# CONTRIBUTION OF THE PERMANENT COURT OF ARBITRATION TO THE REPORT OF THE UNITED NATIONS SECRETARY-GENERAL ON OCEANS AND THE LAW OF THE SEA, AS AT 10 JUNE 2017[1]

## EXECUTIVE SUMMARY

The Permanent Court of Arbitration ("**PCA**") is an intergovernmental organization that provides a variety of dispute resolution services to the international community. It has unparalleled experience in the administration of interstate arbitrations that concern oceans and the law of the sea. To date, it has acted as Registry in 13 arbitrations brought in accordance with Annex VII of the 1982 United Nations Convention on the Law of the Sea ("**Convention**"). It is also administering the first Conciliation pursuant to Annex V of the Convention, and has served as Registry in a number of arbitrations involving the law of the sea that were not brought under the Convention.

In the reporting period since submission of its last contribution to the United Nations Secretary-General's report on oceans and the law of the sea, the following case ended in the issuance of an award:

- *The South China Sea Arbitration (Republic of the Philippines v. the People's Republic of China)*, PCA Case No. 2013-19 (Award issued 12 July 2016);

The PCA has continued to administer the following cases discussed in its last report:

- *The Arctic Sunrise Arbitration (Netherlands v. the Russian Federation*), PCA Case No. 2014-02;
- *The Duzgit Integrity Arbitration (Malta v. São Tomé and Principe)*, PCA Case No. 2014-07;
- *The Arbitration between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2014-04.
- *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28.

Additionally, the following proceedings were initiated since submission of the PCA's last report:

- *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Case No. 2016-10; and
- *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06.

The above-listed disputes were all instituted under the Convention, other than the arbitration between Croatia and Slovenia, which was brought pursuant to a special agreement between the Parties.

The PCA has continued to engage in outreach and education activities relevant to the law of the sea.

[1] For developments after June 2017 and further information about the PCA, see www.pca-cpa.org. For the PCA's previous reports, see http://www.un.org/depts/los/general_assembly/general_assembly_reports.htm.

## A. INTRODUCTION

The Assistant Secretary-General in charge of the Office of Legal Affairs has invited the PCA to contribute to the second part of the United Nations Secretary-General's 2017 report on oceans and the law of the sea. The invitation requests information on the activities that have been undertaken or are ongoing in the implementation of specific provisions of United Nations General Assembly Resolution 71/257 relevant to the PCA. In addition, the invitation requests information on the main developments in the PCA in the field of ocean affairs and the law of the sea that have occurred since the submission of the PCA's last contribution to the Secretary-General's report. The provision of Resolution 71/257 that is most relevant to the PCA is Part IV on the "Peaceful settlement of disputes." Section B of this report provides background on the PCA. Section C describes the PCA's case activities in relation to the 1982 United Nations Convention on the Law of the Sea (the "**Convention**"). Section D describes other PCA arbitrations involving the law of the sea. Section E contains descriptions of relevant cases administered by the PCA in this reporting cycle. Section F sets out additional relevant activities undertaken by the PCA.

Many arbitrations administered by the PCA are confidential. In other matters, the parties have limited the information concerning their dispute that the PCA is authorized to disclose. This report is accordingly limited to publicly available information.

## B. THE PERMANENT COURT OF ARBITRATION

The Permanent Court of Arbitration is an intergovernmental organization designed to facilitate arbitration and other modes of dispute resolution between States, State entities, intergovernmental organizations, and private parties. The PCA is an autonomous institution, governed by the 121 Contracting Parties to one or both of the PCA's founding conventions: the 1899 Convention for the Pacific Settlement of International Disputes and the 1907 Convention for the Pacific Settlement of International Disputes. The PCA is the oldest intergovernmental institution for the resolution of international disputes, and has developed into a modern, multifaceted arbitral institution that has evolved in response to the dispute resolution needs of the international community.

The PCA's caseload continues to grow and it is presently administering 125 registry cases. These include six interstate disputes arising under treaties or special agreements; 76 investment disputes arising under bilateral or multilateral investment treaties; and 43 disputes arising under contracts between private parties and States, other State-controlled entities or intergovernmental organizations. In addition to arbitration, the PCA also administers a range of dispute resolution mechanisms, including mediation, conciliation, fact-finding commissions, expert determinations, and review panels.

The PCA International Bureau is the secretariat of the organization and is headed by the PCA Secretary-General. The International Bureau is engaged in the day-to-day work of the organization in providing administrative support to tribunals or commissions operating under the PCA's auspices. The PCA's Secretariat is also available to assist in the selection of arbitrators, and the PCA Secretary-General may be called upon to designate or act as appointing authority to assist in constituting tribunals. Since submission of the PCA's last contribution to the report, the PCA Secretariat has received 45 appointing authority requests. In addition to its work in respect of the resolution of particular disputes, the PCA is a center for scholarship and publication, and a forum for legal discourse. The International Bureau has its headquarters at the Peace Palace in The Hague, the Netherlands. It also has a Mauritius office and has concluded Host Country Agreements with a number of its Contracting Parties and cooperation arrangements with many arbitral institutions across the globe, enabling it to organize hearings and other activities in those jurisdictions under similar conditions as in the Netherlands. In the period since the PCA's last report, Host Country Agreements were entered into with Malaysia and Djibouti, and cooperation agreements signed with the Bangladesh International Arbitration Centre, the Istanbul Arbitration Centre (ISTAC), and the Qatar International Center for Conciliation and Arbitration.

