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A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration

Charles Qiong Wu*

The international community has long been struggling to find an effective mechanism to resolve transboundary environmental disputes. On June 19, 2001, the ninety-four Member States of the Permanent Court of Arbitration ("PCA")¹ adopted by consensus the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment ("Rules"),² based on the widely used Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules").³ The drafters claim that the Rules make the PCA the first unified international forum for environmental dispute resolution. Although the Rules do provide several innovative features particularly suitable for handling environmental disputes, the absence of compulsory jurisdiction and other procedural limitations will seriously undermine the effectiveness and applicability of the Rules.

I. PROCEDURAL INNOVATIONS

The most significant procedural innovation of the Rules is that they permit greater flexibility in the nature and number of parties that may engage in arbitration than currently exists elsewhere. First, the Rules allow *any combination* of states, inter-governmental organizations, non-governmental organizations ("NGOs"),

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1. Established in 1899 at The Hague, the PCA is the oldest international institution for the settlement of disputes among States. The PCA administers dispute settlement through conciliation, mediation, fact-finding, and arbitration. Since the 1990s, the PCA has taken a series of steps to improve and modernize the functioning of its system.
2. Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment ("Rules"), available online at <<http://www.pca-cpa.org/EDR/ENRrules.htm>> (visited Mar 24, 2002).
3. Arbitration Rules of the United Nations Commission on International Trade Law (UN 1976), available online at <<http://www.pca-cpa.org/BD/uncitralrules.htm>> (visited Mar 24, 2002).

multinational corporations, and individuals to use them.⁴ Second, in a departure from the traditional two-party adversarial system, the Rules also allow multi-party arbitration.⁵

These innovations directly address the two principal lacunae in environmental dispute resolution. First, it is widely acknowledged that granting NGOs direct access to dispute resolution tribunals is indispensable to effective resolution of international environmental controversies.⁶ However, because the existing international legal system is based on the notion of state sovereignty, only a state can be a party before various tribunals; non-state actors gain access to these tribunals indirectly through state actors. For example, most of the tribunals with universal jurisdiction, such as the International Court of Justice ("ICJ") and the World Trade Organization Dispute Settlement Process, are open only to states. Even though some regional tribunals, such as the Court of Justice of European Communities ("ECJ"), do provide access to non-state actors, they must meet stringent standing requirements. The Rules make the PCA the first universal tribunal through which NGOs and individuals can gain equal footing with states and multinational corporations in environmental controversies.

Second, it is equally necessary to have a multilateral system that can bring in all of the interested parties to an environmental dispute. Because international environmental problems often affect many entities and involve multiple sources and cumulative causes, the existing two-party adversarial system of international litigation is arguably incapable of dealing with such issues. Because the Rules are also open to business entities and other interest groups, allowing environmental NGOs involvement will not necessarily privilege environmental interest over other interests. Therefore, the forum is unified in the sense that with such broad flexibility, there should be no international environmental dispute that the PCA regime could not accommodate procedurally.

Another notable innovation of the Rules is that parties may choose to use two panels: one arbitrator panel and one expert panel. Like most arbitration rules, the Rules allow parties to directly appoint a panel of arbitrators. In cases where the parties cannot reach agreement, they may together choose an appointing authority and

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4. E-mail communication from the Assistant Counsel of the PCA to the author [on file with CJIL]. Under previous PCA arbitration rules, at least one of the parties has to be a state.
 5. Rules at introduction (cited in note 2).
 6. See Peggy Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 *Colo J Intl Envir L & Pol* 191 (2001). The basic rationale is that NGOs usually are more focused on environmental protection while States are typically preoccupied with diplomatic and trade concerns. Moreover, NGOs are arguably more representative of public opinion, and more capable of conceptualizing environmental problems and solutions across borders.

entrust that authority with forming the arbitrator panel.⁷ Unlike other arbitral rules, the PCA rules allow the arbitrator panel to appoint one or more experts to form an expert panel that reports to the panel.⁸ Further, to assist parties in rapidly appointing arbitrators and gaining expert opinions, the PCA will provide a list of arbitrators with legal experience in environmental protection or natural resource conservation, as well as a list of environmental scientists who are qualified and willing to provide expert assistance to the parties and the arbitral tribunal.⁹ Although both lists are nominated by Member States and the Secretary-General, parties are free to appoint arbitrators from outside of the arbitrator list and the tribunal is free to select scientists from outside of the scientist list.¹⁰

