PCA

Permanent Court of Arbitration Summaries of Awards 1999–2009

edited by
Belinda Macmahon and Fedelma Claire Smith

T·M·C·Asser Press

PERMANENT COURT OF ARBITRATION

PERMANENT COURT OF ARBITRATION

SUMMARIES OF AWARDS 1999–2009

Edited by

Belinda MACMAHON and Fedelma Claire SMITH

T·M·C·ASSER PRESS

Published by T·M·C·Asser press
P.O. Box 16163, 2500 BD The Hague, The Netherlands
<www.asserpress.nl>

ISBN 978-90-6704-319-9

The Permanent Court of Arbitration (PCA) is an intergovernmental organization, founded at the first Hague Peace Conference in 1899, and based in the Peace Palace in The Hague. It provides a wide range of dispute resolution mechanisms – including arbitration, conciliation and fact finding – in disputes involving various combinations of states, private parties and intergovernmental organizations. The PCA is committed to meeting the rapidly evolving dispute resolution needs of its member states and the international community.

International Bureau
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
Telephone: +31 70 302 4165
Facsimile: +31 70 302 4167
Email: bureau@pca-cpa.org
Website: www.pca-cpa.org

Permanent Court of Arbitration

Summaries of Awards
1999–2009

This book is dedicated to the memory of

Sir Arthur Desmond Watts KCMG, QC

(November 14, 1931 – November 16, 2007)

Member of the Eritrea-Ethiopia Boundary Commission

Arbitrator in the Malaysia/Singapore, Barbados/Republic of Trinidad and Tobago, and Ireland *v.* United Kingdom (MOX Plant) arbitrations

Chairman of the Tribunal in Saluka Investments B.V. *v.* Czech Republic

Member and friend of the Permanent Court of Arbitration

where he served and inspired others with infinite wit,
wisdom, and warmth.

FOREWORD

It gives me great pleasure to present this publication, a collection of summaries of the thirty-one public awards and decisions rendered by fifteen arbitral tribunals and commissions for which the Permanent Court of Arbitration (PCA) in The Hague provided registry and administrative services over the decade December 1999 to August 2009, which saw the organization's remarkable revival. When the PCA was created at the First Hague Peace Conference in 1899, it was originally conceived as an intergovernmental mechanism exclusively for the settlement of disputes between States. However, the evolving flexibility of the PCA has allowed it to identify and respond to the changing dispute resolution needs of the international community in a world order that is dramatically different from that of the late nineteenth century, and that continues today.

The present volume provides an overview of the PCA's recent history and follows on from the PCA's 1999 publication *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution: Summaries of Awards, Settlement Agreements and Reports* (Kluwer Law International), which contained summaries of all publicly available awards, decisions and reports rendered with the PCA's assistance over the one hundred years since its establishment. The period of time covered by the previous volume ended with the conclusion of the first phase of the land and maritime boundary proceedings between Eritrea and Yemen; the first summary in the present volume relates to the second phase of those proceedings.

Over the last decade, the broad and diverse range of arbitrations that the PCA has been called upon to administer includes, amongst others, four arbitrations brought under Annex VII of the 1982 United Nations Convention of the Law of the Sea and the recently concluded arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army. The two commissions established by the peace agreement signed by Eritrea and Ethiopia that brought an end to the war between them that lasted from May 1998 to June 2000 – the Eritrea-Ethiopia Boundary Commission and the Eritrea-Ethiopia Claims Commission – are also featured. The latter only recently completed its mandate with the release of its Final Awards on Damages. The case load of the PCA over the past ten years has thus addressed matters such as State sovereignty, the laws of armed conflict (*jus in bello* and *jus ad bellum*), the delimitation of land and maritime boundaries, and the interpretation of treaties, as well as vital and rapidly-developing fields such as international humanitarian law, the law of the sea, environmental law, and the protection of foreign investors. All of the awards and decisions featured herein are available in full on the PCA's website at www.pca-cpa.org, along with other pertinent information concerning each particular case.

I am greatly indebted to Professor J.G. Merrills, Professor of International Law of the University of Sheffield, United Kingdom, who has – once again – contributed a thorough and in-depth critical analysis on the contribution of these arbitrations to the development of international law and international dispute resolution.

