THE PERMANENT COURT OF ARBITRATION

Remarks of Professor Philippe Sands QC
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on the occasion of a Celebration of the Centenary of the PCA
The Hague, 18 October 2007

Mr President, Secretary-General, distinguished Ambassadors, Ladies and Gentlemen,

It is a privilege for me to be with you today, and I am honoured by the invitation to offer a few remarks on the occasion of the Centenary celebrations of the Permanent Court of Arbitration.

I first came across the PCA in October 1980, during a lecture I attended as an undergraduate student of law. Our lecturer was Professor Jennings, in his last year at Cambridge before being elected to serve as a Judge in another Court that also occupies this building. I must confess that I can't remember the precise words he used, but I do still have my lecture notes, which I got out of the attic, and they refer in passing to this venerable institution. The notes say: "Also PCA. Not much these days. Historical."

Well, that was twenty-seven years ago, in the autumn of 1980. The situation has changed a great deal since then. In preparing these comments, I had before me the 2005 Annual Report, which states that the PCA's caseload "reached an all time high of nineteen pending cases and twenty-four requests for designation of an Appointing Authority or services as Appointing Authority".[1] So the PCA is, once again, a vibrant institution that is making a significant contribution to the peaceful settlement of disputes between States, and also between States and other actors.

What has caused the change in the role of the PCA? It is clear that there are today more international actors than ever before. The number of States has grown to something around two hundred. Other players have emerged onto the international stage, sometimes endowed with the right to participate in international arbitration proceedings. One thinks in particular of the corporate sector in investment treaty disputes. It seems also that there may be a greater propensity amongst these actors to refer their disputes for resolution by arbitral or judicial means. In many situations arbitration is seen as having certain attractions, a point to which I will return shortly.

[1] Permanent Court of Arbitration, 150th Annual Report, 2005, p. 5, para. 1, available at www.pca-cpa.org.

The international legal framework in which the PCA operates has also changed. In the 1960s, the 1970s and the 1980s several new sets of rules emerged that provided for the use of arbitration as a means for resolving disputes. In the field of investment treaty arbitration the International Centre for the Settlement of Investment Disputes (ICSID) was created under the auspices of the World Bank, and they provide for an institutional home for their arbitrations. Other rules were adopted, for example the UNCITRAL rules, but these did not provide an institutional home to host the arbitration proceedings. There was therefore a need for some of those proceedings to locate a home. There have been arrangements for arbitration under many multilateral agreements, such as the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention), Article 32 of which allows a State party to refer a dispute to arbitration.

And of course there is the 1982 United Nations Convention on the Law of the Sea, which came into force in 1994. As many of you will know, UNCLOS provides in Part XV for resolution of a range of disputes by reference to compulsory adjudication. The drafters of the 1982 Convention allowed the parties to opt for different types of dispute settlement. States and other parties could go for resolution of disputes by a court or tribunal, and the International Tribunal for the Law of the Sea and the International Court of Justice were identified. But the drafters also wanted to leave open the possibility of dispute resolution by way of arbitration. Annex VII of the 1982 Convention provides for arbitration to resolve disputes. Like UNCITRAL, Article 32 of OSPAR, the 1982 Convention does not designate a home for the arbitration. For these and other mechanisms, the PCA was available.

Since the 1982 Convention came into force in 1994, four cases have been brought to arbitration under Annex VII.[2] In November 2001, Ireland brought proceedings against the United Kingdom in a case concerning the construction and operation of the Mox plant at Sellafield.[3] In July 2003, Malaysia initiated arbitration proceedings against Singapore in a case concerning a land reclamation project initiated by Singapore in and around the Straits of Johor.[4] In February 2004 Barbados brought arbitration proceedings against Trinidad & Tobago over a maritime boundary dispute.[5] A few weeks later Guyana brought a case against Suriname, and an Arbitral Award was handed down just a month ago.[6]

I have been privileged to be involved in two of those cases, and so have seen first hand how the Permanent Court of Arbitration functions as a facility. I will say something more about this shortly, but before doing so it is appropriate to address two other matters, that are related. Why is it that States would opt for arbitration? And when they do, how is it that the Permanent Court of Arbitration has come to serve as the bureau, or registry, for all of those arbitrations?