PCA's emphasis on the arbitrators' environmental experience directly responds to the criticism that judges on existing tribunals do not have the knowledge and expertise to deal with complicated environmental issues. For example, even though the ICJ established a special Chamber for Environmental Matters ("CEM") in 1993, no state has ever brought a dispute to it—partly because the CEM judges do not have any greater experience in environmental issues than their non-member colleagues. In addition, the ICJ has itself been criticized for being insensitive to environmental causes. For example, in the only environmental dispute brought before it in 1997, the ICJ failed to accept the plaintiff's argument that the anticipated environmental damage should excuse its performance under a treaty it entered with the defendant.¹¹

Notwithstanding the significance of this criticism, the creation of the expert panel may be still more controversial. Because scientific information plays such a critical role in environmental disputes, many international environmental treaties have established scientific bodies to monitor changing environmental conditions and to spearhead research developments. Very few of these treaties allow their respective signatories to exert influence over the scientific body. Allowing parties to have some input into the expert panel will increase disputants' confidence in the system. This

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7. Parties are free to choose an arbitral tribunal of one, three, or five persons. Rules at art 6–8 (cited in note 2).
 8. *Id.* at art 27.
 9. Both lists are still under construction.
 10. Note that these lists are different from the list of Members of the Court. Pursuant to the Hague Conventions of both 1899 and 1907 under which the PCA was established, each Member State may select a maximum of four arbitrators. The persons thus designated are referred to as "Members of the Court." Under the Rules, arbitrators on this list are also available for parties to choose. See *id.*, introduction.
 11. See Mari Nakamichi, *The International Court of Justice Decision Regarding the Gabčíkovo-Nagymaros Project*, 9 *Fordham Envir L J* 337 (1998). In the Gabčíkovo-Nagymaros case, the Hungarian People's Republic entered into a treaty with the Czechoslovak Socialist Republic in 1977 for the construction of a dam on the Danube River. The Hungarian government suspended and subsequently abandoned the project, alleging grave risks to Hungary's environment and water supply. The ICJ held that the potential environmental harm did not constitute a "state of necessity" under customary international law and, hence, Hungary was still bound by the 1977 treaty.

benefit, however, comes at the price of sacrificing the independence and impartiality of the expert panel. Because the arbitral tribunal must rely on the expert panel to assess the magnitude of the risk, to identify the proximate cause, and to determine the level of liability for the alleged environmental damage, one can expect that most of the future battles will likely focus on the selection of expert panels.

The Rules also try to expedite the arbitration process through various innovative measures. Time is of the essence in resolving environmental disputes because of the possibility of irreversible damage to the ecosystem. Despite the need for an expeditious process, existing tribunals have been slow in rendering decisions, in part because such tribunals are not particularly well adapted for the type of fact-finding necessary in complex environmental disputes. For example, it took eight years for the ICJ to decide the *Barcelona Traction Case*¹² and six years to decide the *South West Africa Cases*.¹³ The amended Rules try to expedite the arbitral process by shortening the period of time that the arbitration panel has to decide the case.¹⁴ In addition, if the parties cannot agree on arbitrators, the Secretary-General has the authority to directly appoint arbitrators, rather than simply designating an appointing authority, as is the case under the UNCITRAL Rules.¹⁵

Besides the procedural advantages provided by the Rules, parties also enjoy certain institutional advantages associated with the PCA. For example, with all other factors equal, the tribunal at the PCA is more affordable than some other choices because the operating cost of the PCA's International Bureau is covered under the budget of the United Nations.¹⁶

II. LIMITATIONS

The procedural resources provided by the Rules, together with the institutional resources provided by the PCA, constitute a uniquely attractive forum for international environmental dispute resolution. However, the forum shares a common weakness with all other forums for international disputes: the lack of compulsory jurisdiction. Before the resources mentioned above can be utilized, the parties must agree to submit their disputes to this tribunal; one party alone cannot force other parties to submit to the PCA's jurisdiction.

Therefore, the forum needs the support of some other enforceable instruments to confer jurisdiction. One possible instrument is a multilateral treaty. States may insert a clause into certain treaties requiring submission of disputes to arbitration at

12. *Case Concerning the Barcelona Traction, Light and Power Co, Ltd*, 1970 ICJ 3.

13. *Southwest Africa Cases* (Ethiopia v South Africa; Liberia v South Africa), 1966 ICJ 4, 48.

