The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment

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Abstract. The Permanent Court of Arbitration adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment on 19 June 2001. These Rules seek to address fundamental *lacunae* as identified by a panel of environmental law experts and the member states of the Permanent Court of Arbitration. This article discusses some innovative provisions of the Environmental Rules and concludes that arbitration under the Environmental Rules could have some advantages over adjudication, and that the Environmental Rules can increase access to justice functioning as a tool for interpretation of existing agreements; possibly mending some of the fragmentation of international (environmental) law. The article also offers an examination of present systems and scenarios for how the Environmental Rules may lead to direct environmental improvement.

1. INTRODUCTION

On 19 June 2001, the 94 member states of the Permanent Court of Arbitration ('PCA') adopted by consensus the PCA 'Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment' (hereinafter referred to as the 'Environmental Rules').[1] The Environmental Rules are the fruit of seeds planted by the International Bureau and Administrative Council of the PCA inspired by successful adoption of new

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1. The 94 member states of the PCA are: Argentina, Australia, Austria, Belarus, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chile, China, Colombia, Democratic Republic of Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Israel, Italy, Japan, Jordan, Republic of Korea, Kyrghyz Republic, Laos, Latvia (as of 13 August 2001), Lebanon, Great Socialist People's Libyan Arab Jamahiriya, Liechtenstein, Luxembourg, Macedonia, Malta, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russia, Senegal, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia, Zambia, and Zimbabwe.

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sets of Optional Rules[2] in the initiatives to renew the PCA in the 1990s, and Principle 26 of the Rio Declaration,[3] which urges states to settle their environmental disputes peacefully and by appropriate means in accordance with Article 33(1) of the UN Charter. The PCA commissioned a study by Prof. Philippe Sands in 1996. The study illustrated how the PCA, in light of its institutional power to facilitate complex arbitrations, could play a role in environmental dispute resolution, often involving multiple parties of mixed origin.[4] A Working Group of leading experts in the field of environmental law and arbitration chaired by Prof. Sands was subsequently convened to determine the adequacy of existing environmental dispute resolution mechanisms in international environmental agreements. In the course of the following three years they identified fundamental *lacunae* in such mechanisms, ultimately recommending the adoption of a new set of PCA Optional Rules.[5] A Drafting Committee with Prof. Sands as its chair was then formed, and presented a first draft of the Environmental Rules in September 2000. Although the Rules may be adapted by the parties, are optional in nature, and based on the widely accepted the United Nations Commission on International Trade Law ('UNCITRAL') Rules and previous sets of PCA Optional Rules, their focus on environment raised concerns over sovereignty. Nine months of spirited discussion between member states followed before the Environmental Rules were adopted. The concerns of member states were taken into account by the Drafting Committee and integrated in the Rules, and this should contribute to their acceptance in the international community.

Sands and MacKenzie noted that, "One key weakness in the dispute settlement provisions adopted to date is that by and large they lack compulsory character."[6] States should consider referring disputes to compulsory arbitration under the Environmental Rules. Compulsory binding arbitration in a convention may also offer added security to parties considering accession to a convention in terms of there being recourse to

2. Previous sets of PCA Optional Rules can be found *in* The International Bureau of the Permanent Court of Arbitration (Ed.), Permanent Court of Arbitration – Basic Documents 47–170 (1998) (hereinafter 'PCA – Basic Documents'), or online at www.pca-cpa.org/BD. The Environmental Rules can be found at www.pca-cpa.org/EDR.
3. United Nations Conference on Environment and Development ('UNCED'): Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF. 151/5/Rev.1, reprinted *in* 31 ILM 874 (1992).
4. *See* P. Sands, *Environmental Disputes and the Permanent Court of Arbitration: Issues for Consideration*, Background Paper for the Secretary-General of the Permanent Court of Arbitration (1996).
5. For a detailed overview of deficiencies of existing mechanisms *see* P. Sands & R. MacKenzie, *Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements*, *in* International Bureau of the Permanent Court of Arbitration (Ed.), International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms, The Permanent Court of Arbitration/Peace Palace Papers 305–345 (2001).
6. *See* Sands & MacKenzie, *id.*, at 327.

arbitration at the request of any party. In other words, offering compulsory arbitration in a convention can level the playing field.

