



Duration and Cost of State-State Arbitration Proceedings

(Submitted to UNCITRAL Working Group III on 24 October 2018)

With the present submission, the Permanent Court of Arbitration (“PCA”)¹ provides Working Group III with information about the duration and cost of inter-State arbitration proceedings for which the PCA has acted as registry.

During the thirty-fourth session of Working Group III in November 2017, the PCA contributed to the discussion on the duration and cost of arbitration proceedings, focusing specifically on investor-State arbitration. At the request of the UNCITRAL Secretariat, the PCA is pleased to provide additional information in respect of State-State arbitration proceedings.

The information is intended to assist delegations in assessing the duration and cost of ISDS in comparative perspective, having equal regard to the information concerning the International Court of Justice and the dispute settlement mechanism of the World Trade Organization compiled by the Secretariat.²

1. Duration and Cost of Investor-State Arbitrations

As the PCA noted at the thirty-fourth session of Working Group III, in commercial and investment arbitration, counsel and expert fees account for the majority of costs. Indeed, in commercial arbitration they account for approximately 80% of the cost, whereas tribunal and institutional fees account for the remaining 20%. The contrast appears to be even more marked in large investment arbitration cases where, in the PCA’s experience, counsel and expert fees can account for 90% of the cost, while tribunal and institutional fees can account for the remaining 10%.

At the session, delegates considered whether the duration of investment proceedings had an impact on the costs of such proceedings. To understand what drives costs, the PCA identified the following factors as particularly relevant: the complexity of the case; the parties’ conduct; effective case management; cohesion within the tribunal (unanimity or dissenting opinions, etc.). It follows that time is not an independent cost driver, but instead mostly a function of complexity.

A related issue addressed by the PCA at the thirty-fourth session is the allocation of costs between the parties. Traditionally, the position in public international law has been that each party bears its own costs.³ In contrast to this traditional position, the UNCITRAL Arbitration Rules provide that “costs follow the event” (also referred to as the “loser pays” principle), while granting arbitral tribunals considerable discretion in cost allocation.⁴ In the PCA’s experience, in recent years, cost shifting to the losing party is becoming the norm rather than the exception in ISDS proceedings.

¹ A first submission addressed the PCA’s involvement in the settlement of investment-related disputes, including State-State arbitration and investor-State arbitration, see UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Submissions from International Intergovernmental Organizations, 13 October 2017, A/CN.9/WG.III/WP.143. A second submission provided information on arbitrator appointments and arbitrator challenges in ISDS cases for which the PCA has acted as registry, see UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators, 19 February 2018, A/CN.9/WG.III/WP.146.

² See UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration, 31 August 2018, A/CN.9/WG.III/WP.153.

³ See, for example, Statute of the International Court of Justice, Art. 64; Statute of the International Tribunal for the Law of the Sea, Art. 34.

⁴ UNCITRAL Arbitration Rules (2013), Art. 42(1). See also UNCITRAL Arbitration Rules (1976), Arts. 40(1), 40(2).

2. Duration and Cost of State-State Arbitrations

Since 1996, the PCA has acted as registry in 30 proceedings between States, the majority of which were arbitration proceedings.⁵ The subject matters of these proceedings have varied widely, ranging from land and maritime boundary disputes, to disputes over jurisdiction and immunity, to environmental and natural resource disputes, to damages claims arising out of armed conflict. The average duration of a case was two and a half years. However, individual cases have deviated significantly from this average. The longest case took eight years and eight months to be resolved, resulting in 17 separate awards,⁶ while the shortest cases were decided in only two months.⁷

Information about the costs incurred by States Parties in inter-State cases for fees of experts and legal counsel is limited. Since the parties to inter-State proceedings generally bear their own costs, in the absence of costs claims such amounts spent by States are likely to remain publicly unknown. In the PCA's experience, however, the following factors may have a significant influence on the duration and, presumably, the costs of inter-State arbitration proceedings.