More information on the PCA, including its 2016 Annual Report, is available at www.pca-cpa.org.

## C. THE PCA AND THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The Convention sets forth in Part XV rules for the resolution of disputes between States Parties arising out of its interpretation or application. Pursuant to Article 287 of the Convention, arbitration under Annex VII is the default means of dispute settlement if a State has not expressed any preference with respect to the means of dispute resolution available under Article 287(1) of the Convention, or if the parties have not accepted the same procedure for the settlement of the dispute.

Since the Convention came into force in 1994, the following 13 cases submitted to arbitration under Annex VII of the Convention have been administered by the PCA:

1. *The MOX Plant Case (Ireland v. United Kingdom)*, PCA Case No. 2001-03, which was instituted in November 2001 and terminated through a tribunal order issued on 6 June 2008.
2. *Barbados v. Trinidad and Tobago*, PCA Case No. 2004-02, which was instituted in February 2004 and decided by a award rendered on 11 April 2006;
3. *Guyana v. Suriname*, PCA Case No. 2004-04, which was instituted in February 2004 and decided by a award rendered on 17 September 2007;
4. *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, PCA Case No. 2004-05, which was instituted in July 2003 and terminated by an award on agreed terms rendered on 1 September 2005; and
5. *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, PCA Case No. 2010-16, which was instituted in October 2009 and decided by award rendered on 7 July 2014;
6. *The Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, which was instituted in December 2010 and decided by a award rendered on 18 March 2015;
7. *The ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, which was instituted in October 2012 and terminated by a tribunal order in November 2013 following agreement between the Parties;
8. *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, which was instituted in January 2013 and decided by award rendered on 12 July 2016;
9. *The Atlanto-Scandian Herring Arbitration (Denmark in respect of the Faroe Islands v. European Union)*, PCA Case No. 2013-30, which was instituted in August 2013 and terminated by a tribunal order in September 2014, following agreement between the Parties;
10. *The Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, which was instituted in October 2013 and is still pending;
11. *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, which was instituted in October 2013 and is still pending;
12. *The Enrica Lexie Incident (Italy v. India)*, PCA Case No. 2015-28, which was instituted in June 2015 and is still pending;
13. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, which was instituted in September 2016, and is still pending;

Additionally, the PCA is administering the Conciliation between Timor Leste and the Commonwealth of Australia under Annex V to the Convention. This Conciliation, and the Annex VII arbitrations relevant to the reporting period for the United Nations Secretary-General's 2017 report on oceans and the law of the sea, are discussed in further detail in Section E, below.

## D. OTHER PCA ARBITRATIONS INVOLVING THE LAW OF THE SEA

As noted in the PCA's prior reports, the PCA has administered historical and contemporary arbitrations involving the law of the sea that were not brought under the Convention. Some of the earliest arbitrations administered by the PCA continue to provide significant jurisprudence on aspects of the law of the sea, including: the flagging of vessels (*Muscat Dhows (France/Great Britain)*, 1905); maritime delimitation (*The Grisbådarna Case (Norway/Sweden)*, 1909); fisheries (*North Atlantic Coast Fisheries (United States/Great Britain)*, 1910); port State obligations (*The Orinoco Steamship Company (Venezuela/United States)*, 1910); and vessel seizure (*The "Carthage"* and *French Postal Vessel "Manouba" (France/Italy)*, 1913).

The *Eritrea/Yemen* arbitration involved a two-phase arbitration to resolve the issue of sovereignty over certain islands and maritime features located in the Red Sea and, thereafter, to delimit the maritime boundary between the two States. By agreement of the Parties, the PCA acted as Registry. Even though Eritrea has never acceded to the Convention, the Arbitral Tribunal concluded in its Award in the Second Stage that the Parties' arbitration agreement implied Eritrea's acceptance of the application of provisions of the Convention relevant to maritime delimitation, and in both stages of the proceedings the Awards referred to provisions of the Convention. The Arbitral Tribunal held that among the relevant elements of customary law incorporated in the Convention, definitions in Articles 5 and 15 could be relied upon to determine that the international maritime boundary between the Parties would be a single all-purpose boundary that should, "as far as practicable, be a median line between the opposite mainland coastlines."

The PCA has administered a number of other arbitrations brought in accordance with treaties or special agreements other than the Convention, including the arbitration between Croatia and Slovenia.

## E. RELEVANT PCA ARBITRATIONS AND CONCILIATIONS ADMINISTERED IN THIS CYCLE

### i. Arbitration between the Republic of Croatia and the Republic of Slovenia, PCA Case No. 2012-04

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| **Commencement date** | 4 November 2009 |
| **Jurisdictional basis** | Special Agreement |
| **Tribunal members** | Judge Gilbert Guillaume (Chair), H.E. Ambassador Rolf Einar Fife, Prof. Vaughan Lowe QC, Prof. Nicolas Michel, Judge Bruno Simma |
| **Status** | Ongoing |
| **Further information** | https://pcacases.com/web/view/3 |

The Republic of Croatia and the Republic of Slovenia jointly instituted these proceedings concerning their territorial and maritime dispute.