I wish to express gratitude to my predecessor, Tjaco T. van den Hout, Secretary-General of the PCA from 1999 to 2008, whose vision and resolve made this project possible. Thanks are also due for the diligence and skill of former PCA staff members Fedelma Claire Smith, who drafted and co-edited the summaries, and to Belinda Macmahon, who edited and oversaw the composition of the book and project-managed its publication. I am also grateful to the many tribunal chairpersons and presidents who graciously participated in the rigorous review procedure for each summary.

I am certain that this volume will prove to be a valuable research tool for academics and practitioners of public international law and related disciplines, and for anyone wishing to gain an insight into the PCA's work and field of activity in recent years. I am sure that it will also be useful to foreign ministries and other government departments, intergovernmental organizations, and of course any other body which may in future seek to make use of the Permanent Court of Arbitration.

Christiaan KRÖNER

Secretary-General
Permanent Court of Arbitration
The Hague, December 2009

ABBREVIATIONS

AFDI	Annuaire français de droit international
AM. J. INT'L L.	American Journal of International Law
ASIL	American Society of International Law
AUST. J. INT'L L.	Australian Journal of International Law
BR. Y.B. INT'L L.	British Yearbook of International Law
CHINESE J. INT'L L.	Chinese Journal of International Law
DUBLIN U. L.J.	Dublin University Law Journal
Eur. Ct. H.R.	European Court of Human Rights
EUR. ENV'L L. REV.	European Environmental Law Review
GEO. WASH. INT'L L. REV.	George Washington International Law Review
GERM. Y.B. INT'L L.	German Yearbook of International Law
THE GLOBAL CMTY. Y.B.	The Global Community Yearbook of International Law and Jurisprudence
GRIFFIN'S VIEW ON INT'L & COMP. L.	Griffin's View on International & Comparative Law
HAGUE Y.B. INT'L L.	Hague Yearbook of International Law
I.C.J. REP.	International Court of Justice – Reports of Judgments, Advisory Opinions and Orders
ICSID REP.	International Centre for Settlement of Investment Disputes (ICSID) Reports
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
INT'L & COMP. L.Q.	International and Comparative Law Quarterly
INT'L J. MARINE & COASTAL L.	International Journal of Marine & Coastal Law
INT'L L. & JURIS.	International Law and Jurisprudence
J. CONFLICT & SEC. L.	Journal of Conflict & Security Law
JDI	Journal du droit international
J. ENV'L L.	Journal of Environmental Law
J. INT'L ARB.	Journal of International Arbitration
J. INT'L DISPUTE SETTLEMENT	Journal of International Dispute Settlement
J. WORLD INV. & TRADE	Journal of World Investment & Trade
LEIDEN J. INT'L L.	Leiden Journal of International Law
MARINE POL'Y	Marine Policy
NETH. INT'L L. REV.	Netherlands International Law Review
NORDIC J. INT'L L.	Nordic Journal of International Law
N.Z. Y.B. INT'L L.	New Zealand Yearbook of International Law
OCEAN DEV. & INT'L L.	Ocean Development & International Law

RBDI	Revue Belge de droit international
RGDIP	Revue Générale de Droit International Public
R.I.A.A.	Reports of International Arbitral Awards
RQDI	Revue québécoise de droit international
S.C.R.	Supreme Court of Canada Reports
SING. L. REV.	Singapore Law Review
TILBURG FOREIGN L. REV.	Tilburg Foreign Law Review
WIS. INT'L L.J.	Wisconsin International Law Journal
WORLD TRADE & ARB. MATERIALS	World Trade & Arbitration Materials
Y.B. INT'L HUMAN. L.	Yearbook of International Humanitarian Law

TABLE OF CONTENTS

APPENDICES

OVERVIEW AND ANALYSIS

THE CONTRIBUTION OF THE PERMANENT COURT OF ARBITRATION TO INTERNATIONAL LAW

1999-2009

by

J.G. Merrills*

When the Permanent Court of Arbitration ("PCA") celebrated its centenary in 1999 it marked the occasion by publishing a volume containing a summary of the cases in which the PCA had been involved since its inception.[1] In an introduction to the work the present writer analysed that jurisprudence in order to demonstrate the manifold ways in which the PCA's activity has contributed to the development of the rules and principles of international law.[2] In 2007 another landmark was reached with the centenary of the Second Hague Peace Conference. The PCA has decided to mark it with this volume, summarising cases in which the PCA has been involved over the past ten years. As before, it was thought helpful to open the work with an essay putting the individual cases in their broader context and identifying elements in the jurisprudence with a wider legal significance. There have, of course, been fewer cases decided in this latest period than in the previous century, but if the number of decisions is relatively small, this is more than compensated for by the complexity of the arguments presented and the range of issues that had to be dealt with. Although it is not possible within the limitations of a general survey to examine any of these recent cases in detail, what follows will, it is hoped, serve to highlight their more important features.