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[2] A case brought by St Vincent and the Grenadines against Guinea in December 1997 was initiated by means of application for arbitration proceedings but subsequently transferred to the International Tribunal for the Law of the Sea by agreement of the parties: see the M/V "Saiga": No. 2 Case (St Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, Judgment of 1 July 1999, at para. 4, at www. itlos.org.

[3] Ireland v. United Kingdom (MOX Plant Case), at www.pca-cpa.org.

[4] Malaysia/Singapore, at www.pca-cpa.org. An Award on Agreed Terms was issued by the Tribunal on 1 September 2005.

[5] Barbados/Trinidad and Tobago, Award of 11 April 2006, available at www.pca-cpa.org.

[6] Guyana/Suriname, Award of 17 September 2007, available at www.pca-cpa.org.

As I have already mentioned, the drafters of the 1982 Convention chose not to identify any institutional authority under which UNCLOS proceedings could take place. The only such body with established experience was the Permanent Court of Arbitration, so it seemed a logical place to go when the first of those cases that I have mentioned, the dispute between Ireland and the United Kingdom, was looking for a home. I do not reveal any confidences, I hope, if I let you know that between Ireland and the United Kingdom, two countries with generally excellent relations, there was agreement as to the choice of the Permanent Court of Arbitration. It seemed a logical choice, although not the only possibility. There was some discussion about locating the arbitration at the home of ITLOS in Hamburg, and using that Tribunal's registry as the secretariat for the arbitration. But it seems the judges may have felt that would not be appropriate, as a consequence of which certain benefits came to the PCA. Later on in another case the issue was revisited, including the possibility of opting for a five judge Chamber of ITLOS rather than a five member arbitration tribunal. That too did not come to fruition, and the result is that The Hague, this building and even this room have had ample opportunity to develop real experience in UNCLOS arbitration proceedings.

Why has there been this relatively large number of cases going to arbitration rather than the International Tribunal for the Law of the Sea or the International Court of Justice? That is an interesting question, and not one that admits of an easy answer. The simple point could be made that the States involved will frequently have adopted positions that exclude anything other than arbitration. Yet that is not always the case, and when faced with the issue of costs – why go for five arbitrators at considerable expense when you could have 15 ICJ judges or 21 ITLOS judges for free? – many States remain comfortable with arbitration.

Indeed, for many of those involved in assisting States on these matters a question that is often put concerns the merits and demerits of the International Tribunal for the Law of the Sea as compared with the International Court of Justice or the merits or demerits of judicial settlement as opposed to arbitration. In short, there seem to be four variable factors which emerge.

A first factor concerns the authoritativeness of the institution that is handing down the award or judgment. Will an arbitration award carry any less weight than the judgment of an international court or tribunal? The answer to that turns, of course, on the qualities of the institution that hosts the arbitration and the identity of the individuals who happen to sit as arbitrators. In both respects the answer will depend on the actions of the States themselves, since it is they who choose the arbitrators and have to agree on the hosting authority. The extent to which these Awards are picked up and relied upon elsewhere, for example in cases before national courts or in other international cases, remains to be seen. But in the cases in which I have been involved, and indeed also in the other two, it is difficult to see how it might be said that the Awards and decisions that have been handed down are treated by the parties to the dispute as having any less authority than a judgment handed down by another institution. That reflects positively on the quality of the individual arbitrators and on the effectiveness with which the PCA has carried out its functions. In all four cases the Awards or decisions have assisted the parties in resolving their disputes, in some cases going back years or even decades.

