



**Asia-Pacific
Economic Cooperation**

2016/SOM1/EC/WKSP1/013
Session 12

Investor-State Arbitration – PCA Perspective

Submitted by: Permanent Court of Arbitration



Workshop on Dispute Resolution
Lima, Peru
26 February 2016



The Permanent Court of Arbitration

and the investor-State dispute settlement system

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26 February 2016

Overview

Part I. Introduction to the PCA

Part II. Diversity

Part III. Flexibility

Part IV. Convergence

Part I

Introduction to the PCA

1. History
2. Evolution of Mixed Arbitration
3. PCA Today

I. History of the PCA

1899 Hague Peace Conference: “seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace...”

Result: 1899 Convention for the Pacific Settlement of International Disputes



Art. 16: “arbitration is ... the most effective, and most equitable, means of settling disputes...”

Art. 20: establishes Permanent Court of Arbitration to be “accessible at all times” for “immediate recourse ... for international differences, which it has not been possible to settle by diplomacy”

2. Evolution of Mixed Arbitration

170 known arbitrations between 1794 (Jay Treaty) and 1899 (Hague Conference)

Most common issue for arbitration:

Subject Matter	# of Arbitrations
Private Claims (e.g. contracts)	25
Boundary/Sovereignty Disputes	23
Damage from Armed Conflict/Civil War	18
Damage or Detention of Ships	9
Prize Disputes	7
Arbitrary Arrest/Denial of Justice	7
Fisheries Disputes	4
Railroad Concessions	3

2. Evolution of Mixed Arbitration

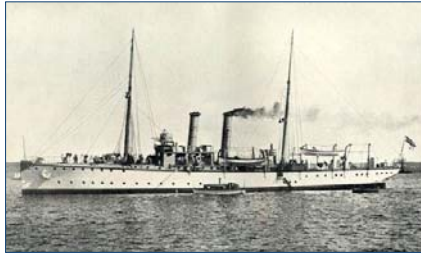
Disputes between States & Private Parties –

Methods of protecting private parties abroad:

Period	General Approach
Early Middle Ages	Private Warfare
Late Middle Ages – 17 th Century	Private Reprisals
18 th Century – 19 th Century	Public Reprisals
19 th Century – 20 th Century	Diplomatic Protection and State-State arbitration or adjudication
Late 20 th Century	Direct Arbitration between States and Private Parties

2. Evolution of Mixed Arbitration

Preferential Treatment of the Blockading Powers of Venezuela (Germany, UK and Italy v. Venezuela, 1903)

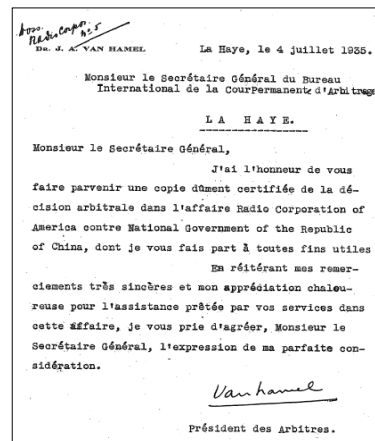


2. Evolution of Mixed Arbitration

Radio Corporation of America v. China (1935)