Article 3(1) of the Parties' arbitration agreement states: "The Arbitral Tribunal shall determine (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." Article 4 of the agreement states: "The Arbitral Tribunal shall apply (a) the rules and principles of international law for the determinations referred to in Article 3(1)(a); (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3(1)(b) and (c)."

The first procedural meeting was held on 13 April 2012, following which the Parties submitted their respective Memorials on 11 February 2013, Counter-Memorials on 11 November 2013, and Reply Memorials on 26 March 2014. The pleadings included nearly 1,500 documentary exhibits and legal authorities, as well as over 250 figures and maps. A two-week hearing at the Peace Palace in The Hague was held in June 2014; a summary of the Parties' respective oral arguments is available at https://pcacases.com/web/sendAttach/241.

On 31 July 2015, Croatia informed the Arbitral Tribunal that, pursuant to Articles 60 and 65 of the Vienna Convention on the Law of Treaties, Croatia had notified Slovenia of its intention to terminate the Arbitration Agreement. Croatia also informed the Arbitral Tribunal that, as of the date of the notification, 30 July 2015, Croatia ceased to apply the Arbitration Agreement. On 13 August 2015, Slovenia informed the Arbitral Tribunal that Slovenia had objected to Croatia's purported unilateral termination of the Arbitration Agreement and that, in Slovenia's view, the Arbitral Tribunal had the power and the duty to continue the proceedings.

On 25 September 2015, following the resignation of the arbitrators appointed by Croatia and Slovenia, the Arbitral Tribunal was recomposed in accordance with Article 2, paragraph 2 of the Arbitration Agreement. By letter dated 1 December 2015, the Arbitral Tribunal invited the two Governments to make further submissions "concerning the legal implications of the matters set out in Croatia's letters of 24 July 2015 and 31 July 2015" and fixed the procedural calendar for additional written submissions in this regard. In accordance with that procedural calendar, Slovenia filed a written submission on 26 February 2016; Croatia did not file any written submission. On 17 March 2016, the Arbitral Tribunal held a one-day hearing. After the hearing, the PCA published a press release available at https://pcacases.com/web/sendAttach/1604, including a summary of the positions of both parties.

On 30 June 2016, the Arbitral Tribunal issued its Partial Award, where it held that by engaging in *ex parte* contacts with the arbitrator originally appointed by it, Slovenia acted in violation of provisions of the Arbitration Agreement. However, the Arbitral Tribunal held that these violations were not of such a nature as to entitle Croatia to terminate the Arbitration Agreement, nor do they affect the Arbitral Tribunal's ability, in its current composition, to render a final award independently and impartially. On the same day, the PCA published the Partial Award on its homepage, available at https://pcacases.com/web/sendAttach/1787. In addition, the PCA published a press release, available at https://pcacases.com/web/sendAttach/1785, summarizing the Parties' positions and the reasoning of the Arbitral Tribunal.

On 29 March 2017, the Arbitral Tribunal informed the representatives of the Parties that it was now satisfied that there was no need for any further submissions from the Parties in respect of the merits of the case and that, for this reason, it declares the hearings closed in accordance with the applicable rules of procedure. The Arbitral Tribunal further indicated that it intends to render the Final Award in the proceedings in the coming months.

### ii. The Republic of Philippines v. The People's Republic of China, PCA Case No. 2013-19

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| **Commencement date** | 22 January 2013 |
| **Jurisdictional basis** | Article 287 and Annex VII to the Convention |
| **Tribunal members** | Judge Thomas A. Mensah (President), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Prof. Alfred H.A. Soons, Judge Rüdiger Wolfrum |
| **Status** | Concluded |
| **Further information** | https://pcacases.com/web/view/7 |

The Republic of the Philippines instituted these proceedings concerning the Philippines' "dispute with China over the maritime jurisdiction of the Philippines" in the South China Sea on 22 January 2013. On 19 February 2013, China rejected and returned the Philippines' Notification and Statement of Claim and has maintained a position of non-acceptance of, and non-participation in, the arbitration.

On 27 August 2013, the Arbitral Tribunal adopted its Rules of Procedure and noted that pursuant to Article 9 of Annex VII to the Convention, the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings. In such circumstances, before making its award, the Arbitral Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law. In accordance with the Rules of Procedure, on 16 December 2014, the Arbitral Tribunal took note of the fact that China had not submitted a Counter-Memorial and requested further written argument from the Philippines on certain issues raised in the Philippines' Memorial. The Philippines filed a Supplemental Written Submission in response on 16 March 2015.

On 7 December 2014, China published a "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" in which it set out its view that the Arbitral Tribunal lacks jurisdiction to consider the submissions of the Philippines. China, however, stated that the Position Paper shall not be regarded as China's acceptance of or its participation in the arbitration. The Arbitral Tribunal decided to treat China's Position Paper as constituting a plea concerning the Arbitral Tribunal's jurisdiction.

From 7 to 13 July 2015, the Arbitral Tribunal convened a hearing on the scope of its jurisdiction and the admissibility of the Philippines' claims. It rendered a unanimous Award on Jurisdiction and Admissibility on 29 October 2015. The Arbitral Tribunal held that, in accordance with Article 9 of Annex VII to the Convention, China's decision not to participate in the proceedings does not deprive the Arbitral Tribunal of jurisdiction. The Arbitral Tribunal did not consider there to be any indispensable third party absent from the proceedings. The Arbitral Tribunal held that the Philippines' decision to commence arbitration unilaterally was not an abuse of the Convention's dispute settlement procedures. The Arbitral Tribunal held that the 2002 China–ASEAN Declaration on Conduct of the Parties in the South China Sea, the joint statements of the Parties, the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity do not preclude, under Articles 281 or 282, recourse to the compulsory dispute settlement procedures under the Convention. Furthermore, the Arbitral Tribunal found that the Parties had exchanged views as required by Article 283 of the Convention.

