Statement of the Permanent Court of Arbitration to the Sixth Committee of the United Nation's General Assembly: Report of the International Law Commission – Report of UNCITRAL

Delivered by Dr. Dirk Pulkowski, Senior Legal Counsel (31 October 2017)

1. The discussion of the Sixth Committee presents, this year, a number of legal issues in which the Permanent Court of Arbitration, or PCA, is closely involved. To name only a few such topics, arbitral tribunals under the auspices of the PCA have dealt with questions pertaining to the provisional application of treaties; international environmental law; and the handling of evidence before an international court or tribunal. The PCA is also an active participant at UNCITRAL and an active user of the UNCITRAL Arbitration Rules.

2. As you may be aware, the PCA is an intergovernmental organization set up to facilitate arbitration and other modes of resolution of disputes between States, State entities, intergovernmental organizations, and private parties. It was established in 1899 during the first Hague Peace Conference, which makes it the oldest intergovernmental institution dedicated to the resolution of international disputes.

3. Currently, the PCA's International Bureau provides registry support in 128 pending international arbitration and conciliation proceedings, involving over 50 different governments or State-controlled entities. Proceedings administered by the PCA involve various combinations of States, State entities, intergovernmental organizations, and private parties. These disputes range from maritime and boundary disputes under the United Nations Convention on the Law of the Sea and disputes under other bilateral or multilateral treaties, to investor-State disputes under investment treaties, to contract cases involving State entities or intergovernmental organizations. Moreover, the PCA's functions include registry support for alternative forms of dispute resolution (ADR), including mediation and conciliation.

Provisional Application of Treaties

4. A series of recent PCA arbitrations in the investment field have raised significant questions regarding the provisional application of treaties. As some delegates will be aware, the PCA has provided administrative support in several proceedings under the Energy Charter Treaty in which investors relied on the protections of that Treaty as well as the dispute settlement mechanism established under it on the basis of its provisional application by the host State.

5. I shall not express any view on the substance of the conclusions reached by, now, several tribunals on the effect of provisional application, which I realize remain controversial. I would emphasize however that much of the extensive legal analysis conducted in theses arbitrations is now in the public domain. In the interim awards on jurisdiction and

admissibility in one set of cases,[1] for example, a PCA tribunal summarized the legal opinions prepared by dozens of leading jurists, which had been submitted in the arbitration by both sides, the claimants and the respondent State.

6. Beyond the particular points at issue in those arbitrations, that expert discussion highlights the purpose of provisional application; the nature of a State's consent to provisionally apply a treaty; distinctions between a treaty's application, legal force and effectiveness; the rationale of some carve-outs from provisional application that are typically found in treaties; and the stances taken by various domestic legal systems.

7. The awards to which I have just referred are publicly available on the PCA's online Case Repository, in case this is of interest to delegates.[2]

Protection of the Atmosphere

8. Turning to the topic "Protection of the Atmosphere", I note that the Special Rapporteur explores in his Forth Report the legal principles governing the relationship between rules of international environmental law and other rules of international law. He highlights, in particular, the principle of mutual supportiveness, according to which rules of international environmental law are to be considered, and regarded as relevant, in the application of general international law and special treaty rules in other issue areas.

9. Such linkages are particularly evident in the relationship between international environmental law and international investment law—as previously stated by two distinguished international judges, "now a real subject in international law, […] set to be a permanent and expanding feature of the international agenda, which may also challenge national and international courts and tribunals."[3]

10. The Special Rapporteur's Fourth Report already refers to the ongoing PCA case of *Bilcon v. Canada,*[4] in which the claimants alleged that Canada breached its NAFTA obligations in the course of an environmental impact assessment. In its award, the tribunal recognized public concern that investment treaties might hinder the maintenance and implementation of high standards of environmental protection. The tribunal pointed out that the NAFTA Preamble not only refers to "a predictable commercial framework for business planning and investment" but also to "strengthen[ing of] the development and enforcement of environmental law"[5]—evidence that "economic development and environmental integrity can not only be reconciled, but can be mutually reinforcing".[6] As such, the tribunal established that investment law must give appropriate space and effect to environmental

[1] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation,* PCA Case No. 2005-03/AA226, Interim Award, 30 November 2009, available at: https://pca-cpa.org/en/cases/62; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Interim Award, 30 November 2009, available at: https://pcacases.com/web/sendAttach/421; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation,* PCA Case No. 2005-05/AA228, Interim Award, 30 November 2009, available at: https://pca-cpa.org/en/cases/62/.