Other forms of dispute settlement such as adjudication have potential disadvantages for environmental matters. One is that in adjudicative proceedings, parties are not involved in the choice of judges, and the subject matter of environmental disputes often requires environmental expertise. The Environmental Rules address this by making available a panel of environmental law experts and a panel of environmental science experts to parties. Another possible disadvantage is that adjudication often takes longer than arbitration, potentially resulting in greater expense for the parties, and a slower reaction to the subject matter of the dispute.[7] The Environmental Rules were designed with such shortcomings in mind and have been streamlined to save time and cut costs. Convention member states may further adapt the PCA Environmental Rules to suit their specific needs. Finally, arbitration under the PCA Environmental Rules allows by agreement that all interested parties be given access to justice. This is a feature also not yet universally available in adjudication, and one that could perhaps ensure political acceptance of a convention or measures taken pursuant to a convention.

In this article I will survey some of the innovative provisions of the Environmental Rules, while examining scenarios for their application, and providing background for their development.

2. Survey of the Environmental Rules

The Environmental Rules provide a forum to which states, inter-governmental organizations, non-governmental organizations, corporations, and private parties can have recourse when they agree to use them in seeking resolution of disputes involving environmental protection, and/or conservation of natural resources.[8] It was decided that the scope of the Environmental Rules be broad enough to potentially allow for standing of non-state entities, as existing mechanisms[9] were seen as not adequately addressing the standing of such parties.[10] Parties using the Environmental Rules may wish to modify them to specify jurisdiction *ratione personae*.

7. And thus potentially more environmental harm.
8. *See* the Environmental Rules, *Introduction* and Art. 1(1).
9. This list included the International Court of Justice ('ICJ'), and most existing multilateral environmental agreements ('MEAs') with dispute settlement provisions. Only the 1982 UN Convention on the Law of the Sea allows for a limited intervention by private parties. *See* Hey, *infra* note 10, at 291 for an overview of the Law of the Sea provisions allowing access to private parties.
10. Ellen Hey provides a good survey of the problems that private parties face when seeking access to justice, *see* E. Hey, *Reflections on an International Environmental Court*, *in* International Investments and Protection of the Environment, *supra* note 5, at 287–295, esp. 294–295. Some members of the Drafting Committee cited to Principle 10 of the Rio Declaration, *supra* note 3, in the discussion on standing for non-state entities, which states

Although private parties may be seen as having an obligation to exhaust local remedies before possibly being able to gain the consent of a state to participate in an arbitration, states may see a political incentive in allowing private parties with a legitimate legal interest to do so, by waiving the requirement to exhaust local remedies. This could also apply where a private party seeks to intervene in an ongoing arbitration. Waiving the requirement to exhaust local remedies could lend credibility to the outcome of an arbitration, in that all parties could be seen as having had access to justice in one forum. Arbitration has the added incentive of procedural economy for multiparty disputes. For the foregoing reasons, multiparty arbitration possibly involving private parties under the Environmental Rules could be seen as a way of providing a quick and efficient initial solution to such disputes instead of a last resort.

While allowing for parties to adapt the Rules to suit the specifics of the dispute is a feature common to all sets of PCA Optional Rules, the Environmental Rules go a step further by enumerating in Article 1(1) the various types of legal instruments which might contain reference to the Rules. These are references under Article 1(1) to "any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation to which, the dispute arises" (Article 3(3)(c)). The scope of the Environmental Rules needed to be as wide as possible, and those involved in the drafting process noted that there are approximately 900 legal instruments which contain environmental provisions.[11] Where there is no prior arbitration clause referring to them, the Rules may be invoked on a case-by-case basis pursuant to a submission agreement after a dispute has arisen.

Article 1 can be seen as an attempt to address the fragmentation of international environmental law into multifarious specialized instruments.[12] In that connection, the Environmental Rules can provide for a bridge between such agreements and a separate and distinct law based forum. Although the tribunal may be able to address issues from a variety of instruments, the Environmental Rules cannot be used to create any permanent hierarchy among fora. They can be used to connect systems and actors which might previously have been viewed as separated.[13] An arbitral award is strictly

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that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level […]. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

11. *See* P. Malanczuk, Akehurst's Modern Introduction to International Law, Seventh Revised Edition 244 (1997).
12. E. Hey discusses fragmentation in international law and notes that "Besides divergent interpretations of the law and conflicts of jurisdiction [there is] the absence of a hierarchy among law-based forums for dispute settlement […]." She considers that since fragmentation is the status quo, we must find ways to live with it. Some fragmentation with a degree of experimentation is a possible solution, *supra* note 10, at 285–286.
13. It must be borne in mind that in order to arbitrate a dispute under the Environmental Rules all parties must give their consent, whether it be treaty based or given in a submission agreement.

inter partes, although parties to a convention or other agreement might consent to be bound by the terms of an award interpreting that convention or agreement. Parties referring disputes arising under a convention or agreement may choose to include specific language on the relationship between an arbitral award and the convention or agreement.

