

“Resolving International Disputes through Arbitration”

**Public lecture delivered by
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22 May 2009

Thank you, Foreign Minister Kasit, for those words of introduction. Excellencies, colleagues, ladies and gentlemen: good afternoon. It is a pleasure to be with you here at the invitation of the Saranrom Institute of Foreign Affairs (SIFA) and the Department of Treaties and Legal Affairs of the Ministry of Foreign Affairs to speak to you in the SIFA lecture series on inter-state dispute resolution through arbitration.

I shall focus primarily on international arbitration conducted by tribunals operating under the auspices of the Permanent Court of Arbitration (PCA) in The Hague. I do so in light of my background, having served as its Secretary-General for almost ten years until September 2008. In broad brushstrokes I will paint a picture of the various, and varied, roles that the PCA has played, and still plays, in this field. In the process I will cover a number of specific cases submitted to and decided upon by such tribunals, in the recent past.

With what seems to be an unabated growth in the number of inter-state disputes in this conflict-ridden world it is critical for States to have ready access to reliable, efficient and, above all, effective methods of dispute resolution. Over one hundred years ago, at the end of the 19th century, in a world considerably less complex but no less dangerous, world leaders were already anxiously looking to establish some structure for third-party dispute resolution.

This anxiety gained momentum in the final years of the 19th century and culminated in the 1899 International Peace Conference at The Hague. Former UN Secretary-General, Kofi Annan, referred to this conference as: “that landmark gathering where seeds were planted that later germinated into the League of Nations and, ultimately, the United Nations and its principal judicial organ, the International Court of Justice.”

It was during this conference that the Permanent Court of Arbitration, conceived for the peaceful settlement of disputes between States, was established. That “date of birth” makes it the world’s oldest intergovernmental institution devoted to the peaceful resolution of disputes. It predates both the United Nations and, even, the League of Nations. The PCA currently has 108 Member States and new Member-States continue to accede to its constitutive treaties – an indication of the Organization’s continued relevance for, and appeal to, States.

The international dispute resolution system has greatly evolved since those treaties came into force more than one hundred years ago. Since the creation of the United Nations after World War II, States have had at their disposal a wide range of mechanisms to resolve disputes between States peacefully. Obviously the primordial role of the UN Security Council and the good offices of the UN Secretary-General deserve mention here. However, more relevant to the subject matter I am discussing is Article 33, paragraph 1

of the United Nations Charter that reads as follows: “[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

It is not without interest that in this paragraph “arbitration” is positioned between “conciliation” and “judicial settlement”, almost as if to suggest that those who drafted the UN Charter considered it an intermediary phase between the two on the scale that they had in mind. I should point out, however, that arbitration and judicial settlement have more in common with *each other* than *either* does with any of the *other* dispute resolution mechanisms mentioned in this Article of the UN Charter. The characteristics common to “arbitration” and “judicial settlement” are that decisions of both international arbitral tribunals and international courts are binding on the parties to a dispute and final.

The Hague Conventions of 1899 and 1907, for instance, state that international “arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law”. Elsewhere, these conventions state that recourse to arbitration “implies an engagement to submit in good faith to the award.” And, finally, they state that an award of an arbitral tribunal “puts an end to the dispute definitively, without appeal.” Similarly, the Statute of the International Court of Justice provides that a judgment of that Court is “final and without appeal”.

The PCA administers various types of dispute resolution procedures – not only arbitration, but also conciliation and fact-finding – in which the parties to the dispute may be any combination of States, international organizations, and private entities. In the last 5 years, the caseload of the PCA has covered the full spectrum of this broad mandate, and at the moment has as many as 30 pending cases. Some of these cases are spelled out on the PCA’s website <www.pca-cpa.org>, others are not at the request of parties, for reasons of confidentiality.

That the PCA is an independent intergovernmental organization and not part of the United Nations system can be an attractive aspect for States considering a third party mechanism to resolve an outstanding dispute with a neighbouring State where domestic political considerations render involvement of, for instance, the UN’s principal judicial organ – the ICJ, also known as the World Court – problematic.