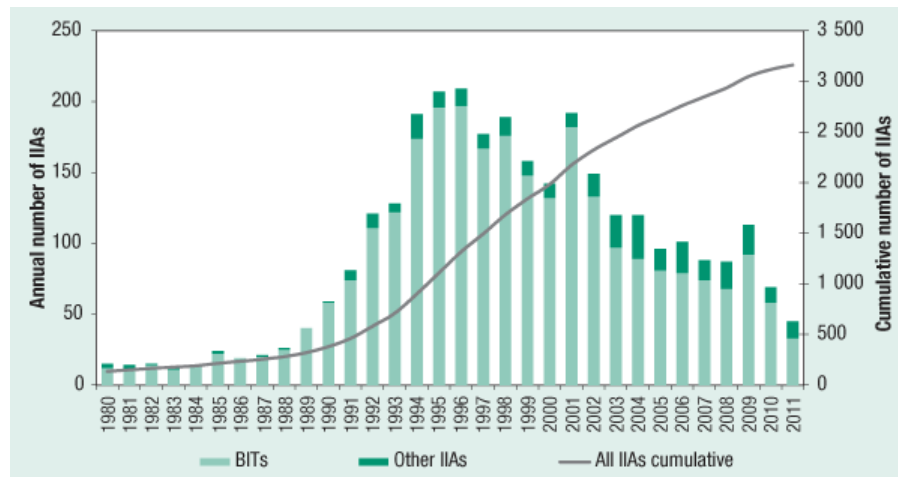
RCA



2. Evolution of Mixed Arbitration

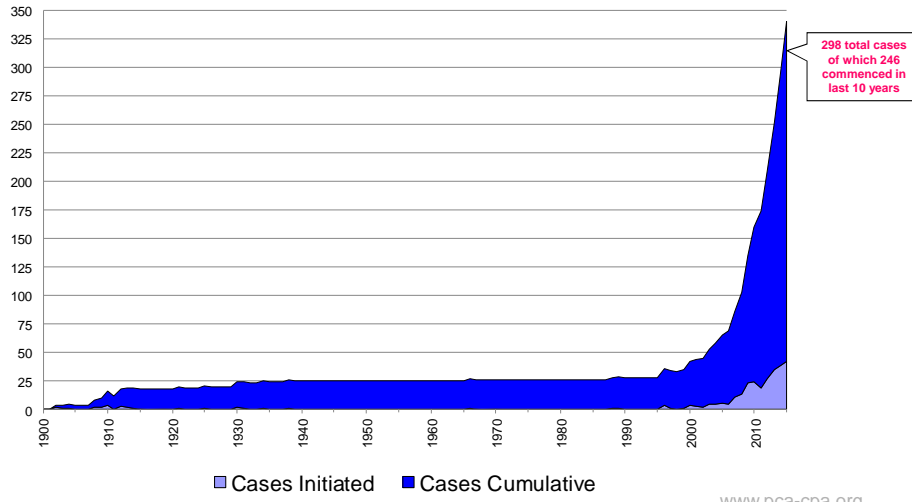
- **PCA Rules for Mixed Arbitration (1960)**
- **ICSID (1965)**
- **UNCITRAL Rules (1976)**
- **BITs (late 1980s onwards)**

2. Evolution of Mixed Arbitration

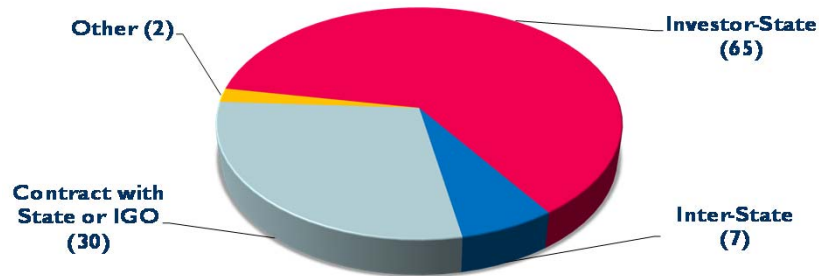


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3. PCA Today



3. PCA Today



Rules of Procedure
 60 cases under 1976 UNCITRAL Rules (44 investor-state)
 25 cases under 2010 UNCITRAL Rules (19 investor-state)
 7 interstate cases under specific agreed Rules of Procedure
 Rest: PCA specialized rules, conciliations, *ad hoc* procedures

Asia-Pacific
 28 cases involve a party from Asia-Pacific
 21 cases have arbitrator from Asia-Pacific
 16 cases involve an investment in Asia-Pacific
 7 cases have seat or venue in Asia-Pacific

Part II

Diversity

1. Choice of forum
2. Independence and impartiality
3. Forum shopping
4. Investor wrongdoing/windfall

I. Choice of forum

1. Number of BITs

2. Choice of forum in BITs

3. Non-ICSID States:

- Bolivia
- Brazil
- Ecuador
- India
- Iran
- Mexico
- Poland
- Russia
- South Africa
- Thailand
- Venezuela
- Viet Nam

2. Independence and impartiality

Three cases in Nov-Dec 2009:

1. **Participaciones Inversiones Portuarias v. Gabon:** ICSID rejects challenge, distinguishing high ICSID standard (“manifest lack”) from IBA Guidelines (“justifiable doubts”)
2. **Perenco v. Ecuador:** PCA sustains challenge in sui generis procedure based on IBA Guidelines (“justifiable doubts”)
3. **ICS v. Argentina:** AA designated by PCA sustains challenge under UNCITRAL Rules (“justifiable doubts”), relying on IBA Guidelines

3. Forum shopping

ICSID Convention, Art. 25: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State”

White Industries v. India (UNCITRAL): Tribunal finds no need to comply with inherent definition of “investment” (*Salini* test: (1) contribution, (2) duration, (3) risk, and (4) return)

García & García v. Venezuela (UNCITRAL): Tribunal upholds jurisdiction over dual Spanish-Venezuelan national

4. Investor wrongdoing

Greece-Romania BIT, Art. 9: “Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way...”

