

PCA CASE N° 2015-42
IN THE MATTER OF THE ARBITRATION UNDER
THE TIMOR SEA TREATY OF 20 MAY 2002
between
THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE
and
THE COMMONWEALTH OF AUSTRALIA
CASE CONCERNING THE MEANING OF ARTICLE 8(B)

RULES OF PROCEDURE

SECTION I. INTRODUCTORY RULES

Scope of Application

Article 1

1. The arbitration shall be conducted in accordance with Article 23 and Annex B of the *Timor Sea Treaty* and these Rules.
2. The International Bureau of the Permanent Court of Arbitration (the ‘International Bureau’) shall act as registry and shall provide administrative support in the arbitral proceedings.

Notice, Calculation of Periods of Time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received when it has been delivered to the addressee. Notice shall be deemed to have been received on the day it is so delivered.
2. For the purposes of paragraph 1 of this article, ‘delivered’ includes delivery by electronic means.
3. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-work day in the State of the addressee, the period is extended until the first work day which follows. Official holidays or non-work days occurring during the running of the period of time are included in calculating the period.

4. The time zone by which periods of time shall be calculated is that of The Hague, the Netherlands. Deadlines for submissions and other notifications, communications, and proposals shall expire at midnight on the date due under such designated time zone.

Representation and Assistance

Article 3

Each party shall appoint an agent. The parties may also be assisted by persons of their choice. The name and address of the agent must be communicated in writing to the other party, to the International Bureau and to the arbitral tribunal after its members have been appointed.

SECTION II. COMPOSITION OF THE ARBITRAL TRIBUNAL

Arbitrators

Article 4

For the purposes of these Rules, 'arbitrator' or 'arbitrators' refers to those appointed or approved by the parties in accordance with the *Timor Sea Treaty*.

Challenge to Arbitrators

Article 5

A prospective arbitrator shall disclose to those who approach him/her in connection with his/her possible appointment any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him/her of these circumstances.

Article 6

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. Either party may challenge the arbitrator appointed by that party only for reasons of which the party becomes aware after the appointment has been made.

Article 7

1. A party who intends to challenge an arbitrator shall send notice of its challenge within thirty days after the appointment of the challenged arbitrator has been notified to the challenging party or within thirty days after the circumstances mentioned in articles 5 and 6 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his/her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Annex B of the *Timor Sea Treaty* shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise its right to appoint or to participate in the appointment.

Article 8

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made by the Secretary-General of the Permanent Court of Arbitration.
2. If the Secretary-General of the Permanent Court of Arbitration sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure set out in Annex B to the *Timor Sea Treaty*.

Replacement of an Arbitrator

Article 9

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure set out in Annex B of the *Timor Sea Treaty*. Any resignation by an arbitrator shall be addressed to the arbitral tribunal and shall not be effective unless the arbitral tribunal determines that there are sufficient reasons to accept the resignation, and if the arbitral tribunal so determines the resignation shall become effective on the date designated by the arbitral tribunal.
2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his/her performing his/her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the *Timor Sea Treaty* and these Rules shall apply.

Repetition of Hearings in the Event of the Replacement of an Arbitrator

Article 10

If the presiding arbitrator is replaced under articles 7 to 9, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

SECTION III. ARBITRAL PROCEEDINGS

General Provisions

Article 11

1. Subject to the provisions of the *Timor Sea Treaty* and these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are closely consulted and treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case. The arbitral tribunal, in exercising its discretion,

shall conduct the arbitration so as to provide a fair and efficient process for resolving the parties' dispute and to avoid unnecessary delay and expense.

2. If either party so requests at any appropriate stage of the proceedings, the arbitral tribunal shall hold an oral hearing on interlocutory matters. In the absence of such a request, the arbitral tribunal shall decide whether to hold such a hearing or whether decisions on such matters shall be made on the basis of documents and other materials.
3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party and a copy shall be filed with the International Bureau.

Place of Hearings and Meetings

Article 12

1. Unless the parties agree otherwise, the place where hearings will be held shall be The Hague, the Netherlands.
2. The arbitral tribunal may hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. After inviting the views of the parties, the arbitral tribunal may meet at any place it deems appropriate for the inspection of property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

Language

Article 13

1. The language of the arbitration is English.
2. Any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into English.

Order of Pleading

Article 14

1. The timetable for submissions shall be as follows:
 - (a) Timor-Leste's submission of its statement of claim: 30 January 2017
 - (b) Australia's submission of its statement of defence: 30 June 2017
2. At the request of either party, and after having sought the views of the other party, the arbitral tribunal may extend the time for the submission of any pleading.
3. The arbitral tribunal may, *proprio motu* or at the request of a party, and after seeking the views of the parties, direct that the parties file such further written pleadings as may be required, and shall fix the periods of time for the submission of such pleadings.