Although the PCA is not part of the UN system it does work closely with it where appropriate. Former UN Secretary-General Kofi Annan explicitly endorsed the use of the dispute resolution services of the PCA in 2005 when he stated: “with more than a century’s worth of experience in the peaceful settlement of disputes, the PCA is both improving its operations in traditional areas of competence and expanding into new areas of dispute resolution”...“I am heartened that in recent years, a growing number of States have acceded to the [PCA’s] Convention for the Pacific Settlement of International

Disputes and that more State and non-State actors are making use of the Court's services.”

Let me now address some particular aspects of international arbitration. There are two main ways in which States may decide to submit disputes to arbitration: first, States may accede to treaties providing for arbitration as the means to settle future disputes; second, States may agree at any time to submit an existing dispute, to arbitration. The second way is achieved when States that are parties to the dispute conclude an arbitral agreement or “*compromis*”.

I will first turn to the PCA's involvement in the former of the two: that is, when States are parties to treaties that provide for arbitration of future disputes. I would like to discuss one important treaty in particular – the United Nations Convention on the Law of the Sea (to which I will refer as either “UNCLOS” or “the Convention”). Both Thailand and Cambodia, if we stay close at home when looking at SE Asia, have signed this Convention but have yet to ratify it. 150 States now have.

UNCLOS was designed to regulate the international community's use of the world's seas and oceans, and to ensure the conservation and equitable usage of resources and the marine environment. The Convention addresses matters such as sovereignty and rights of usage in maritime zones, navigational rights, and protection and preservation of the marine environment.

When acceding to the Law of the Sea Convention, a State may make a declaration choosing one of the following means for “settlement of disputes concerning the interpretation and application of [the] Convention”:

- the International Tribunal for the Law of the Sea in Hamburg, Germany;
- the International Court of Justice in The Hague; or
- ad hoc arbitration.

The default dispute settlement mechanism if a State does *not* declare which method of dispute settlement it prefers when it signs the Convention, or if disputing States have declared different preferences, is arbitration under Annex VII to the Convention.

A number of recent disputes between parties to the Convention have been successfully resolved by its arbitration procedures. These arbitrations have dealt with a broad range of issues, including the exploitation of and jurisdiction over living and non-living natural resources in a maritime zone, pollution of the marine environment, and general issues of maritime delimitation.

Arbitration has a number of traditionally cited advantages over other methods of dispute resolution that make it an attractive default mechanism under the Convention:

First, party involvement in the tribunal's composition. Arbitration is a process in which each party to the dispute may appoint an arbitrator with the knowledge and experience

that this party considers appropriate to the case. In most inter-state arbitrations tribunals are composed of three or five arbitrators, with each State being allowed to appoint at least one arbitrator. This direct involvement in the composition of the body that will decide the case is an attractive, confidence-building aspect of arbitration for most States, which may even appoint one of their own nationals.

Second, efficiency. In arbitration, the procedural timetable is agreed between the arbitral tribunal and parties to suit the time-concerns of all involved. By contrast, many courts are faced with significant backlogs, and cases may have to wait several years to be heard, let alone decided. Arbitration is generally regarded as more cost-effective due to the relative speed of its process. Arguably, where the PCA serves as the registry to an arbitral tribunal, the tribunal's administrative burden is reduced and therefore its efficiency is enhanced, allowing it to complete its work more quickly and thereby cutting costs.

Third, flexibility. The flexibility of its procedures is a particularly attractive feature of arbitration. For example, arbitral hearings and meetings can be conducted in the location most convenient to the parties, rather than a fixed and pre-determined location as with most court proceedings. Parties can also select the language most appropriate for the proceedings. The facilities of the PCA in the Peace Palace in The Hague, which is also home to the International Court of Justice or "World Court", are ideal for hosting arbitral proceedings. However, in the last few years the PCA has also served as registry for arbitrations conducted elsewhere, in countries such as India, Malaysia, the United States, Switzerland, and the United Kingdom. Moreover, the PCA has concluded a number of framework agreements with States around the world, allowing arbitral proceedings under PCA auspices to be conducted under conditions similar to those enjoyed under its Headquarters Agreement with the Government of The Netherlands. One of the States with which such an agreement has been concluded is Singapore, another is India.

Fourth, confidentiality. To the extent that parties have agreed, all or parts of the arbitral proceedings are kept confidential.