14. Rules at forward (cited in note 2).

15. *Id* at art 6.

16. Sean D. Murphy, *Does the World Need a New International Court?*, 32 *Geo Wash J Intl L & Econ* 333, 348 (2000).

the PCA. As of 1995, some twenty-three multilateral environmental treaties provided for unilateral submission of disputes to arbitration, and twenty-one treaties allowed submission to arbitration only upon parties' agreement.¹⁷

Although many of these treaties provide detailed rules on the constitution of the arbitral tribunal, only a few contain detailed procedures for arbitral proceedings.¹⁸ Even for those that do specify procedures, the secretariats of the conventions are often small and do not have enough financial or human resources to implement the procedures.¹⁹ Therefore, disputants under these treaties seldom pursue the recourse of arbitration. The forum at the PCA could bridge this gap by serving as the designated arbitral forum for future environmental agreements. Moreover, existing international environmental arbitration decisions are scattered among different tribunals, and often inconsistent. Shared use of the forum by various treaties would, in turn, enhance its continuity and legitimacy, and the forum itself could become a source of legal principles and precedents.

However, since most treaties are agreements among nations, non-state actors will still have to rely on some form of state sponsorship to participate. Recent experience indicates that states may invite NGOs into international environmental disputes.²⁰ But even with such invitations, NGOs still do not have independent standing. Nevertheless, private parties can obtain direct access to arbitral forums by private contract. Thus, if a multinational corporation wants to invest in a developing country, the host government could insert a provision into the investment contract requiring submission of environmental disputes to arbitration at the PCA.²¹ But NGOs will have very few occasions to enter into private contracts, and therefore have no opportunity to insert such arbitration clauses.

On the other hand, if States and multinational corporations do not want to expose themselves to suits brought by NGOs and individuals, the same opposition remains when they are asked to enter into treaties or contracts that contain a mandatory arbitration clause. States might never sign a treaty that may bring NGOs into arbitration proceedings and a multinational corporation might never enter into a contract that will be enforced by arbitration at the PCA. Even if they agree to use the

17. Philippe Sands and Ruth MacKenzie, *Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements*, art 26, available online at <<http://www.pca-cpa.org/EDR/envannex1.htm>> (visited Mar 24, 2002).

18. *Id.* at art 28.

19. *Id.*

20. In the recent Shrimp/Turtle case before the WTO, a number of developing countries challenged a US regulation that prohibited shrimp imports from countries that failed to require turtle excluder devices on shrimp harvesting nets. The US designated briefs from two groups of environmental NGOs as an annex to its submission to the Panel. See Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 *Colo J Intl Envir L & Pol* 47 (2001).

21. See Murphy, 32 *Geo Wash J Intl L & Econ* 333 (cited in note 16).

PCA, they might still insist on excluding certain types of disputes from the agreements to avoid unpredictable liabilities.

In criticizing the PCA forum for lacking compulsory jurisdiction, one should realize that the problem is unlikely to be solved through procedural or institutional innovations. There has been extensive discussion in the international legal community about the need for an international environmental court that would have compulsory jurisdiction over states and non-state actors. However, establishing such a court would require states to surrender their sovereignty. Environmental disputes usually involve vital national interests, making states even more unwilling to surrender their autonomy. If states do not want to be held accountable to NGOs before existing tribunals, they are unlikely to ratify an instrument creating such a court. In fact, the question of an international environmental court was taken off the agenda at the 1992 Earth Summit in Rio de Janeiro because of opposition from participating states. Therefore, because the international community operates on a consensus basis, an environmental tribunal with compulsory jurisdiction is unlikely to emerge.

Mindful of the importance of cooperation in international arbitration, the drafters of the Rules made every effort to give parties the maximum amount of flexibility and autonomy. However, doing so may have limited the desirability of the forum in some circumstances. For example, under the Rules each party bears its own costs of arbitration.²² This symmetric structure surely makes it easier for parties to agree to arbitration, but developing countries, NGOs with little financial resources, and indigent individuals might find it difficult to pay. Although the PCA provides a Financial Assistance Fund to help developing countries meet the costs of arbitration, only countries that are both members of the PCA and are listed as aid recipients by the Organization for Economic Cooperation and Development qualify.²³ Moreover, since the Fund relies on voluntary contributions from states, organizations, and individuals, the supply is not guaranteed and may not meet the demand of all qualified countries.²⁴ Therefore, the cost allocation mechanism might thwart the PCA's goal of becoming a truly unified forum.