[2] See www.pca-cpa.org and www.pcacases.com.

[3] Ndiaye, T.M., & Wolfrum, R. *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amircom Judge Thomas A. Mensah* (Brill-Nijhoff, 2007) p. 320.

[4] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Admissibility, 17 March 2015, available at: https://pca-cpa.org/en/cases/50/.

[5] *Ibid*. paragraph 596.

[6] *Ibid*. paragraph 597.

considerations. The tribunal also affirmed that "lawmakers in Canada and the other NAFTA parties set environmental standards as demanding and broad as they wish."[7]

11. I would commend two other PCA investment cases to the attention of the International Law Commission—*Chemtura v. Canada*[8] and *Allard v. Barbados*.[9] In *Chemtura v. Canada*, the claimant challenged a ban of the agro-chemical "lindane" on the basis of its health and environmental effects. While the tribunal's task was not to carry out a scientific assessment of the risks associated with lindane as such,[10] the tribunal consulted specific international treaties that were pertinent to this question, such as the Stockholm Convention on Persistent Organic Pollutants,[11] and the Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (the so-called Aarhus Protocol).[12] The tribunal also stated that "it is incumbent on it to interpret [NAFTA] in light of the customary international law for the protection of the environment today." On this basis, the tribunal introduced in the investment-law context key principles of international environmental law, such as the principle of participation, pursuant to which States are under a duty to provide channels of participation to groups and individuals who are potentially affected by the environmental consequences of a project.

12. In *Allard v. Barbados*, the tribunal accepted the principle that legitimate expectations by an investor that the State will observe standards of environmental protection can form the basis of a claim under an investment treaty. States must live up to the expectations to which their own assurances in the environmental sector give rise. In the specific case, however, the tribunal found that the claimant had failed to prove that the respondent State had violated such standards. In relation to the role of international environmental law, the tribunal also noted that "[t]he fact that Barbados is a party to the Convention on Biological Diversity and the Ramsar Convention does not change the standard under the disputed treaty, although consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances".[13]

13. Turning to recent arbitrations between States, in the *Iron Rhine Arbitration*[14] between Belgium and the Netherlands, the tribunal applied concepts of contemporary customary international environmental law to treaties dating back to the mid-nineteenth century, when issues of environmental protection were rarely, if ever, the subject of international treaties. The tribunal specifically adopted the international law principle of prevention, stating that States have "a duty to prevent, or at least mitigate significant harm to the environment when pursuing large-scale construction activities."[15]

14. The duty to prevent environmental harm was also reiterated in the *Indus Waters Kishenganga*[16] case between Pakistan and India. In that case, the court of arbitration

---

[7] *Ibid*. paragraph 738.
[8] *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, PCA Case No. 2008-01, Award, 02 August 2010, available at: https://pcacases.com/web/sendAttach/468.
[9] *Peter A. Allard (Canada) v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, available at: https://pcacases.com/web/sendAttach/1955.
[10] *Supra* note 8, paragraph 134.
[11] *Supra* note 8, paragraph 136.
[12] *Supra* note 8, paragraph 137.
[13] *Supra* note 9, paragraph 244.
[14] *Iron Rhine Arbitration (Belgium/Netherlands),* PCA Case No. 2003-02, Award, 24 May 2005, available at: https://pcacases.com/web/sendAttach/477.
[15] *Ibid*. paragraph 29 and paragraph 222.
[16] *Indus Waters Kishenganga Arbitration (Pakistan v. India),* PCA Case No. 2011-01, Partial Award, 18 February 2013, available at: https://pcacases.com/web/sendAttach/1681.

referred to the *neminem laedere* principle of customary international law, affirming that "no State has the right to use its territory in a manner as to cause damage to the territory of another." Specifically, the court referred to Principle 21 of the 1972 Stockholm Declaration on the Human Environment, which states that "States must ensure that activities within their jurisdiction or control do not cause damage to the environment."[17]

