty)
- Mutual benefit / dual purpose of investment treaty

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Example preamble in an investment treaty
Hong Kong-Australia BIT (1993)

**AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS**

The Government of Hong Kong, having been duly authorised to conclude this agreement by the sovereign government which is responsible for its foreign affairs, and the Government of Australia (hereinafter referred to as the "Contracting Parties");

Desiring to create favourable conditions for greater investment by investors of one Contracting Party in the area of the other;

Considering that investment relations should be promoted and economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for equality, mutual benefit, non-discrimination and mutual confidence;

Recognising that the encouragement and reciprocal protection under agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both areas;

Have agreed as follows:

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Investor-State and other "Mixed" Arbitrations
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3. INVESTOR-STATE ARBITRATIONS

Example arbitration clause in an investment treaty
Hong Kong-Australia BIT (1993)

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.

3. INVESTOR-STATE ARBITRATIONS

Example arbitration commenced under an investment treaty
Philip Morris Asia Ltd (Hong Kong) v. Australia

• HK subsidiary of Philip Morris alleges that Australia’s plain packaging tobacco legislation violates substantive obligations owed in respect of its investment under the BIT
3. INVESTOR-STATE ARBITRATIONS

Example of how an UNCITRAL Rules investor-state arbitration becomes administered by PCA

7. Case Administration

The International Bureau of the PCA shall act as registry (“Registry”) in the arbitration on the following terms:

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.

3. INVESTOR-STATE ARBITRATIONS

PCA has 49 pending investor-State arbitrations

- Different types of treaty
  - 10 multilateral (ECT, NAFTA); 38 BITs; 1 national investment law

- Different degrees of confidentiality/transparency
  - See e.g. PO5 in *Philip Morris Asia Ltd v. Australia*
  - NAFTA cases (public hearing next month)

- Different seats and hearing locations
  - See e.g. PO3 in *Philip Morris Asia Ltd v. Australia*
  - London, Singapore, Hong Kong, New York, Washington, San Jose

- Geographic spread of Respondent States
4. FURTHER EVOLUTION?

(a) PCA's first Intra-State Arbitration

(b) Cases under the PCA's environmental rules

(c) Cases involving IGOs

ABYEI ARBITRATION
Gov’t of Sudan / Sudanese People’s Liberation Movement/Army (2009)

- 1st “Intra-State” PCA case. Post-civil war, pre-referendum on independence
- Appointment procedure: Referenced “Members of the Court” (past & present)
- Fast-track: 9 months from constitution of tribunal to rendering Award
- Finance/Costs: PCA’s Financial Assistance Fund, pro bono services to South
- Languages: testimony in Arabic, Dinka and English. Arabic version of Award
- Full transparency: publication of all documents, open proceedings, webcast
- Award rendering: in 90-day limit, ceremony webcast, UN peace-keepers on ground

4. FURTHER EVOLUTION?

(b) Cases under PCA’s environmental rules

PCA has had 3 cases under the 2001 Optional Rules for Arbitration of Disputes relating to the Environment and/or Natural Resources.

(c) Cases involving IGOs

PCA has had 12 cases involving intergovernmental organizations.

Adapting procedures to suit the evolving nature of international disputes...