The Arbitral Tribunal rejected the arguments set out in China's Position Paper that the Parties' dispute is actually about sovereignty over the islands in the South China Sea and the delimitation of a maritime boundary and therefore beyond the Arbitral Tribunal's jurisdiction. On the contrary, the Arbitral Tribunal held that each of the Philippines' Submissions reflects disputes between the two States concerning the interpretation or application of the Convention. The Arbitral Tribunal decided it had jurisdiction with respect to matters raised in seven of the Philippines' Submissions, however the remaining Submissions involved issues that did not possess an exclusively preliminary character and accordingly reserved its decision on jurisdiction on those Submissions to the merits phase.

From 24 to 30 November 2015, the Arbitral Tribunal held a hearing on the merits and remaining issues of jurisdiction and admissibility. China did not participate. With the permission of the Arbitral Tribunal after consulting the Parties, seven interested States sent small delegations to observe the proceedings. The Philippines' arguments, which are available in transcripts (in addition to the written pleadings) published on the PCA's website, included: (i) that China is not entitled to exercise what it refers to as historic rights over the waters, seabed and subsoil beyond the limits of its entitlements under the Convention; (ii) that the so-called 'nine-dash line' has no basis under international law insofar as it purports to define the limits of China's claim to historic rights; (iii) that none of the various maritime features relied upon by China as a basis upon which to assert its claims in the South China Sea are capable of generating entitlements beyond 12 miles, and some generate no entitlements at all; (iv) that

China has breached the Convention by interfering with the Philippines' exercise of its sovereign rights and jurisdiction; and (v) that China has damaged the marine environment, in breach of the Convention.

On 12 July 2016, the Arbitral Tribunal issued a unanimous Award. First, the Arbitral Tribunal held that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the 'nine-dash line'. The Arbitral Tribunal found that to the extent that China had historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent that they were incompatible with the exclusive economic zones provided for in the Convention. The Tribunal also noted that, although Chinese and other navigators and fishermen had historically made use of the *islands* in the South China Sea, there was no evidence that China had historically exercised exclusive control over the *waters* or their resources. The Tribunal concluded that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the 'nine-dash line'.

Second, the Arbitral Tribunal considered entitlements to maritime areas and the status of features in the South China Sea. The Arbitral Tribunal evaluated whether certain reefs claimed by China were above water at high tide. The Tribunal noted that the reefs have been heavily modified by land reclamation and construction, recalled that the Convention classifies features on their natural condition, and relied on historical materials in evaluating the features. The Tribunal then considered whether any of the features claimed by China could generate maritime zones beyond 12 nautical miles, by interpreting and applying Article 121(3) of the Convention which provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." The Tribunal concluded that this provision depends upon the objective capacity of a feature, in its natural condition, to sustain either a stable community of people or economic activity that is not dependent on outside resources or purely extractive in nature. The Tribunal noted that the current presence of official personnel on many of the features is dependent on outside support and not reflective of the capacity of the features. The Tribunal found historical evidence to be more relevant and noted that the Spratly Islands were historically used by small groups of fishermen and that several Japanese fishing and guano mining enterprises were attempted. The Tribunal concluded that such transient use does not constitute inhabitation by a stable community and that all of the historical economic activity had been extractive. Accordingly, the Tribunal concluded that none of the Spratly Islands is capable of generating extended maritime zones. The Tribunal also held that the Spratly Islands cannot generate maritime zones collectively as a unit. Having found that none of the features claimed by China was capable of generating an exclusive economic zone, the Tribunal found that it could—without delimiting a boundary—declare that certain sea areas are within the exclusive economic zone of the Philippines, because those areas are not overlapped by any possible entitlement of China.

Third, the Arbitral Tribunal held that China had violated the Philippines' sovereign rights in its exclusive economic zone by interfering with Philippine fishing and petroleum exploration, constructing artificial islands, and failing to prevent Chinese fishermen from fishing. The Tribunal also held that fishermen from the Philippines (like those from China) had traditional fishing rights at Scarborough Shoal and that China had interfered with these rights in restricting access. The Tribunal further held that Chinese law enforcement vessels had unlawfully created a serious risk of collision in obstructing Philippine vessels.

Fourth, the Arbitral Tribunal found that China had caused severe harm to the coral reef environment and violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species. The Tribunal also found that Chinese authorities were aware that Chinese fishermen had harvested endangered species on a substantial and failed to stop such activities.

Finally, the Tribunal considered whether China's actions since the commencement of the arbitration had aggravated the dispute between the Parties. The Tribunal found that it lacked jurisdiction to consider the implications of a stand-off between Philippine marines and Chinese naval and law enforcement vessels at Second Thomas Shoal, holding that this dispute involved military activities. The Tribunal found, however, that China's recent large-scale land reclamation and construction of artificial islands was incompatible with the obligations on a State during dispute resolution proceedings, insofar as China

has inflicted irreparable harm to the marine environment, built a large artificial island in the Philippines' exclusive economic zone, and destroyed evidence of the natural condition of features in the South China Sea that formed part of the Parties' dispute.