15. The court of arbitration further held that States are required to take environmental protection into consideration when planning infrastructure projects, such as hydroelectric dams. The court sided with the ICJ's finding in the *Pulp Mills Case* that States are to undertake international environmental impact assessments when "there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context."[18] The court also reiterated that there is a need to "reconcile economic development with the protection of the environment,"[19] as established in the ICJ case of *Gabcikovo-Nagymaros.* The court of arbitration clarified that for its review of the consistency of a hydroelectric project with the Indus Waters Treaty "[h]ydrologic, geologic, social, economic, environmental and regulatory considerations are all directly relevant".[20]

16. The recent case law at the PCA would thus seem to lend further support to the principle of "mutual supportiveness", as enshrined in "Draft Guideline 10." Reference to international environmental law in proceedings under other international treaties is already a reality in many arbitral proceedings. In its final work product, the International Law Commission may wish to consider discussing some of the case law just mentioned, most of which does not yet appear to be reflected in the Special Rapporteur's Report.[21]

General Principles of Law

17. The PCA would also like to add a few comments on two potential new topics, which may be included in the long-term work programme of the Commission—general principles of law and evidence before international courts and tribunals. It is the prerogative of governments to decide whether either of these topics is suitable for the ILC, and the PCA takes no position on this question. If the Committee were to task the ILC with taking up these topic, the PCA would be pleased to assist the Commission in so far as international arbitral practice is concerned.

18. In examining the role of "general principles of law" within the meaning of Article 38(1) of the ICJ Statute in judicial and arbitral practice, the Commission may wish to review the awards and decisions made available on the PCA's Case Repository, covering by now over 120 PCA cases, including many inter-State proceedings. PCA-administered tribunals have applied general principles of law in various contexts, including the principles of good faith; abuse of rights; *nemo auditur propiam turpitudinem allegans*; *pacta sunt servanda*; and estoppel.

[17] *Ibid.* paragraph 448.
[18] *Supra* note 18, paragraph 450.
[19] *Supra* note 18, paragraph 449.
[20] *Supra* note 18, paragraph 522.
[21] The exceptions being *Bilcon of Delaware et al. v. Canada,* discussed in the Special Rapporteur's Fourth Report, and *Indus Waters/Kishenganga*, briefly discussed in the Special Rapporteur's Third Report.

19. For example, in the PCA case *of Venezuela US, S.R.L. (Barbados) v. The Bolivarian Republic of Venezuela*,[22] faced with the issue of determining jurisdiction, the Tribunal stated in its interim award that "this Tribunal has no other choice than to apply and enforce the [disputed Treaty] provisions in accordance with their terms pursuant to the principle of *pacta sunt servanda*."[23]

20. Another example can be found in the boundary arbitration between *Republic of Croatia and the Republic of Slovenia*,[24] in which the tribunal held that "it is well-established in international law that tribunals should presume, in the absence of evidence to the contrary, that States act consistently with their legal obligations, and that steps that have been taken, and instruments that have been adopted by States are consistent with those obligations. This is sometimes expressed in the Latin maxim *omnia praesumuntur rite esse acta*: all acts are presumed to have been duly done."[25]

21. In the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*,[26] the tribunal noted that estoppel as a "general principle of law", "does not distinguish between representations as to existing facts and those regarding promises of future action or declarations of law".[27] It explained that estoppel came into play in the "grey area of representations and commitments whose original legal intent may be ambiguous or obscure, but which, in light of the reliance placed upon them, warrant recognition in international law".[28]

22. In conclusion, various tribunals in PCA-administered proceedings have applied general principles of international law in circumstances where treaties or customary international law did not provide a rule of decision.

Evidence before International Courts and Tribunals

23. The second potential topic, "evidence before international courts and tribunals" is a subject of particular practical relevance to international adjudication. The practices of different dispute settlement bodies—ranging from permanent inter-State courts, to arbitral tribunals, to the WTO's system and human rights courts—have varied considerably in this regard. In recent years, however, an increasing interest in developing and learning from best practices of other institutions and systems can be observed, which could be encouraged and systematized by an appropriate international body. The PCA would be pleased to support such efforts, whether in the ILC or elsewhere, given that both inter-State proceedings and investor-State proceedings at the PCA routinely involve the submission of significant documentary evidence, witness and expert testimony and other, less commonly used forms of evidence-taking such as tribunal-appointed experts and site visits.