Parties may gain more insight into the decision-making process beyond that in other sets of PCA Optional Rules and the UNCITRAL Rules, and of a kind which is more traditionally found in adjudicative proceedings by allowing for separate or dissenting opinions in Article 32(5). By including provisions allowing for separate or dissenting opinions, the Drafting Committee noted that these may, together with the majority award, contribute to forming a body of environmental arbitral jurisprudence.

Although the jurisdiction *ratione materiae* of the Environmental Rules centers on disputes relating to natural resources and/or the environment, Article 1(1) states that:

> The characterization of the dispute as relating to the environment or natural resources is not necessary for jurisdiction, where all parties have agreed to settle a specific dispute under these Rules.

This clarification might prevent parties becoming embroiled in a protracted process of defining terms like "environment" or "natural resource" which may be highly controversial. Many tribunals require such definitions for jurisdiction.[14] The principle of *lex specialis derogat generalis* has been invoked in environmental matters to contest or verify the jurisdiction of a tribunal.[15] The tribunal should rule on any objection to its jurisdiction as a preliminary question, or at its discretion in the final award under Article 21(4). By allowing the tribunal to rule on a plea that it has no jurisdiction in the final award, the tribunal may proceed with the arbitration.

The Secretary-General may make available to parties using the Rules two panels, nominated by member states and/or referred by the Secretary-General; one composed of arbitrators experienced in natural resources and environmental law,[16] and one of environmental science experts.[17] The

14. As the Law of the Sea Tribunal does. *See* Sands & MacKenzie, *supra* note 5, at 327. *See also* R.R. Churchill & A.V. Lowe, The Law of the Sea, Third Edition, 447–462, esp. at 454–459 (1999).
15. *See* H. Hohmann, *Der Konflikt zwischen freiem Handel und Umweltschutz in WTO und EG*, 2 RIW 88–99 (2000). The World Trade Organization ('WTO') Committee on Trade and Environment takes the position that trade measures pursuant to a more specialized multilateral treaty might prevail over less specialized WTO provisions, giving the more specialized multilateral treaty jurisdiction. *See* WTO website at http://www.wto.org/english/tratop_e/envir_e/cte01_e.htm.
16. On general appointment procedures *see* the Environmental Rules, Arts. 6–8; *see* the Environmental Rules, Art. 8(3), for the role of the Secretary-General in referring arbitrators.
17. *See* the Environmental Rules, Art. 27(5), for the provision regarding environmental science/technical experts.

panels are a key feature of the Rules and parties are ensured of their qualifications and expertise in environmental matters because they are nominated by member states and proposed by the Secretary-General in a procedure similar to that used for PCA members.[18] The choice of arbitrators and appointing authority is however, not limited to the PCA lists and parties are free to choose whomever they wish. In order to further facilitate the tribunal's understanding of technical matters and to assist them in determining whether experts need to be consulted, the tribunal may request the parties to agree upon and provide a non-technical document, summarizing and providing background on scientific or technical issues necessary for understanding the matter in dispute.[19] Since time is often a factor in preventing or relieving environmental harm, the "fall-back" appointment procedures provided for ensure the rapid constitution of a panel, where parties or their agreed appointing authority fail(s) or refuse(s) to act in appointing an arbitrator. In case of the latter, the Secretary-General of the PCA shall act as the appointing authority.[20] When acting as appointing authority, or in assisting the parties or an appointing authority, the Secretary-General is able to draw from, or make available as the case may be, current biographies and contact details for several hundred environmental arbitrators and scientific experts. Again, keeping in mind that environmental issues often require rapid response, time periods in terms of appointment procedures and submissions have been shortened compared to those used in previous sets of PCA Optional Rules.[21]