A second factor that States are interested in concerns the calendar. How long will it take for a case to proceed along the arbitral route as opposed to the route of judicial settlement, is a question I am sometimes asked? There are bound to be some instances in which a Claimant State, where the case is initiated unilaterally, will not be concerned with the time element. But where time is an issue there is some indication that arbitration proceedings will be speedier than proceedings before other international bodies. Let me give you an example, although there could of course be others that went a different way. In 1999, Nicaragua filed proceedings before the International Court of Justice in a maritime boundary dispute with Honduras. The written pleadings were completed by 2003 and the hearing took place in the spring of 2007. The judgment in that case was handed down just last week. It took some seven years from initiation of proceedings to judgment. By contrast, the case of *Guyana v. Suriname* was initiated in February 2004 by Guyana. The written pleadings were completed in the summer of 2006 and hearings were held in December 2006, in Washington DC, at the Organisation of American States, under the auspices of the PCA. There was also a separate hearing in July 2006 on issues of an interlocutory nature concerning admissibility and jurisdiction, and also an application for access to archival materials. The Order in that case came down in September 2007, and so that case took three and a half years from initiation to completion. There may be good reasons to explain the difference between the two cases, although they are rather similar in their level of complexity and the range of issues raised. The case of *Barbados v. Trinidad & Tobago* went even quicker than that of *Guyana v. Suriname*. This suggests that if time is a factor, and that isn't always the case, arbitration may prove to be an attractive option for a Claimant.

Closely related to the question of timing is a third issue: cost. Will arbitration be more or less expensive than judicial settlement? Unlike judicial settlement, where the judges come at no cost to the parties, like the Registry, in arbitration the parties have to share the cost of the arbitrators' fees and the costs of the Registry. Those can be quite significant. All other things being equal, and assuming that a case proceeds on the same time line, one would expect arbitration to be more expensive. But, where arbitration proceeds more speedily, there can be considerable cost savings. At the end of the day, I doubt that there would be much material difference in cost between a case that runs at the International Court of Justice for seven years and one that runs in Arbitration for three and a half years.

A fourth question concerns the efficiency of the proceedings. What do I mean by efficiency? I suppose what I am referring to is the availability of interim relief and interlocutory decisions. The case of *Guyana v. Suriname* was interesting in a number of respects. Apart from the maritime boundary issue it also dealt with issues of cooperation and even the threatened use of force. The case may well attract attention also for one procedural aspect: one of the parties, Guyana, went to the Arbitral Tribunal to request an Order that the other party, Suriname, modify its position and drop its objection to Guyana having access to archival material held by the Kingdom of The Netherlands. This may look like a surprising application. Certainly, I find it difficult to imagine such an application being made at an interlocutory stage before the International Court of Justice, which has not had a practice, at least until the present day, of dealing with such issues in that way. The Annex VII Tribunal heard the parties in writing and orally and then issued a decision which had the effect, in

essence, of opening up access to the archives of the Kingdom of The Netherlands. The Arbitral Tribunal went further. It appointed its own independent expert, Professor van Houtte, to review the archival material, determine its relevance and provide an opinion where a question arose on the confidentiality of the material. This proved to be an efficient and effective procedure. It also went a considerable way to resolving an incidental dispute between the parties which threatened to make the resolution to broader dispute even more difficult. At the time this struck me as a rather wise approach, and one from which other dispute settlement bodies might draw inspiration. It reflects, at the very least, a willingness of that body to get involved in the nitty-gritty issues that often accompany international disputes.

There is another point that needs to be made. It might be called the Robustness Point. I and other colleagues are sometimes asked whether there is any evidence, in our experience, that on the merits of the case, in relation to the applicable law, arbitration tribunals are more or less prone than judicial settlement to "split the cake". That is to say, do Arbitral Tribunals have a greater propensity to want to give something to both sides? That's an interesting question and a difficult one to answer in the abstract. I have been involved in some cases before the International Court of Justice or the International Tribunal for the Law of the Sea where one has the sense that the Tribunal wished, for whatever reasons, to give something to both sides. There is also sometimes that sense in an Arbitral Tribunal process. Yet the most recent arbitral awards and decisions in the four cases that fly the PCA's flag, the awards appear to be rather robust and decisive, whether in relation to interlocutory applications, wrangles about evidence, the determination of maritime boundaries, or the suspension of proceedings. Whatever the merits of the Award in *Guyana v Suriname*, no reasonable reader could conclude that it lacked a decisive quality. Some may even wonder whether the Annex VII Tribunal was willing to go further than the International Court of Justice or the International Tribunal for the Law of the Sea might have gone. It is not immediately apparent for example, to some observers, that the International Court would have reached the same conclusion as the Annex VII Tribunal in the case of *Guyana v. Suriname* on the issue of the threatened use of force.