---

[22] *Venezuela US, S.R.L. (Barbados) v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award, 26 July 2016, available at: https://pcacases.com/web/sendAttach/1858.
[23] *Ibid*. paragraph 122.
[24] *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Final Award, 29 June 2017, available at: https://pcacases.com/web/sendAttach/2172.
[25] *Ibid*. paragraph 347.
[26] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, available at: https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.
[27] *Ibid*. paragraph 437.
[28] *Ibid*. paragraph 446.

24. I note that the ILC has provisionally identified as a concern that international rules of procedure do not address evidence in great detail, which may result in a fractured system producing inconsistent decisions. As far as international arbitration is concerned, this conclusion may require some qualification. It is certainly true that the applicable rules of procedure—including Article 27 of the 2012 PCA Arbitration Rules—describe the framework of evidence-taking at a high degree of abstraction, giving wide discretion to the arbitral tribunal. It should not be overlooked, however, that tribunals usually adopt detailed procedural orders in consultation with the disputing parties, in which the precise modalities of evidence-taking are laid down for a particular case. It would thus seem useful for the Commission to expand its enquiry to such procedural orders and indeed to the practice of courts and tribunals pursuant to them. The following methods of evidence-taking may be addressed in this regard.

25. A Party may request the production of documents from the other Party. While documentary evidence is common in all forms of dispute settlement, international arbitral tribunals are frequently asked to rule on so-called document production requests. These are requests by one party that the other party disclose to it certain documents that the latter party has in its possession, custody or control. This practice, originating in the common law legal tradition and commonplace in commercial arbitration, has more recently been adopted in inter-State proceedings.

26. An alternative procedural mechanism are requests of one party—a private entity or a State—to gain access to the governmental archives of the other State party to the dispute. Access to national archives may raise difficult questions of political sensitivity. As was demonstrated in the *Guyana v. Suriname*[29] arbitration, some of these questions may be resolved through the appointment of a so-called document master—an independent expert designated by the tribunal who may inspect confidential materials on the tribunal's instructions.

27. Other evidence includes written and oral witness testimony. In the *Duzgit Integrity Arbitration*,[30] the *Abyei Arbitration*,[31] and the *Arctic Sunrise Arbitration,*[32] tribunals established different procedures for the examination of witnesses at hearings.

28. Tribunals may appoint their own experts to assist them, notably in disputes with a scientific component. A hydrographic expert has been appointed in every maritime boundary arbitration conducted at the PCA. Such appointments have occurred in a transparent fashion, with the tribunal consulting the parties in respect of its proposed candidate. In cases with a non-participating party, to establish whether the claimant's claims were well-founded in fact, the tribunal even appointed several independent experts with different areas of scientific knowledge.

29. Tribunals may also decide to perform a site visit. The purpose of a site visit could be for the arbitral tribunal to gather information that might eventually become part of the

[29] *Guyana v. Suriname*, PCA Case No. 2004-04, Award, 17 September 2009, available at: https://pcacases.com/web/sendAttach/902.
[30] *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe),* PCA Case No. 2014-07, Award, 05 September 2016, available at: https://pcacases.com/web/sendAttach/1915.
[31] *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration),* PCA Case No. 2008-07, Final Award, 22 July 2009, available at: https://pca-cpa.org/en/cases/92/.
[32] *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Merits, 14 August 2015, available at: https://pcacases.com/web/sendAttach/1438.

evidentiary record, or only to obtain a visual impression and a better understanding of the subject-matter of the dispute. Site visits have occurred in several PCA inter-State and investor-State arbitrations. In the *Indus Waters Kishenganga* case,[33] for example, the tribunal inspected hydro-electric projects on both sides of the line of control in Cashmere during the dry season and returned to the same places a second time during the wet season. The notes and photographs taken during the two visits were used in the internal deliberations of the Tribunal. In the *Bay of Bengal Maritime Boundary Arbitration,*[34] the Tribunal decided to conduct a site visit, stating that the site visit helped confirm the "location, visibility and protuberance of the base points located on the respective coastlines of Bangladesh and India identified by the Parties."