Roussalis v. Romania: Tribunal lacks jurisdiction to entertain counterclaims by host State for investor wrongdoing

Part III

Flexibility

1. Independence and impartiality
2. Forum shopping
3. Investor wrongdoing

I. Independence and impartiality

Recasting standard:

1. **Blue Bank v. Venezuela (2013)**
2. **Abaclat v. Argentina (2014)**
3. **Caratube v. Kazakhstan (2014)**

But...

- **RSM v. St. Lucia (2014):** Arbitrators appear not to fully accept new standard and reject challenge

2. Forum shopping

1. **Romak v. Uzbekistan:** simple cross-border sale contract does not meet inherent definition of investment
2. **Philip Morris Asia Ltd (Hong Kong) v. Australia:** dismissed case on grounds of “abuse of process” due to last-minute restructuring
3. **Guaracachi (US) & Rurelec (UK) v. Bolivia:** Tribunal dismissed first Claimant’s claim under denial of benefits clause

3. Investor wrongdoing/windfall

1. **Yukos v. Russia:** accepts claim for contributory fault
2. **Chevron v. Ecuador I:** accepts quasi-tax set off on the basis of “but for” causation

Part IV

Convergence

1. Independence and impartiality
2. Forum shopping
3. Investor wrongdoing

Perceived shortcoming	CETA	TTIP (EU informal proposal)	TPP
Lack of independence and impartiality of arbitrators	<ul style="list-style-type: none"> •Compliance with International Bar Association Guidelines on Conflict of Interest in International Arbitration •Supplemental rules adopted by the Committee on Service and Investment •Mandatory Code of Conduct <p>(Investment Chapter, Art. X.25.6 and X.42(2)(b), Annexed Rules of Procedure and Code of Conduct, consolidated CETA text)</p>	<ul style="list-style-type: none"> •Permanent judges •Appointed jointly by EU and US •Judges assigned randomly to each case •High technical and legal qualification •Prohibited from working as counsel in investment cases •Mandatory Code of Conduct <p>(Section 3, Art. 9 and 10, 11(1) + Annex II (Code of Conduct), EU proposal)</p>	<ul style="list-style-type: none"> •Code of conduct •Other relevant rules and guidelines on conflicts of interest in international arbitration on which the Contracting Parties may agree <p>(Art. 9.21.6, TPP text released)</p>

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Perceived shortcoming	CETA	TTIP (EU informal proposal)	TPP
Frivolous or abusive claims	<ul style="list-style-type: none"> • Cooling-off period of 180 days • 3 years statute of limitations to bring a claim (or 2 years after end of proceedings before national tribunal) • Expedited review of manifestly unfounded claims • Loser pays principle • Manipulative and fraudulent claims are excluded <p>(Investment Chapter, Arts. X.17, X.18, X.21, X.29, X.30, X.36, para. 5, CETA text)</p>	<ul style="list-style-type: none"> • Cooling-off period of 6 months • 3 years statute of limitations to bring a claim (or 2 years after end of proceedings before national tribunal) • Expedited review of manifestly unfounded claims • Loser pays principle • No jurisdiction when claimant acquired ownership/control of investment for purpose of bringing claim <p>(Section 3, Arts. 4.5, 6, 15, 16, 17 and 28(4) , EU proposal)</p>	<ul style="list-style-type: none"> • Cooling-off period of 6 months • 3 ½ years statute of limitations to bring a claim • Expedited review of manifestly unfounded claims • Possible award of attorneys' fees • Denial of benefits clause to "shell companies" • Express provision for States' counterclaims <p>(Arts. 9.17 , 9.18, 9.20.1, 9.22.4, 9.22.5, 9.22.6, TPP text released)</p>

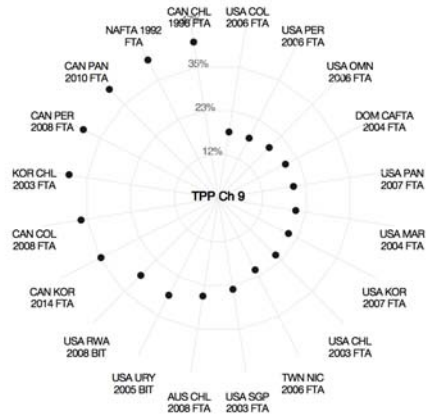
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IV. Convergence

(from: www.mappingbits.com)

Treaties most similar to TPP Chapter 9



The charts show Jaccard distances to TPP Chapter 9 for each article.
 A distance of 0.18, for instance, means 82% of textual overlap.
 FTAs include only respective investment chapters. Footnotes and annexes are omitted.
 Click on treaty name to open its text below.

Thank you!



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