The tribunal may order provisional measures of protection and security under Article 26(1) which it deems necessary to "preserve the rights of any party or to prevent serious harm to the environment falling within the subject matter of the dispute," unless the parties otherwise agree. Some member states were initially concerned that the tribunal, by being able to order measures to prevent environmental harm in general, could over-

18. Panelists serve the same term of 6 years that PCA members of Court do, although the panelists do not have the same functions as PCA members. For a description of the functions of PCA members, *see* the 1907 Hague Convention, Art. 44, reproduced *in* PCA – Basic Documents, *supra* note 2, at 28–29. Under Art. 44 each contracting power nominates up to four persons "of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator." *Also see* the ICJ Statute, Art. 4, elaborating the function of the PCA members in their National Group to nominate persons to serve as judges of the ICJ.
19. *See* the Environmental Rules, Art. 24(4).
20. A more active role for the Secretary-General than in previous sets of PCA Optional Rules and the UNCITRAL Rules is provided for throughout the Rules. *See Notes to the Tex*t in the Environmental Rules for a list of all articles which are modifications of the UNCITRAL Rules. On fall-back procedures and the role of the Secretary-General, *see* Arts. 6(2) and 7(2)(b).
21. Time periods for the fall-back procedure in Art. 6(2) have been shortened from sixty days in the *PCA Optional Rules for Arbitration between International Organizations and Private Parties* Rules, *in* PCA – Basic Documents, *supra* note 2, at 125–152, to thirty days now in the Environmental Rules. Time periods for submissions may not exceed ninety days in the *PCA Optional Rules for Arbitration between International Organizations and Private Parties*, compared with sixty days in the Environmental Rules.

extend jurisdiction to affect third parties not involved in the arbitration. The present provision in Article 26(1) reflects that concern by limiting provisional measures to the "subject matter of the dispute" to "preserve the rights of any party." This provision also reflects the general arbitral principle that tribunals do not have jurisdiction to affect the rights of third parties.[22] Before ordering provisional measures the tribunal must first obtain the views of all parties. Some member states noted that this requirement might be abused as a dilatory tactic although the form of this is not spelled out in the Environmental Rules. The tribunal may however conduct the arbitration "in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case."[23] This means that the tribunal could set the time period for obtaining such views, and determine when it had actually obtained the views of the parties as long as due process is respected.

The Drafting Committee determined a need for confidentiality clauses stronger than those found in existing mechanisms, given the generally sensitive nature of environmental matters. The confidentiality procedures in Article 15(4)–(6) were designed with the protection of information impacting national security, intellectual property, trade secrets, and other proprietary information in mind. Article 15(4) of the Environmental Rules takes confidentiality requirements of existing agreements, especially those obligating parties to share information, into consideration, and provides that experts appointed by the tribunal be held to confidentiality requirements. Article 15(5) allows the tribunal to determine whether information is of such a nature that the absence of special measures of protection would cause harm to a party invoking confidentiality, and to set conditions for its handling. Determination of whether information is of such a nature that it needs to be "classified" does not necessarily entail discovery of the information by the tribunal. Article 15(6) allows for a confidentiality advisor to be appointed as an expert to report on confidential issues, without disclosing them to the party "from whom the confidential information does not originate or to the tribunal." The confidentiality procedures were also intended to save the tribunal and parties having to draft provisions by setting out confidentiality procedures in a more detailed manner than previously provided for in PCA Optional Rules or the

22. The Tribunal ruled in the recent PCA arbitration Larsen *v.* Hawaiian Kingdom, at para. 6(10) that

> It is a cardinal condition for international arbitration (a) that the dispute is a legal one, and (b) that the Tribunal only has jurisdiction as between the parties to the contract of arbitration […]. The Tribunal lacks jurisdiction to award interim measures against non-parties.

The full award can be found at www.pca-cpa.org/RPC/#Larsen.

23. Environmental Rules, Art. 15(1).

UNCITRAL Rules. In keeping with general arbitral practice, Article 25(4) requires hearings to be held *in camera* unless the parties otherwise agree.

Article 33(1), requires the tribunal to apply "the law or rules of law designated by the parties as applicable to the substance of the dispute." Further, failing such designation by the parties, the tribunal shall apply "the national and/or international law and rules of law it determines to be appropriate." This is an especially important innovation considering that in international environmental law, issues often arise in a national context and become transnational at a later stage.[24] Thus, the arbitrators are given the broadest possible scope in determining the applicable law.