The PCA has served as registry for four UNCLOS arbitral tribunals: one between Ireland and the United Kingdom, one between Guyana and Suriname, one between Barbados and Trinidad & Tobago – the very first Annex VII maritime delimitation, which I will discuss further – and one between Malaysia and Singapore (a land reclamation dispute).

Because the Law of the Sea Convention only provides a limited procedural framework for the conduct of an arbitration, the PCA has been called upon by States to assist in drafting detailed procedural rules regarding matters such as evidence and confidentiality, the hearing of witnesses, the allocation and sharing of costs, and the publication of the award. As a result, the PCA has developed a particular expertise and valuable procedural precedent that will prove invaluable in future disputes submitted to arbitration under the Law of the Sea Convention.

The PCA is also referred to in the dispute settlement provisions of the Energy Charter Treaty. This treaty sets out principles for international trade, transit and investment in energy sources, such as oil and gas, and has been signed by more than 50 countries. Under the treaty, if one Member State considers that another member State is not complying with its obligations, the matter may be referred to a three-member arbitral tribunal. The treaty provides that in arbitrations between States, if the respondent State fails to appoint an arbitrator, or if the parties fail to agree on the third arbitrator, the Secretary-General of the PCA shall make the appointment. The treaty goes on to state that, unless otherwise agreed by the parties, the tribunal shall sit in The Hague, and use the premises and facilities of the PCA.

As I mentioned earlier, the PCA also deals with cases between States that do not arise under a previously signed treaty. Instead, an agreement to arbitrate is concluded after the dispute has arisen. States may enter into agreements providing for arbitration at the PCA at any time.

This is what occurred in the recent arbitration between Belgium and The Netherlands. This case concerned an historical railway known as the “Iron Rhine” built in 1879, that runs from Belgium to Germany via Dutch territory. The Iron Rhine railway traces its legal origins to a right of transit across Dutch territory that was conferred on Belgium and later elaborated through several treaties concluded in the 19th century. The railway was used intermittently for over 100 years but had fallen into disuse by the late 1980s. During the years the railway was not in use the Netherlands created several nature reserves on the path of the old railway. In 1998, Belgium sought to reactivate the railway on the basis of its treaty rights. However, the Dutch Government was anxious to regulate any reactivation of the railway to ensure that its nature reserves would not be damaged.

For a number of years the two countries attempted to negotiate the terms of any reactivation project at “senior officials level”. These senior officials were not successful and in 2003, six years ago now, the two Governments agreed that the matter would be submitted to arbitration and that this arbitration would take place at the PCA.

The disagreement between Belgium and the Netherlands turned on two main points: first, to what extent Belgium’s right to reactivate the railway in Dutch territory was constrained by Dutch environmental law; and second, how the costs of any reactivation in Dutch territory were to be shared between the two countries. The Netherlands submitted, among other things, that it had the right to impose the building of underground and over-ground tunnels along Dutch parts of the railway at Belgium’s expense.

The Tribunal of five arbitrators (including one Dutch and one Belgian arbitrator) determined that Belgium’s reactivation plans were indeed restricted by Dutch environmental law but that such restrictions could not be so burdensome as to deny Belgium’s right of transit nor render it unreasonably difficult. Accordingly, the Netherlands was entitled to impose the building of underground and over-ground tunnels on sections of its territory but the costs of this were to be shared between the two States.

The dispute in this case was effectively decided by identifying Belgium's rights under the 19th century treaties and the remaining rights of the Netherlands being/ those not in conflict with the treaty rights of Belgium. The Tribunal's decision is an important example of finding a balance between the rights of one State over the territory of another by virtue of a treaty, and the "residual sovereignty" of the other State. This arbitration was commenced in July 2003. In less than two years, the case was concluded with a unanimous final award rendered in May 2005.

Let me now turn to another completed PCA case, that dealt primarily with territorial sovereignty and maritime delimitation, the Eritrea-Yemen arbitration. This case involved a dispute between the two States with respect to sovereignty over a number of islands in the Red Sea and associated natural resources. The conflict came to a head in 1995 when Eritrean naval patrols discovered a small Yemeni military presence on one of the islands. The dispute over the islands erupted in hostilities in December of that year and reached a stalemate, with Eritrean forces occupying one island and Yemeni forces occupying another.