---

* Professor of International Law (Emeritus), University of Sheffield, United Kingdom.

[1] THE PERMANENT COURT OF ARBITRATION: INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION pp. 3-27 (Phyllis Hamilton *et al.* eds., 1999) [hereinafter THE PCA: INTERNATIONAL ARBITRATION]. *See also* Gilbert Guillaume, *The Contribution of the Permanent Court of Arbitration and its International Bureau to Arbitration between States*, Remarks on the Occasion of a Celebration of the Centenary of the PCA, The Hague, Oct. 18, 2007, *available at* the PCA website, www.pca-cpa.org.

[2] J.G. Merrills, *The Contribution of the Permanent Court of Arbitration to International Law and to the Settlement of Disputes by Peaceful Means*, *in* THE PCA: INTERNATIONAL ARBITRATION, *supra* note 1, at p. 3.

I. TERRITORIAL SOVEREIGNTY

Historically, territorial sovereignty has been one of the fundamental concerns of international law. As international law developed to govern the relations of States, which are territorial entities, so rules and principles to regulate the acquisition of territory, its transfer and the delineation of boundaries were an early requirement and still constitute a key component of the system. In view of the importance attached to territory and the uncertainty of many historic titles, it is not surprising that several of the PCA's early cases, included the well-known *Island of Palmas* case,[3] involved territorial issues. In the period we are concerned with two further cases have been added to the list – the 2002 Decision of the Commission in the *Eritrea-Ethiopia Boundary* case, which was followed by efforts by the same Commission to demarcate the boundary, and the 2009 Award of the Tribunal in the *Abyei* arbitration.

As with the other cases in this survey, it is unnecessary to describe the decision of the Boundary Commission exhaustively, or to review aspects of the case which have already been covered in the literature. However, with territory and boundaries, as with other topics, whilst the general legal framework may now be reasonably clear, only the application of the law to specific situations can clarify its contents in detail. In addition, as well as their substantive contribution, all arbitral decisions have a procedural dimension which may shed light on methods of dispute settlement from the institutional aspect. As we shall see, in both respects the *Eritrea-Ethiopia Boundary* case[4] contains a number of points of interest.

The disputed boundary consisted of three sectors: a central sector and western and eastern sectors, defined by three treaties concluded respectively in 1900, 1902 and 1908, when Ethiopia was an independent State, but Eritrea was an Italian colony. The Boundary Commission's mandate was "to delimit and demarcate the colonial treaty border," based on these treaties, "and applicable international law." Accordingly, at the delimitation stage the Commission's task was mainly one of treaty interpretation. However, guided by the ruling of the International Court of Justice ("ICJ") in the *Kasikili/Sedudu Island* case,[5] the Commission held that the reference to "applicable international law" entitled it to go beyond the law relating to treaty interpretation and to take into account rules of customary international law, even if they might have the effect of altering the position as laid down in the treaty.[6] In the

---

[3] Island of Palmas (U.S./Neth.), 2 R.I.A.A. p. 829 (1928), *also available at* www.pca-cpa.org; *see also* THE PCA: INTERNATIONAL ARBITRATION, *supra* note 1, pp. 3-6 and 118-128.

[4] *See* p. 144 of this volume.

[5] Kasikili/Sedudu Island (Bots./Namib.), Judgment, I.C.J. REP. p. 1045 (1999).

[6] *See* Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Government of Ethiopia, Apr. 13, 2002, paras. 3.14 and 3.15, *available at* www.pca-cpa.org.

context of territorial acquisition and boundaries this is plainly an important facility as it enables an arbitrator to take into account, amongst other factors, arguments relating to prescription, acquiescence, or other legally significant conduct, which either or both of the parties may wish to have considered.

The way in which subsequent conduct can vary the parties' treaty rights is particularly evident in the Boundary Commission's decision on the location of the boundary in the central sector. In one area it adjusted the boundary by taking account of an admission made in the course of the proceedings by Ethiopia; in another it found Eritrean activity sufficient to justify treating the region as part of that State; while in two further places it found the conduct of both parties supported the conclusion that they belonged to Ethiopia. In this sector map evidence was also significant. The evidence of maps is, of course, something which can vary greatly in value, as international courts and tribunals have often explained.[7] Here, however, the description of the boundary in the 1900 Treaty was somewhat vague, but a map which was more explicit had been annexed to it. The Commission therefore concluded that this map could be relied on and should be interpreted as part of the treaty.