Relatedly, a point arises whether the law applied by an Annex VII Arbitral Tribunal might in some way be different from that applied by the International Court of Justice or ITLOS. This might be called the 'predictability' issue, raising a question of whether the outcome of proceedings could be reasonably foreseeable, having regard to the possibility that an Annex VII tribunal might interpret or apply the rules differently. That seemed to have been clearly resolved by the recent decision in *Guyana v. Suriname* and in *Barbados v. Trinidad & Tobago.* In both cases, the Arbitral Tribunals relied heavily on the jurisprudence of the International Court of Justice on the issues of maritime delimitation. In *Guyana v. Suriname*, the Tribunal concluded that there were no grounds for adopting "a methodology at variance with that which has been practiced by international courts and tribunals during the last two decades", namely the drawing of a provisional equidistance line and its possible adjustment to achieve an equitable solution.[7] The Tribunal rejected Suriname's argument in favour of the use of what has been called the "angle bisector

[7] *Ibid*., at para. 372.

methodology".[8] Yet just three weeks later, in its judgment of 8 October last, the International Court re-embraced the use of the "angle bisector methodology" as proposed by Nicaragua in the *Case Concerning Territorial and Maritime Disputes between Nicaragua and Honduras in the Caribbean Sea*, in circumstances in which it concluded that the construction of an equidistance line from the mainland was not "feasible", because it was "impossible" for the Court to identify the base points that could be used.[9] I express no view on the merits or demerits of the Court's approach. I note, however, that both parties in that case were able to prepare a provisional equidistance line, and the final result obtained by the Court bore an uncanny similarity to the provisional equidistance line proposed by Honduras. Those who acted for Guyana will no doubt feel some relief that the Court's judgment of last week was not handed down a year earlier!

It is difficult to reach general conclusions on all these issues. Each case turns on its own merits, every case has its own facts. States now have a number of institutional options for resolving some of their disputes. It could be said that a market of sorts has emerged, reflecting developments in the international legal order. In my experience one conclusion is clear. Those who chose to make use of the facilities of the Permanent Court of Arbitration will experience a Registry that operates with admirable efficiency and effectiveness. States that participate in international proceedings look for absolute independence and balance in the Registry, and they look for work being carried out in a timely, confidential and functionally efficient manner. Speaking personally, my experience on the cases that I have mentioned, as well as the case brought by Ireland against the United Kingdom under the 1992 OSPAR Convention,[10] indicates a high level of satisfaction with the way in which the PCA has carried out the tasks that have been allocated to it.

This points to a solid future for this venerable institution, the youthful dinosaur that came back from near extinction. Plainly there will be more cases under the Law of the Sea Convention. If arbitration is the method chosen, then the PCA is going to be a logical place to come. I suspect also that the Permanent Court of Arbitration will be increasingly involved in resolving disputes between investors and states under bilateral investment treaties. And looking even further to the future, the Permanent Court of Arbitration has put itself in a privileged position on disputes relating to the environment and natural resources, under multilateral environmental agreements and its own Optional Rules in that area.[11] One does not wish for more disputes to arise, in any area. But as and when they do, the Permanent Court of Arbitration's impressive record over the past decade, under the stewardship of its recent Secretary-Generals, Ambassadors Jonkman and van den Hout, supported by a staff of admirable quality and commitment, will surely stand it in good stead.

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[8] *Ibid.*

[9] *Case Concerning Territorial and Maritime Disputes between Nicaragua and Honduras in the Caribbean Sea*, Judgment of 8 October 2007, paras. 280 and 283.

[10] Ireland v. United Kingdom (OSPAR Arbitration), Award of 2 July 2003, available at www.pca-cpa.org.

[11] Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment; Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment, both available at www.pca-cpa.org.