### iii. Arctic Sunrise Arbitration (Netherlands v. Russian Federation), PCA Case No. 2014-02

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| **Commencement date** | 4 October 2013 |
| **Jurisdictional basis** | Article 287 and Annex VII to the Convention |
| **Tribunal members** | Judge Thomas A. Mensah (President), Mr. Henry Burmester QC, Prof. Alfred H.A. Soons, Prof. Janusz Symonides, Dr. Alberto Székely |
| **Status** | Ongoing |
| **Further information** | https://pcacases.com/web/view/21 |

The Kingdom of the Netherlands instituted these proceedings on 4 October 2013 with respect to a dispute concerning the boarding and detention of the vessel *Arctic Sunrise* in the exclusive economic zone of the Russian Federation, and the detention of persons on board the vessel by Russian authorities.

Prior to the constitution of the Arbitral Tribunal, the Netherlands applied for provisional measures from ITLOS, which rendered an Order on 22 November 2013, that the vessel and all persons detained in connection with the dispute be released and allowed to leave Russian jurisdiction upon posting of a bond.

By Note Verbale to the PCA dated 27 February 2014, Russia indicated its "refusal to take part in this arbitration." In its Rules of Procedure dated 17 March 2014, the Arbitral Tribunal affirmed Russia's right to fully participate at any stage of the arbitration, and reserved its own authority to pose questions to the Parties regarding "specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted" by the Netherlands. On 28 November 2014, the Arbitral Tribunal took note of the fact that Russia had not submitted a Counter-Memorial and requested further written argument from the Netherlands on certain issues raised in its Memorial.

After inviting comments from the Parties regarding a request from Greenpeace International to file an amicus curiae submission in the case, the Arbitral Tribunal denied this request on 8 October 2014.

Following its determination that a 22 October 2013 Note Verbale from Russia to the Netherlands constituted a plea concerning the Arbitral Tribunal's jurisdiction, the Arbitral Tribunal issued an Award on Jurisdiction on 26 November 2014. The Arbitral Tribunal unanimously held that Russia's declaration upon ratifying the Convention did not exclude the present dispute from compulsory dispute settlement procedures. Having dismissed the preliminary objections, the Arbitral Tribunal held a hearing on the remaining issues in dispute on 10-11 February 2015 in Vienna, which Russia did not attend.

During the hearing, the Netherlands presented fact witnesses for examination and answered questions from the Arbitral Tribunal. The Netherlands subsequently filed its full and final responses to the Arbitral Tribunal's questions as well as additional documents.

The Arbitral Tribunal issued its unanimous Award on 14 August 2015. It affirmed its jurisdiction over all the claims submitted by the Netherlands, all of which it found to be admissible. It found that by boarding, investigating, inspecting, arresting, detaining, and seizing the *Arctic Sunrise* without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the persons on board the vessel, Russia breached obligations owed by it to the Netherlands as the flag State under Articles 56(2), 58(1), 58(2), 87(1)(a), and 92(1) of the Convention. The Arbitral Tribunal also found that, by failing to comply with the ITLOS Order, Russia breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the Convention. In addition, the Arbitral Tribunal

found that, by failing to pay the deposits requested by it in these proceedings, Russia breached its obligations under Part XV and Article 300 of the Convention.

The Arbitral Tribunal held that, as a result of these breaches, the Netherlands is entitled to compensation (with interest) for material damage to the *Arctic Sunrise*, material and non-material damage to the persons on board the vessel, and the costs incurred by the Netherlands in connection with the issuance of a bank guarantee pursuant to the ITLOS Order. The Arbitral Tribunal also ordered Russia to return objects seized from the *Arctic Sunrise* and the persons aboard and, failing their timely restitution, to compensate the Netherlands for their value. Finally, the Arbitral Tribunal also ordered Russia to immediately reimburse Russia's share of the deposits paid on its behalf by the Netherlands.

The Arbitral Tribunal reserved questions of the quantum of compensation and interest to the next phase of the proceedings, which is currently underway.

### iv. The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), 1982 Convention on the Law of the Sea, PCA Case No. 2014-07

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| **Commencement date** | 22 October 2013 |
| **Jurisdictional basis** | Article 287 and Annex VII to the Convention |
| **Tribunal members** | Prof. Alfred H.A. Soons (President), Judge James Kateka, Prof. Tullio Treves |
| **Status** | Ongoing |
| **Further information** | https://pcacases.com/web/view/53 |

The Republic of Malta instituted these proceedings with respect to a dispute concerning the arrest by São Tomé of a Maltese flagged vessel – the Duzgit Integrity – on 15 March 2013 when it attempted to undertake a ship-to-ship ("STS") cargo transfer in São Tomé's archipelagic waters, and the subsequent measures taken by São Tomé in relation to the vessel, its master, cargo, owner and charterer. The case marks the first instance in which disputing parties have agreed to apply Article 3 of Annex VII to the Convention mutatis mutandis to the constitution of a three-member Arbitral Tribunal.