In the western sector the Boundary Commission faced a problem of a type that is all too common in boundary disputes. The 1902 Treaty defined part of the boundary by referring to a named river, but the parties were in disagreement as to which of two possible rivers was meant. To resolve this issue the Commission employed the full range of material relevant to treaty interpretation, taking into account the meaning of the key words in the light of the object and purpose of the treaty, its context and negotiating history and the subsequent conduct of the parties in its application. The Commission finally came down in favor of Eritrea's interpretation, an important factor being the finding that the object and purpose of the treaty explicitly included the assignment of a named tribe to Eritrea. Having identified the relevant river, the Commission then had to identify a further part of the boundary which had not been delimited in the 1902 Treaty. This it did by using maps produced later by the parties which it found amounted to subsequent conduct or practice of the parties evidencing their acceptance of the line claimed by Eritrea. Here therefore, as in the central sector, maps were again significant, though in a rather different way.

In the eastern sector the boundary was defined by the 1908 Treaty as a line "parallel to and at a distance of 60 kilometres from the coast." The question here was essentially one of implementation and the Commission decided that the best method was to take a satellite image of the relevant coastline and project it inland so as to produce the necessary boundary line. This decision, which is a good example of how modern technology can assist boundary-making, generated a provisional boundary line, which the Commission then reviewed in the light of the parties' subsequent

---

[7] *See* J.G. Merrills, *The International Court of Justice and the Adjudication of Territorial and Boundary Disputes*, 13 LEIDEN J. INT'L L. p. 873, at pp. 887-888 (2000).

conduct, finding that in one place a small adjustment was needed to reflect their common agreement.

When the delimitation decision (which was unanimous) was rendered in 2002, both parties immediately accepted it. The Commission then began its further task of demarcating the boundary, but soon encountered obstacles. Although demarcation started successfully in the eastern sector, in the central and western sectors the work was obstructed. Having failed to secure the parties' agreement to its activity on the ground, the Commission eventually decided to identify the location of points for the emplacement of boundary pillars by using image processing and terrain modelling techniques. By this means it was able in due course to provide the two governments with a complete list of boundary points. Since the Commission could not remain in existence indefinitely, it decided at the end of 2006 that if within twelve months it had been unable to resume its activity, that list should be regarded as fulfilling its mandate. No further co-operation from the parties was forthcoming, and so in November 2007 the Commission decided to terminate its activity.[8]

The Boundary Commission evidently did its best in very difficult circumstances. Although it is possible that the delimitation stage would have benefited from more time, the Commission had to operate within the time scale laid down by the parties and produced a careful and well-reasoned decision. With the benefit of hindsight it may be questioned whether it was wise to give the Commission the additional task of demarcating the boundary, or whether, as is more commonly the case, that work should have been entrusted to others.[9] But if the case highlights some of the problems of combining the two functions, there is no doubt that when it encountered obstacles the Commission took practical steps to overcome them. The *Eritrea-Ethiopia Boundary* case, though less than ideal in its outcome, therefore contains much of interest to boundary-makers.

The *Abyei* arbitration[10] involved boundary questions of a rather different kind. Sudan achieved independence at the beginning of 1956, but soon afterwards civil war broke out between the north and the south. In 1972 that war was ended by an agreement providing for a referendum to allow certain areas to remain in Northern Sudan or to join a new autonomous Southern Sudan. However, subsequent disputes over self-determination and other issues led in 1983 to a second civil war. The Abyei Area in the middle of the country was the geographical centre of the conflict which in the next two decades claimed over two million lives. In 2002 the Sudanese Govern-

---

[8] On the problems encountered by the Commission in demarcating the boundary *see* Malcolm N. Shaw, *Title, Control and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission*, 56 INT'L COMP. L.Q. p. 755, at pp. 786-793 (2007).

[9] On this point *see id.* p. 794.

[10] The Government of Sudan/The Sudan People's Liberation Movement/Army ("Abyei Arbitration"), Final Award, July 22, 2009, *available at* www.pca-cpa.org. Further details of this case can be found at p. 296 of this volume.