a. Complexity

The complexity of a case is often the main driving force behind prolonged proceedings. Arbitrations with a high degree of complexity usually require specialized counsel and involve the preparation of lengthy memorials and awards.⁸ Complex arbitrations often address multiple claims and issues,⁹ and are sometimes bifurcated into multiple stages.¹⁰ Complex proceedings may also involve a greater diversity

⁵ *State of Eritrea/Republic of Yemen (Sovereignty and Maritime Delimitation in the Red Sea)*, PCA Case No. 1996-04; *Kingdom of Netherlands/French Republic (The Rhine Chlorides Arbitration)*, PCA Case No. 2000-02; *Eritrea-Ethiopia Boundary Commission*, PCA Case No. 2001-01; *Eritrea-Ethiopia Claims Commission*, PCA Case No. 2001-02; *Ireland v. United Kingdom (OSPAR Arbitration)* PCA Case No. 2001-03; *Republic of Ireland v. United Kingdom of Great Britain and Northern Ireland (MOX Plant Case)*, PCA Case No. 2002-01; *Kingdom of Belgium/Kingdom of the Netherlands (Iron Rhine Arbitration)*, PCA Case No. 2003-02; *Barbados v. Republic of Trinidad and Tobago*, PCA Case No. 2004-02; *Guyana v. Suriname*, PCA Case No. 2004-04; *Malaysia v. Republic of Singapore (Land Reclamation by Singapore in and around the Straits of Johor)*, PCA Case No. 2004-05; *Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Area Arbitration)*, PCA Case No. 2008-07; [Confidential Case] (2008); *People's Republic of Bangladesh v. Republic of India (Bay of Bengal Maritime Boundary Arbitration)*, PCA Case No. 2010-16; *Islamic Republic of Pakistan v. Republic of India (Indus Waters Kishenganga Arbitration)*, PCA Case No. 2011-01; *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland (Chagos Marine Protected Area Arbitration)*, PCA Case No. 2011-03; *Republic of Croatia/Republic of Slovenia*, PCA Case No. 2012-04; *Republic of Ecuador v. United States of America*, PCA Case No. 2012-05; *Malaysia/Republic of Singapore (Railway Land Arbitration)*, PCA Case No. 2012-01; *Argentine Republic v. Republic of Ghana (ARA Libertad Arbitration)*, PCA Case No. 2013-11; *Kingdom of the Netherlands v. Russian Federation (The Arctic Sunrise Arbitration)*, PCA Case No. 2014-02; *Democratic Republic of Timor-Leste v. Commonwealth of Australia (Arbitration under the Timor Sea Treaty)*, PCA Case No. 2013-16; *Republic of Philippines v. People's Republic of China (South China Sea Arbitration)*, PCA Case No. 2013-19; *Kingdom of Denmark in respect of the Faroe Islands v. The European Union (The Atlanto-Scandian Herring Arbitration)*, PCA Case No. 2013-30; *Republic of Malta v. Democratic Republic of São Tomé and Príncipe (The Duzgit Integrity Arbitration)*, PCA Case No. 2014-07; *Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, PCA Case No. 2013-14; *Italian Republic v. Republic of India (The "Enrica Lexie" Incident)*, PCA Case No. 2015-28; *Democratic Republic of Timor-Leste v. Commonwealth of Australia (Arbitration under the Timor Sea Treaty)*, PCA Case No. 2015-42; *Conciliation between Democratic Republic of Timor-Leste/Commonwealth of Australia*, PCA Case No. 2016-10; *Ukraine v. Russian Federation (Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait)*, PCA Case No. 2017-06; *Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, PCA Case No. 2018-13.

⁶ *Eritrea-Ethiopia Claims Commission*, PCA Case No. 2001-02.

⁷ *Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, PCA Case No. 2013-14; *Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, PCA Case No. 2018-13.

⁸ See, for example, *Republic of Philippines v. People's Republic of China (South China Sea Arbitration)*, PCA Case No. 2013-19, where the final award was nearly 500 pages; *Republic of Croatia/Republic of Slovenia*, PCA Case No. 2012-04, where the final award was nearly 400 pages.