The Rules make provision for the fixing and awarding of fees and costs. Article 40(3) excluded additional fees for the correction of an award, but not for additional awards or interpretation of awards. This was introduced to discourage parties from attempting to frustrate the implementation of the award.

In an attempt to ensure equity, access may be granted to the PCA's Financial Assistance Fund for use of the Environmental Rules by developing countries or countries with economies in transition.[25]

3. CONCLUSION(S)

The Environmental Rules are the product of years of research and discussion on environmental dispute resolution and represent the practical experience of leading environmental jurists while reflecting the concerns of the 94 member states of the PCA. The drafting process has led to the development of innovative provisions while avoiding procedures which may cause environmental dispute settlement to fail. The PCA's strength as an institution comes in part from the will of its member states to nominate members who are internationally recognized jurists to its general list of members which is made available to parties seeking to resolve their disputes peacefully. As a corollary to this, it could be argued that nowhere more than in international environmental law are jurists and scientists with expert knowledge needed. Recourse to the panels of environmental law experts and scientists is recourse to this institutional strength in a vital area.

Do the Environmental Rules fill the gaps in environmental dispute resolution which they were intended to? The answer is that they can. They allow for a quick reaction to an issue, and time is of the essence in preventing and mitigating environmental harm. The tribunal can order interim

24. *See* P. Birnie & A. Boyle, International Law and the Environment 89–95 (1992). Note especially the reference to the Trail Smelter arbitration, at 89.
25. *See Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes – Terms of Reference and Guidelines*, *in* PCA – Basic Documents, *supra* note 2, at 231.

measures to prevent or mitigate environmental harm unless the parties otherwise agree. Perhaps even more important is that by offering private parties potential access to justice, legitimate disputes may now be brought before a tribunal, where they might otherwise have gone unheard for lack of a forum.

Several important conventions contain dispute settlement clauses referring to an annex on arbitration, but have not yet adopted arbitration procedures.[26] The Environmental Rules offer such conventions the advantage of being based on the widely accepted UNCITRAL Rules of Procedure (thus also being suited to environmental disputes with commercial dimensions) and the PCA Optional Rules (suited to public international law). The Environmental Rules are *prêt-a-porter*. By adopting a comprehensive and widely accepted set of rules, lengthy and costly tailoring which might arise in negotiations on a novel instrument could be avoided. By referring disputes arising under the context of a multilateral environmental agreement to arbitration under the Environmental Rules, agreements containing dispute settlement clauses, but not yet providing concomitant procedures can be completed, and legally strong regimes created. Where a regime foresees, but lacks a dispute settlement mechanism, it might not function efficiently.

For example, the Kyoto Protocol to the United Nations Framework Convention on Climate Change ('UNFCCC')[27] provides for binding arbitration as an optional means for settling disputes, but does not set out arbitration procedures. The PCA was active at the UNFCCC Conference of the Parties, 6 part 2 in Bonn to promote the Environmental Rules to serve as the Annex on Arbitration referred to in Article 14 of the UNFCCC.

The Environmental Rules do what they were intended to; that is they fill the gaps identified in existing environmental dispute resolution procedures. If major international environmental regimes like the Climate Change regime can now be completed by integrating them, their contribution to the development of international environmental law will be amplified. However, the very existence of the Environmental Rules means that there are arbitration procedures with broad international acceptance available for settling environmental disputes on a case-by-case basis pursuant to a submission agreement. Therefore, even if major environmental conventions do not complete their dispute settlement regimes using the Rules anytime soon, the Environmental Rules are always available where parties agree to use them.

Finally, in completing environmental regimes, and offering access to justice for private parties, awareness of environmental problems is also promoted. The Environmental Rules are therefore not only a bridge be-

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26. Sands and MacKenzie list a number of conventions which could benefit from dispute settlement procedures, *supra* note 5, at 327–330.
27. Kyoto Protocol to the UN Framework Convention on Climate Change, 10 December 1997 and 22 May 1992, reprinted *in* 37 ILM 22 (1998) and 31 ILM 849 (1992).

tween legal instruments, they are a bridge between all actors who can potentially be affected in environmental disputes.[28] As any good bridge, they do not discriminate between traffic, whether pedestrian or diesel-powered, they remain neutral, simply providing the space to move.

28. The International Bureau of the PCA and the Drafting Committee are presently working on rules for conciliation of disputes relating to natural resources and/or the environment.