30. In *Guyana v. Suriname*,[35] finally, the tribunal dispatched its hydrographic expert on-site to examine the condition and coordinates of a historic boundary marker on the tribunal's behalf.

31. These are only some examples of the recent practice in respect of evidence-taking by PCA tribunals. We would be pleased to elaborate on this practice in a more systematic manner, should this be of assistance to the ILC. In particular, the PCA would be ready to give a presentation to the ILC at any future session in Geneva.

The Work of UNCITRAL with respect to ISDS Reform

32. Allow me to close by returning, briefly, to a topic that was on the agenda of the Committee under item No. 79—the work of UNCITRAL, a UN Commission with which the PCA has enjoyed a longstanding working relationship. As delegates will be aware, UNCITRAL will look into possible reform proposals to the present system of investor-State arbitration. The PCA's docket of cases between the early 20th century and today exemplifies various elements of historical continuity and change in the system of international dispute settlement, which may help put that discussion into perspective.

33. Some of the PCA's earliest proceedings extended to inter-State cases relating to the treatment of foreign investors. The *Japanese House Tax*[36] *case* of 1902, for example, involved facts that bear a striking resemblance to modern investment disputes. Early PCA cases also show the potential for arbitration to assist diplomatic relations where investment disputes might otherwise hinder them. The *Orinoco Steamship Corporation*[37] arbitration between the US and Venezuela provided not only for a resolution of the legal dispute but also allowed the reestablishment of normal political relations. Finally, in the 1930s, the PCA administered for the first time an arbitration opposing a private entity and a State. This case was *Radio Corporation of America v. China,*[38] which set a precedent for the PCA's involvement in disputes between private parties and States, including modern-day investment proceedings.

---

[33] *Supra note* 18.
[34] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA Case No. 2010-16, Award, 07 July 2014, available at: https://pcacases.com/web/sendAttach/383.
[35] *Supra note* 33.
[36] *Japanese House Tax (Germany, France, and Great Britain / Japan)*, PCA Case No. 1902-02, Sentence, 22 May 1905, available at: https://pcacases.com/web/sendAttach/486.
[37] *The Orinoco Steamship Company case (United States of America / Venezuela)*, PCA Case 1909-02, Award of the Tribunal, 25 October 1910, available at: https://pcacases.com/web/sendAttach/513.
[38] *Radio Corporation of America v. China*, PCA Case No. 1934-01, Award of the Tribunal, 13 April 1935, available at: https://pcacases.com/web/sendAttach/713.

34. More recently, the PCA acquired particular expertise in the administration of investor-State arbitration proceedings under the UNCITRAL Arbitration Rules. In the past years, the PCA has consistently registered around 40 new cases per year. Around 60% of these have concerned treaty-based investment arbitrations. This brings the total number of treaty-based UNCITRAL investment arbitrations administered by the PCA to over 170.

35. The PCA also has unique experience as registry to arbitral tribunals with a permanent or long-term character. For example, the PCA acts as secretariat for the standing arbitral tribunal of the Bank for International Settlements, which was first constituted in the 1930s. The PCA also acted as registry for the Eritrea-Ethiopia Claims Commission, which, over a period of almost a decade, issued a series of 17 awards addressing 40 different claims for loss, damage or injury.

36. The PCA's experience suggests that "permanence" and "institutionalization" of courts and tribunals are matters of degree, falling within a spectrum of possibilities. The PCA takes no view as to the desirability of particular reforms in this area, as it is the prerogative of governments to select the dispute settlement mechanism that they regard as most appropriate, taking account of their policy preferences and interests. To the extent that States wish to consider new approaches to the present system of investment arbitration, however, the PCA stands ready to support any such initiatives at the technical level, including by assisting States in designing and implementing efficient and fair mechanisms for the resolution of disputes with foreign investors.

***

37. Thank you for your attention. The PCA looks forward to supporting the work of the Sixth Committee as well as the ILC and UNCITRAL, the two principal fora established by the General Assembly for the development of international law. I sincerely hope that our participation in the discussion may lead to greater understanding of what arbitral practice can contribute to the codification and development of international law.