The Arbitral Tribunal was constituted on 13 March 2014. After a full exchange of written pleadings, on 23 and 24 February 2016, a hearing was held at the Peace Palace, in The Hague. The hearing pertained to all issues of jurisdiction, admissibility, merits, and any entitlement to reparation. São Tomé had objected to jurisdiction on the grounds that the dispute between the Parties did not concern the interpretation or application of the Convention. São Tomé had also contended that Malta's claims were not admissible on the grounds that: Malta had failed to fulfil the Convention's requirement with respect to the exhaustion of local remedies; Malta had not sufficiently specified the grounds on which several of its claims were based; and Malta had failed to fulfil the Convention's requirement with respect to exchanging views regarding settlement of the dispute before resorting to arbitration. In addition, São Tomé had contended that Malta's claims for damages suffered by the owner of the Duzgit Integrity were not admissible as they were the object of a settlement agreement. Malta disputed all of São Tomé's objections regarding jurisdiction and admissibility.

With respect to the merits of the dispute, Malta had claimed, inter alia, that the measures taken by São Tomé violated Articles 2(3) and 25 of the Convention, which relate to the exercise of a State's sovereignty over its territorial sea, and Article 49(3) of the Convention, which relates to the exercise of a State's sovereignty over its archipelagic waters. Malta had also claimed that São Tomé breached Articles 192, 194, and 225 of the Convention, which relate to preservation of the marine environment, when São Tomé undertook a subsequent transfer of the vessel's cargo. Malta had also invoked in relation

to all of its claims Article 300 of the Convention which imposes upon States a duty of good faith and prohibits the abuse of rights. São Tomé opposed all of Malta's claims.

On 5 September 2016, the Arbitral Tribunal issued its Award, finding that it had jurisdiction over the dispute and that Malta's claims were admissible. The Arbitral Tribunal determined that Article 49 of the Convention was applicable (rather than Articles 2 2(3) and 25) because the Duzgit Integrity was located in the archipelagic waters of São Tomé at the time of its arrest. On the facts, the Arbitral Tribunal found that the Duzgit Integrity did not have the prior authorization that was required under São Tomé's domestic law to undertake the intended STS transfer. The Arbitral Tribunal also considered that the master of the Duzgit Integrity had indicated repeatedly his willingness to move to outside São Tomé's territorial sea to make the transfer. The Arbitral Tribunal noted that, under international law, enforcement measures taken by a coastal State in response to activity within its archipelagic waters are subject to the requirement of reasonableness, which encompasses the general principles of necessity and proportionality.

The Arbitral Tribunal found, unanimously, that the measures taken by São Tomé on 15 March 2013 – detaining the vessel, requesting the master to come onshore to explain the circumstances, and imposing the IMAP fine – fell well within the exercise by São Tomé of its law enforcement jurisdiction. The Arbitral Tribunal found, by majority, however, that the other penalties imposed by São Tomé – the prolonged detention of the master and vessel, the monetary sanctions, and the confiscation of the entire cargo – when considered together, could not be regarded as proportional when considering the original offence or the interest of ensuring respect for São Tomé's sovereignty. The Arbitral Tribunal found, by majority, that the disproportionality was such that it rendered the cumulative effect of the sanctions incompatible with the responsibilities of a State exercising sovereignty on the basis of Article 49 of the Convention. Consequently, the Arbitral Tribunal held, by majority, that Malta was entitled to claim reparation regarding certain heads of claim in a later phase of this arbitration. Having determined a breach of Article 49(3) of the Convention, the Tribunal saw no need to determine a violation of Article 300 of the Convention.

The Arbitral Tribunal also dismissed Malta's claims under Articles 192, 194, and 225 of the Convention finding that, based on the evidence before it, Malta had not persuaded the Tribunal that São Tomé had exposed its marine environment to an unreasonable risk. As regards the proceedings to date, the Tribunal ordered that the Tribunal's expenses be borne in equal shares by the Parties and that the Parties bear their own legal costs. Judge Kateka attached a dissenting opinion in which he disagreed with the majority's finding that São Tomé had violated Article 49 of the Convention. Judge Kateka stated, inter alia, that each penalty imposed by São Tomé should be considered on its own merit, and in the context of its particular circumstances and the gravity of the violation.

Malta is now entitled to to proceed to claim reparations in a further phase.

### v. The "Enrica Lexie" Incident (Republic of Italy v. Republic of India), PCA Case No. 2015-28

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| **Commencement date** | 26 June 2015 |
| **Jurisdictional basis** | Article 287 and Annex VII to the Convention |
| **Tribunal members** | Judge Vladimir Golitsyn (Chair), Professor Francesco Francioni, Judge Jin-Hyun Paik, Judge P. Chandrasekhara Rao, Judge Patrick L. Robinson |
| **Status** | Ongoing |
| **Further information** | https://pcacases.com/web/view/117 |

On 26 June 2015, Italy served on India a notification of dispute under Article 287 and Annex VII, Article 1 of the Convention. According to Italy, the Parties' dispute arises from an incident

approximately 20.5 nautical miles off the coast of India involving the "MV Enrica Lexie", an oil tanker flying the Italian flag, and India's subsequent exercise of criminal jurisdiction over the vessel and two Italian marines from the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, in respect of that incident. According to India, the "incident" in question concerns the killing of two Indian fishermen, on board an Indian vessel named the "St. Antony", and the subsequent exercise of jurisdiction by India. It is alleged that the fishermen were killed by the two Italian marines stationed on the "Enrica Lexie"

On 11 December 2015, Italy filed a request for provisional measures pursuant to Article 290, paragraph 1, of the Convention. On 18 January 2016, the Arbitral Tribunal held a first procedural meeting at the Peace Palace, The Hague. India submitted its Written Observations on Italy's request on 26 February 2016. On 30 and 31 March 2016, a public hearing on provisional measures was held at the Peace Palace in The Hague. Both parties presented two rounds of oral arguments.