⁹ See, for example, *Eritrea-Ethiopia Claims Commission*, PCA Case No. 2001-02, where various discrete aspects of the armed conflict between the two States were addressed; *Republic of Croatia/Republic of Slovenia*, PCA Case No. 2012-04, where the arbitration agreement entrusted to the tribunal the determination of "(a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia; (b) Slovenia's junction to the High Sea; (c) the regime for the use of the relevant maritime areas." (Arb. Agr., 4 November 2009, Art. 3(1)).

¹⁰ See, for example, *Kingdom of the Netherlands v. Russian Federation (The Arctic Sunrise Arbitration)*, PCA Case No. 2014-02, where the proceedings were divided into (1) jurisdictional, (2) liability, and (3) compensation stages; *State of Eritrea/Republic of Yemen (Sovereignty and Maritime Delimitation in the Red Sea)*, PCA Case No. 1996-04, where the

of stakeholders, including other States¹¹ and intergovernmental organizations. Coordinating with, or integrating the interests of, different stakeholders may require additional time and resources.

b. Terms of the Arbitration Agreement

The terms of the arbitration agreement can have a significant effect on the duration and cost of the arbitral proceedings. In the arbitration agreement States Parties may agree, for example, on the number of arbitrators;¹² a timetable for written submissions (memorials);¹³ and/or a particular deadline, from the closure of submissions, for the tribunal to issue the award.¹⁴

In the PCA's experience, an increase in the number of arbitrators ordinarily results in an increase in costs. Moreover, the duration of a case is invariably affected by the procedural calendar, which is often agreed between the States parties.¹⁵ In certain cases where time was of the essence, the States Parties agreed on a procedural calendar that reduced the duration of the proceedings dramatically.¹⁶ In other cases, the Parties deliberately agreed on a generous pleading schedule, presumably to allow for the collation of relevant evidence (see below).¹⁷ To the extent that the States Parties have imposed time limits on arbitral tribunals, tribunals have complied with them. Thus, careful drafting of the arbitration agreement can be a valuable tool to reduce cost and delay.

c. Volume and Types of Evidence

A large volume of documentary exhibits, technical expertise, and other evidence (such as photographs, plans, maps, and drawings) submitted by the parties contributes to the complexity of an arbitration, and may therefore have a bearing on costs and duration.¹⁸ Moreover, in appropriate cases, tribunals have conducted site visits to areas or installations of evidentiary interest,¹⁹ or have dispatched experts on-site for inspections and measurements.²⁰ In addition to the time and cost required for the preparation and organization of such site visits, parties may also request an opportunity to address the findings of such visits in written submissions or at a hearing.

proceedings were bifurcated into stages concerning (1) territorial sovereignty and (2) maritime delimitation. Bifurcation may be the result of agreement of the States parties or an order of the tribunal at the request of one of the States parties.

¹¹ See, for example, *Republic of Philippines v. People's Republic of China (South China Sea Arbitration)*, PCA Case No. 2013-19, where Australia, Indonesia, Japan, Malaysia, Singapore, Thailand, and Viet Nam requested and were allowed to attend the hearings. See also 1899 Hague Convention for the Pacific Settlement of International Disputes, Art. 56; 1907 Hague Convention for the Pacific Settlement of International Disputes, Art. 84.

¹² See, for example, *Islamic Republic of Pakistan v. Republic of India (Indus Waters Kishenganga Arbitration)*, PCA Case No. 2011-01, where the underlying treaty provided for the constitution of a seven-member "Court of Arbitration".

¹³ See, for example, *Eritrea-Ethiopia Boundary Commission*, PCA Case No. 2001-01; *Republic of Ireland v. United Kingdom of Great Britain and Northern Ireland (OSPAR Arbitration)*, PCA Case No. 2001-03; *Barbados v. Republic of Trinidad and Tobago*, PCA Case No. 2004-02. See also *Kingdom of Belgium/Kingdom of the Netherlands (Iron Rhine Arbitration)*, PCA Case No. 2003-02, where the States parties agreed to dispense with a hearing.

¹⁴ See, for example, *Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Area Arbitration)*, PCA Case No. 2008-07, where the award was to be issued within three months from the closure of submissions; *People's Republic of Bangladesh v. Republic of India (Bay of Bengal Maritime Boundary Arbitration)*, PCA Case No. 2010-16, where the award was to be issued within six months from the closure of proceedings.