4. Having regard to paragraph 3 hereof, either party shall, within 15 days of the submission of the statement of defence, make any application for the filing of further written pleadings as it considers appropriate. After affording the other party an opportunity to express its views on the application in question, the arbitral tribunal shall rule on the application within 15 days.
5. Unless the arbitral tribunal otherwise decides, no further document or witness may be tendered by a party after the close of the written proceedings.

Statement of Claim

Article 15

1. Consistent with the timetable at article 14 and requirements as to form at article 19, Timor-Leste shall communicate its statement of claim in writing to the respondent and to the arbitral tribunal.
2. The statement of claim shall include a precise statement of the following particulars:
 - (a) The names and addresses of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought.

Statement of Defence

Article 16

1. Consistent with the timetable at article 14 and requirements as to form at article 19, Australia shall communicate its statement of defence in writing to the claimant and to the arbitral tribunal.
2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 15, paragraph 2).
3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the *Timor Sea Treaty*.
4. The provisions of article 15, paragraph 2, shall apply to a counter-claim.

Amendments to the Claim or Defence

Article 17

During the course of the arbitral proceedings either party may amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause.

Pleas as to the Jurisdiction of the Arbitral Tribunal

Article 18

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause.
2. The arbitral tribunal shall have the power to determine the existence or the validity of the treaty of which an arbitration clause forms a part. For the purposes of article 18, an arbitration clause which forms part of the treaty shall be treated as an agreement independent of the other terms of the treaty. A decision by the arbitral tribunal that the treaty is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence, or with respect to a counter-claim, in the reply to the counter-claim. A plea that the arbitral tribunal does not have jurisdiction arising out of a second or subsequent round of pleadings shall be made no later than the next pleading of the party raising the plea, or, in the case of the last pleading of the arbitration, within thirty days.
4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in its final award.

Form of Written Submissions

Article 19

1. The parties shall submit together with any written submission all documentary, witness, expert and other evidence upon which they intend to rely in support of that submission. The parties shall also append legal authorities (such as treaties, laws, decrees, or judicial decisions) cited in their submissions.
2. The parties' written submissions shall be transmitted in the following manner:
 - (a) On or before the day of the deadline, the submitting party shall transmit an electronic copy of its submission, if possible in searchable Adobe PDF, by email and by USB flash drive (or other electronic device) to the other party and to the International Bureau, for onward transmission to the arbitral tribunal.
 - (b) On or before the same day, the submitting party shall dispatch by courier five hard copies of the same materials sent electronically to the International Bureau, for onward transmission to the arbitral tribunal. The submitting party shall also dispatch two hard copies of those materials to the opposing party, unless the opposing party indicates that it does not require hard copies.
3. Evidence and legal authorities appended to the parties' written submissions shall be organised as follows:
 - (a) Documents submitted to the arbitral tribunal shall be numbered consecutively throughout the arbitration and shall clearly distinguish between different types of documents (e.g., exhibits, witness statements, expert reports, legal authorities). The parties shall agree on a method of numbering and labelling of documents that is consistent between them.
 - (b) Written submissions shall be accompanied by a detailed table of contents describing all

evidence and legal authorities appended to them by exhibit number, date, type of document, and author or recipient, if and as applicable.

Evidence and Hearings

Article 20

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. At any time during the arbitral proceedings the arbitral tribunal may call upon the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine, subject to any appropriate confidentiality requirements. The arbitral tribunal shall take note of any refusal to do so as well as any reasons given for such refusal.

Article 21

1. There shall be an oral hearing. The arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof, and shall make reasonable efforts to accommodate the parties' availability in scheduling the hearing.
2. Before any hearing, a party may be called upon by the arbitral tribunal or the other party to present at the hearing for examination and cross-examination any witness or expert whose written testimony has been advanced with the written submissions. A party may also call its own witnesses or experts for examination at the hearing. Each party shall notify the International Bureau and the other party of the names of the witnesses and experts it wishes to call to testify at the hearing no later than thirty days prior to the hearing.
3. Except with leave of the arbitral tribunal, no expert or witness of fact may be heard unless he or she has provided a signed written expert report or statement.
4. Where a language other than English is to be used by a witness or expert, the necessary arrangements for interpretation into English shall be made by the International Bureau.
5. Before testifying, witnesses (other than experts) shall not be in attendance at the hearing. The arbitral tribunal is free to determine the manner in which witnesses are examined.
6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.
7. The International Bureau shall make arrangements for a verbatim record of each hearing to be produced.