On 29 April 2016, the Arbitral Tribunal adopted its Order in respect of Italy's request for the prescription of provisional measures. In the operative part of the Order, the Arbitral Tribunal unanimously: (i) prescribed that Italy and India shall cooperate to achieve a relaxation of the bail conditions of Sergeant Girone; (ii) confirmed Italy's obligation to return Sergeant Girone to India in case the Arbitral Tribunal finds that India has jurisdiction over him; and (iii) decided that Italy and India shall each report to the Arbitral Tribunal on compliance with its provisional measures.

On 30 September 2016, Italy submitted its Memorial, following which India submitted a Counter-Memorial on 14 April 2017, including a counter-claim. According to the procedural calendar established by the Arbitral Tribunal in a Procedural Order dated 1 June 2017, it now falls on Italy to submit a Reply, including a Counter-Memorial on India's jurisdictional objections and a Counter-Memorial on India's counter-claim by 11 August 2017. India may submit a Rejoinder, including a Reply to Italy's Counter-Memorial on jurisdiction and/or admissibility and to Italy's Counter-Memorial on India's counter-claim by 15 December 2017.

### vi. Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia

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| **Commencement date** | 11 April 2016 |
| **Jurisdictional basis** | Annex V to the Convention |
| **Conciliation Commission** | H.E Ambassador Peter Taksøe-Jensen, Dr. Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, Judge Rüdiger Wolfrum |
| **Status** | Ongoing |
| **Further information** | https://pca-cpa.org/en/cases/132/ |

On 11 April 2016, pursuant to Article 298 and Annex V of the Convention, Timor-Leste initiated compulsory conciliation proceedings against Australia concerning the maritime boundary between the two countries.

From 29 to 31 August 2016, the Conciliation Commission held a hearing at which the Parties addressed the background to the conciliation and Australia's objections to competence. By agreement of the Parties, the opening session of the hearing on 29 August 2016 was webcast live and remains available on the PCA's website. On 19 September 2016, the Conciliation Commission issued its Decision on Competence, finding itself competent to continue the conciliation proceedings.

From 10 to 13 October 2016, the Conciliation Commission held a series of confidential meetings with the Parties' delegations in Singapore. In the course of those meetings the governments of Timor-Leste and Australia agreed to an integrated package of confidence-building measures intended to facilitate the

conciliation process and create the conditions conducive to the achievement of an agreement on permanent maritime boundaries in the Timor Sea. As part of these confidence-building measures, Timor-Leste wrote to the tribunals in the two arbitrations it had initiated with Australia under the *Timor Sea Treaty* (PCA Case No. 2013-16 and PCA Case No. 2015-42) in order to request the suspension of the proceedings.

On 9 January 2017, in continuation of the agreed package of confidence-building measures, the Foreign Ministers of Timor-Leste and Australia and the Conciliation Commission issued a Trilateral Joint Statement, noting Timor-Leste's intention to terminate the *Treaty on Certain Maritime Arrangements in the Timor Sea* and setting out the Parties' agreement on the legal consequences of such termination. In that Trilateral Joint Statement, the Foreign Ministers of Timor-Leste and Australia and the Conciliation Commission also recognized the importance of providing stability and certainty for petroleum companies with interests in the Timor Sea and of continuing to provide a stable framework for petroleum operations and the development of resources in the Timor Sea.

From 16 to 20 January 2017, the Conciliation Commission held a series of confidential meetings with the Parties' delegations in Singapore. At the conclusion of those meetings, as the last step in the agreed package of confidence-building measures, Timor-Leste wrote to the tribunals in the two arbitrations under the *Timor Sea Treaty* in order to withdraw its claims.

From 26 to 31 March 2017, and again from 6 to 9 June 2017, the Conciliation Commission held a further series of confidential meetings with the Parties' delegations in Washington DC and Copenhagen to explore their positions and to identify possible areas of agreement. Both the Parties and the Commission agreed that the meetings were productive, and reaffirmed their commitment to work towards the conclusion of an agreement on maritime boundaries. "Over the course of the last months, the Commission has gained a deeper understanding of the Parties' interests and of the differences that separate them," said Ambassador Peter Taksøe-Jensen, the Chairman of the Commission. "The Commission continues to believe that, with the goodwill we see from both governments, a comprehensive resolution of this dispute is possible. We will continue to work with that objective in mind".

A number of further meetings between the Parties and the Commission are expected to take place in the coming months. The Commission will conduct future meetings in a confidential setting in order to provide an environment conducive to facilitating the eventual success of the conciliation, although further public statements may be made from time to time.