An agreement to arbitrate the dispute was concluded between the two States in 1996, and the PCA was invited by the arbitral tribunal to act as its registry. At the request of the two States, this arbitration was divided into two phases: the first-phase award covering territorial sovereignty was rendered in October 1998. The second-phase award covering maritime delimitation was rendered just over a year later, in December 1999.

In the first phase Eritrea contended that upon gaining independence in 1993 it inherited title to the islands from Ethiopia, which had in turn inherited title from Italy. Yemen argued that it had held title to the islands during the Middle Ages, before the Ottoman Empire controlled the area, and that after the collapse of the Ottoman Empire at the end of the First World War, title to the islands reverted back to Yemen. Both parties supplied the Tribunal with extensive evidence supporting their claims to sovereignty. In this regard the parties relied on, among other things, displays of governmental authority over the islands, recognition by other States of their purported title and a large number of maps – historical and modern – attributing the islands to either one State or the other.

The Tribunal found that much of the parties' evidence was not conclusive. The Tribunal ruled that Eritrea had sovereignty over two sets of islands that were within 12 miles of its coast and that Yemen had sovereignty over a number of other islands over which it had frequently displayed governmental authority in the years leading up to the arbitration.

In the second phase of the proceedings, each side proposed different median lines as the appropriate maritime boundary between the two States. The Tribunal rejected the boundaries proposed by each party and determined, for the most part, that the appropriate maritime boundary was the equidistant line between the mainland coasts of the two States. In its analysis, the Tribunal found evidence of petroleum agreements and concessions as relevant to the maritime boundary. The Tribunal concluded that while offshore petroleum contracts entered into by the two governments, failed "to establish or

significantly strengthen the claims of either party to sovereignty over the disputed islands,” they did, however, “lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties.

In obligating the parties to inform and consult one another on any oil and gas discovered straddling their shared maritime boundary, the Tribunal provided a framework for the parties to share and/or jointly use such resources. The Tribunal’s decision in respect of these petroleum contracts and concessions between the parties is an authoritative and innovative statement on international law governing oil and gas resources, and can be considered a valuable resource for international lawyers dealing with similar issues of resources straddling maritime boundaries.

This brings me to the conclusion of my overview of recent examples of the involvement of the PCA in international arbitrations between States. Although the PCA has been available to sovereign States for assistance in the resolution of disputes since 1899, it is really only in this 21st century that the community of States has discovered its real potential. Of late, the PCA has moved from a rather lengthy period of “relative inactivity” to a docket of over 20 pending cases per year. Further, in that short period of time its membership has increased by some 25% to 108 States. The international community recognizes that at a time when disputes are becoming more numerous and complex, the PCA has a useful role to play in the peaceful, and efficient, resolution of international disputes.

The question of whether the PCA could, perhaps, play a role in the dispute between Thailand and Cambodia regarding the temple referred to in Thai as Phra Viharn and in Khmer as Preah Vihear, is compelling. I, for one, would argue that it could indeed if certain conditions are met. First, both parties would have to actually agree to submit the dispute to arbitration under auspices of the PCA. Arbitration is a consensual process. Not as litigious in nature as a court procedure where one party might actually “confront” the other by way of unilateral action. Being consensual and more amicable, arbitration is an appropriate procedure for States to pursue that have a common border. Second, the parties to the dispute would need to agree on what is specifically at issue. They will need to agree on the scope of the dispute. Usually, these two elements are articulated in the arbitral agreement concluded between parties typically after negotiating teams of both sides fail to resolve the dispute through diplomatic negotiations.

In seeking a resolution of this dispute, Thailand does not wish to “internationalise” it. But in my considered opinion submitting this (or any other dispute, for that matter,) to an arbitral tribunal composed of members appointed by the parties, can hardly be considered “internationalising the dispute” in the actual sense of the word. Parties to the dispute retain much of their autonomy. I would argue that arbitration could in fact be a very attractive route for both sides in the event negotiations fail either outright or reach some type of a stalemate. The two Governments should, after all, bring closure to this dispute that has burdened bilateral relations for too long. They should both seriously consider arbitration. Utilizing the Permanent Court of Arbitration and thereby ensuring that the

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arbitration is brought to a successful conclusion, makes sense. Both countries are Member States of the PCA having signed up to, and ratified, its constitutive conventions – Siam even as early as 1899, being as one of the Organization's founding members.

Thank you.