Confidentiality

Article 22

1. The arbitration shall be listed on the website of the International Bureau. The listing shall identify the parties to the arbitration, the members of the arbitral tribunal, and the parties' agents, co-agents, counsel, advocates and advisers.
2. Hearings shall be held *in camera* and all submissions, evidence, including witness statements and other written material, and the content therein, related to the proceedings shall be confidential unless otherwise agreed by the parties.

3. Subject to any redactions ordered by the arbitral tribunal upon the application of either party, any award of the arbitral tribunal shall be made public on the website of the International Bureau.
4. Within thirty days after the receipt of any award, either party, with notice to the other party, may apply to the arbitral tribunal for redactions to the award. After considering the views of the parties, the arbitral tribunal shall decide on the requested redactions within thirty days, after which the award shall be made public.
5. Pending publication of an award in accordance with paragraphs 3 and 4, it shall remain confidential. In the event that the arbitral tribunal decides to make public a redacted award, the unredacted award shall remain confidential unless otherwise agreed by the parties.
6. If the parties agree to the publication of written pleadings, documents and evidence submitted in the arbitration, verbatim transcripts of meetings and hearings, or the arbitral tribunal's procedural orders and decisions, the same procedure for redactions shall apply as for any award.
7. Sanctions for a breach of confidentiality shall be at the discretion of the arbitral tribunal, including termination of the proceedings.

Interim Measures of Protection

Article 23

1. Unless the parties otherwise agree, the arbitral tribunal may, at the request of either party, take any interim measures it deems necessary to preserve the respective rights of either party.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

Failure to Appear or to Make Submissions

Article 24

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate its claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate its statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.
2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal shall, subject to the decision of the other party, proceed with the arbitration.
3. If one of the parties, duly required to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make an award on the evidence before it.

Closure of Hearings

Article 25

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, *proprio motu* or upon application of a party, to reopen the hearings at any time before the final award is made.

Waiver of Rules

Article 26

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

SECTION IV. THE AWARD

Decisions

Article 27

1. Any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his/her own, subject to revision, if any, by the arbitral tribunal.

Form and Effect of the Award

Article 28

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
2. An award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and shall contain the date on which the award was made. Where an arbitrator fails to sign, the award shall state the reason for the absence of the signature.
5. Copies of the award signed by the arbitrators shall be communicated to the parties by the International Bureau.

Applicable Law

Article 29

The arbitral tribunal shall decide such disputes in accordance with the terms of the *Timor Sea Treaty* and relevant international law, such as:

- (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) The general principles of law recognized by civilized nations;
- (d) Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Settlement or Other Grounds for Termination

Article 30

1. If, before the final award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.
2. If, before the final award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.
3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated to the parties by the International Bureau. Where an arbitral award on agreed terms is made, the provisions of article 28, paragraphs 2 and 4 to 5, shall apply.

Interpretation of the Award

Article 31

1. Within sixty days after the receipt of an award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 28, paragraphs 2 to 5, shall apply.

Correction of the Award

Article 32

1. Within sixty days after the receipt of an award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.
2. Such corrections shall be in writing, and the provisions of article 28, paragraphs 2 to 5, shall apply.

Additional Award

Article 33

1. Within sixty days after the receipt of an award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.
3. When an additional award is made, the provisions of article 28, paragraphs 2 to 5, shall apply.

Costs

Article 34

The term 'costs' includes only:

- (a) The fees of the arbitral tribunal;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague and the International Bureau.

Article 35

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the complexity of the subject-matter, the time spent by the arbitrators, the amount in dispute, if any, and any other relevant circumstances of the case.
2. When a party so requests, the arbitral tribunal shall fix its fees only after consultation with the Secretary-General of the Permanent Court of Arbitration who may make any comment he/she deems appropriate to the arbitral tribunal concerning the fees.

Article 36

1. Each party shall bear its own costs of arbitration.
2. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 31 to 33.

Deposit of Costs

Article 37

1. The International Bureau following the commencement of the arbitration, may request each party to deposit an equal amount as an advance for the costs referred to in article 34, paragraphs (a), (b), (c) and (e). All amounts deposited by the parties pursuant to this paragraph and paragraph 2 of this article shall be directed to the International Bureau, and disbursed by it for such costs, including, inter alia, fees to the arbitrators, the Secretary-General and the International Bureau.
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.
3. If the requested deposits are not paid in full within sixty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
4. After the final award has been made, the International Bureau shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.