In addition, the Rules may be inadequate to address certain new challenges insofar as they simply transplant the UNCITRAL Rules from the commercial context to the environmental context. For example, the Rules retain a provision similar to the UNCITRAL Rules, granting the arbitral tribunal power to issue

22. Rules at art 40 (cited in note 2).

23. Permanent Court of Arbitration, *Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines*, art 5, available online at <<http://www.pca-cpa.org/BD/torfundenglish.htm>> (visited Mar 24, 2002).

24. *Id.* at art 4; see also Bette E. Shifman, *The Revitalization of the Permanent Court of Arbitration*, 23 *Intl J Legal Info* 284, 287 (1995) (by 1995, only one government had made a significant commitment to the fund).

interim orders and interim awards.²⁵ It is foreseeable that this power will be invoked much more frequently in the environmental context than in the commercial context because environmental disputes usually involve irreparable harms. However, unlike the final arbitral awards that are usually enforced by national courts pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),²⁶ interim orders and awards are not specifically covered in that convention. The attitude of local courts varies from jurisdiction to jurisdiction. For example, in the US, once the parties agree to arbitrate, the court has no jurisdiction to issue provisional remedies in aid of international arbitration and can only enforce the final award.²⁷ One could argue that, as a practical matter, parties would voluntarily comply with such orders for fear of displeasing the arbitral tribunal. However, previous cases show that parties have been reluctant to comply regardless of the potential adverse consequences.²⁸ Moreover, in many environmental disputes, parties may seek injunctions from local courts before the arbitral tribunal is set up. In those cases, the court will be more reluctant to consider issuing an injunction because the parties have agreed to arbitrate.

Finally, the measure of interim awards helps commercial disputants more than environmental disputants. Both the UNCITRAL Rules and the PCA Rules authorize the tribunal to collect security for costs of both interim awards and interim orders. Thus, interim awards may be more easily enforced than interim orders. It is usually difficult to measure environmental risks in monetary terms, and a damage award is arguably inadequate to compensate for environmental losses. Therefore, the enforcement problem of interim orders may deter some disputants from choosing this forum.

III. CONCLUSION

For the past two decades, the world has seen extensive proliferation of alternative dispute resolution mechanisms. Just as arbitration is but one of various means to settle disputes, the forum at the PCA is but one of various tribunals from which to choose. In this marketplace of tribunals, each forum needs to find its own niche in order to survive. Compared with other types of international dispute resolution, arbitration guarantees that the dispute can be resolved by a peaceful means when all other diplomatic methods fail. Within the category of arbitration, institutional

25. Rules at art 26 (cited in note 2).

26. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517 (1970).

27. See David E. Wagoner, *Interim Relief in International Arbitration: Enforcement Is a Substantial Problem*, 51 Disp Resol J 68 (Oct 1996).

28. Vivienne M. Ashman, *UNCITRAL Initiatives to Further Harmonize and Modernize Arbitration Laws, Rules and Practices*, 624 PLI/Lit 635, 654 (2000).

tribunals enjoy advantages over ad hoc tribunals because they provide immediate secretariat support and efficient administrative assistance. Such features may be extremely attractive for environmental disputants. Compared with other arbitral institutions, the PCA has the longest history, a broader membership representation, and a closer tie with the UN. Although not an organ of the UN, the PCA was granted permanent observer status in the General Assembly in 1993. In various documents, the UN has encouraged the international community to use the PCA to peacefully settle disputes.²⁹ The fact that its Secretary-General was entrusted by the UNCITRAL Rules to designate appointing authorities further illustrates its prominence in international arbitration.

Undoubtedly, this new set of arbitration rules will enhance the status of the PCA as a permanent institution for environmental dispute arbitration. However, despite numerous procedural innovations, the Rules will probably not be as effective and unified as the drafters hoped. Since no case has been brought yet under the Rules, a full evaluation is yet to be had of their actual performance and the impacts on the international legal community. But if the Rules receive positive responses from the international community, other tribunals may follow the PCA's lead and make comparable changes to their own procedures for environmental dispute resolution.

29. See Kofi A. Annan, *Forward to the Basic Documents of the Permanent Court of Arbitration*, available online at <<http://www.pca-cpa.org/BD/foreword.htm>> (visited Mar 24, 2002) ("I encourage States, international organizations and private parties to make greater use of the Court's services.").