### vii. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06

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| **Commencement date** | 16 September 2016 |
| **Jurisdictional basis** | Article 287 and Annex VII to the Convention |
| **Tribunal members** | Judge Jin-Hyun Paik (Chair), Judge Boualem Bouguetaia, Judge Alonso Gómez-Robaldo, Professor Vaughan Lowe QC, Judge Vladimir Golitsyn |
| **Status** | Ongoing |
| **Further information** | https://pcacases.com/web/view/149 |

On 16 September 2016, Ukraine served on the Russian Federation a Notification and Statement of Claim under Article 287 and Annex VII to the Convention referring to a 'dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait'.

On 12 May 2017, the Arbitral Tribunal held its first procedural meeting at the Peace Palace in The Hague, during which they consulted with the Parties in respect of the procedural framework for the arbitration, including the calendar for oral and written pleadings. On 18 May 2017, the Tribunal adopted Rules of Procedure for the arbitration in light of the discussion at the first procedural meeting. The Tribunal's Rules of Procedure and press photographs of the meeting are available on the PCA website.

## F. ADDITIONAL RELEVANT PCA ACTIVITIES

### i. Support for other flexible dispute settlement mechanisms

The PCA also administers procedures, other than arbitration, in cases related to ocean and maritime affairs. Examples, such as the review of a decision of the Southern Pacific Regional Fisheries Management Organisation conducted in 2013, are included in the PCA's contribution to the 2015 Secretary-General's report. The full record of those review proceedings is also available on the PCA website at http://www.pcacases.com/web/view/33. The PCA has also helped administer a conciliation between an IGO and NGO under the UNCITRAL Rules of Conciliation, and a matter initially referred to arbitration under the PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources was referred, by party agreement, to conciliation under the PCA Optional Rules for Conciliation of Disputes Relating to the Environment and/or Natural Resources.

### ii. Education and outreach

The PCA regularly participates in conferences and publishes on issues relating to the peaceful settlement of disputes in international law, including in the context of the governance of oceans and the law of the sea. For example, in 2016, Ms. Judith Levine, a Senior Legal Counsel at the PCA, presented on recent procedural challenges in PCA law of the sea cases at the King's College London and UC Berkley Law of the Sea Conference. The series of lectures presented by the PCA Deputy Secretary-General, Brooks Daly, at the 2014 Hague Academy of International Law on 'The Renaissance of Interstate Arbitration', are currently being edited for book publication. An important theme of the lectures was the contribution of Part XV of the Convention to the increased use in recent years of arbitration for the peaceful resolution of interstate disputes. In 2016, Mr. Daly also presented lectures on the Convention and related cases for the Advanced LLM in Public International Law at Leiden University.

Given the increasing number of PCA-administered disputes involving sustainable development and environmental law, including under the Convention, the PCA regularly engages in education and outreach in relation to climate change related disputes. Following from the PCA's participation in COP21,[2] the PCA sent a delegation to COP22, the 22nd meeting of the Conference of Parties to the UN Framework Convention on Climate Change, in Marrakesh in November 2016. A book of papers from the COP21 side event that the PCA jointly hosted with the International Bar Association (IBA), ICC Court of International Arbitration, and the Stockholm Chamber of Commerce (SCC), has recently been published, including a chapter by PCA Senior Legal Counsel Judith Levine, on 'Adopting and Adapting Arbitration for Climate Change Related Disputes – The Experience of the PCA'. Since 2016, Ms. Levine is a Visiting Lecturer in the Global Law of Climate Change LLM course at King's College, London. PCA Senior Legal Counsel Martin Doe participated in a joint SCC/IBA/ICC/PCA conference "Bridging the Climate Change Policy Gap" in Stockholm in December 2016.

The PCA gives guest lectures to students, visiting scholars, legal practitioners, and government representatives. In many of these presentations, the PCA discusses cases that relate to the governance of oceans and the law of the sea. Since the submission of the PCA's last contribution to the report, the

[2] The speech of the Secretary-General at COP21 on the PCA and resolution of environmental disputes is available at https://pca-cpa.org/wp-content/uploads/sites/175/2015/12/PCA-Press-Release-dated-8-December-2015.pdf.

PCA presented lectures to students from the World Maritime University and Leiden University, to a delegation from the Office of the Special Envoy to the President of the Republic of Indonesia for Maritime Delimitation between Indonesia-Malaysia, and to fellows from the International Tribunal for the Law of the Sea, on issues relating to law of the sea and maritime arbitration. As described in the 2016 PCA Annual Report, presentations were recently also given to officials, diplomats and legal professionals from Mauritius, Senegal, Kuwait, Latvia, China, the United Kingdom and the Netherlands.

### iii. Coordination with other international institutions

The PCA seeks to contribute to a cooperative approach amongst international institutions engaged in the peaceful settlement of international disputes relating to maritime and ocean affairs. Through an exchange of letters between the Secretary-General of the PCA and the Registrar of ITLOS, the PCA and ITLOS have agreed to cooperate with respect to relevant legal and administrative matters. The PCA and ITLOS have undertaken to exchange documents and explore cooperation in areas of mutual concern. In 2016, the PCA also participated in the 20th anniversary ITLOS symposium on "The contribution of the tribunal to the Rule of Law".

The PCA was represented, as observer, at the twenty-seventh meeting of the States Parties to the Convention, held in New York from 12 to 16 June 2017. On 14 June 2017, PCA Senior Legal Counsel, Dirk Pulkowski, addressed the States Parties at a side event organized by DOALOS, on the subject of "Choice of Procedure under Article 287 of the United Nations Convention on the Law of the Sea".