¹⁵ See, for example, *Republic of Croatia/Republic of Slovenia*, PCA Case No. 2012-04, where the States parties agreed to a one-year time period for the submission of the first round of memorials.

¹⁶ See, for example, *Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Area Arbitration)*, PCA Case No. 2008-07, where the proceedings lasted little more than a year.

¹⁷ See, for example, *Republic of Croatia/Republic of Slovenia*, PCA Case No. 2012-04, where the Arbitration Agreement provides for a twelve-month period for the exchange of the first round of memorials.

¹⁸ See, for example, *Republic of Croatia/Republic of Slovenia*, PCA Case No. 2012-04, where nearly 1,500 exhibits were filed, together with over 250 maps and figures.

¹⁹ See, for example, *Islamic Republic of Pakistan v. Republic of India (Indus Waters Kishenganga Arbitration)*, PCA Case No. 2011-01, where the tribunal conducted two sites visits; *People's Republic of Bangladesh v. Republic of India (Bay of Bengal Maritime Boundary Arbitration)*, PCA Case No. 2010-16, where one site visit was conducted.

²⁰ See, for example, *Eritrea-Ethiopia Claims Commission*, PCA Case No. 2001-02, where a team of experts examined on-site the location of various structures; *Guyana v. Suriname*, PCA Case No. 2004-04, where a hydrographic expert performed a site visit.

Similarly, reliance by a tribunal on tribunal-appointed experts may have an impact on duration and cost.²¹ In boundary disputes, it is customary for tribunals to appoint hydrographic and/or cartographic experts.²² Furthermore, in cases involving confidential evidence, an independent expert may be appointed to review the confidential evidence and report to the tribunal and the parties.²³

d. Provisional Measures and Challenges to Arbitrators

The duration of arbitrations may be affected by requests of a party for the issuance of provisional measures,²⁴ or by challenges to an arbitrator.²⁵ In the event of such application, the proceedings on the merits of the underlying dispute may be stayed, pending a decision on the request for provisional measures or the challenge to the arbitrator.

e. Matters Beyond the Control of the Parties and the Tribunal

The duration of cases may also be adversely affected by factors beyond the control of either of the States parties or the tribunal. For example, arbitration proceedings may need to be suspended in consideration of related proceedings before another adjudicatory body.²⁶ The proceedings may also be disrupted by illness of a member of the tribunal, leading to the need to replace an arbitrator during the course of the proceedings,²⁷ or counsel for a party.

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²¹ While the intervention of experts may add to the duration and cost of the proceedings, it may also result in greater procedural efficiency and cost-savings, as tasks of a technical character need not be carried out by the full tribunal.

²² Hydrographic experts were appointed by tribunals in all recent maritime delimitation disputes, and cartographic experts were appointed in respect of land boundary disputes; see *Eritrea-Ethiopia Boundary Commission*, PCA Case No. 2001-02. See also PCA Arbitration Rules 2012, Art. 29; United Nations Convention on the Law of the Sea, Art. 289.

²³ See, for example, *Guyana v. Suriname*, PCA Case No. 2004-04, where a tribunal-appointed expert reviewed the archives of a third non-disputing State.

²⁴ See, for example, *Islamic Republic of Pakistan v. Republic of India (Indus Waters Kishenganga Arbitration)*, PCA Case No. 2011-01.

²⁵ See, for example, *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland (Chagos Marine Protected Area Arbitration)*, PCA Case No. 2011-03, where the challenge to an arbitrator was rejected by the other members of the tribunal nearly one year after the date of submission of the challenge.

²⁶ See, for example, *Republic of Ireland v. United Kingdom of Great Britain and Northern Ireland (MOX Plant Case)*, PCA Case No. 2002-01, where the arbitration proceedings were suspended pending a decision by the European Court of Justice.

²⁷ See, for example, *Italian Republic v. Republic of India (The "Enrica Lexie" Incident)*, PCA Case No. 2015-28.