PCA Draft Presentation at the UNECE Intergovernmental Working Group on Civil Liability, 2nd Meeting, 5 February in Geneva

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On behalf of the Secretary-General of the Permanent Court of Arbitration I would like to thank the assembled delegates of the Intergovernmental Working Group, Executive Secretaries Enderlein and Ludwiczak, and the Chair - and Vice-Chairpersons for their kind invitation to the PCA to speak today. The Secretary-General regrets that he could not address the Working Group today personally, but has asked me to present to you his most sincere compliments on your activities in drafting a legally binding instrument on civil liability for transboundary damage caused by hazardous activities within the scope of the UNECE Water Convention and Industrial Accidents Convention.

When the then 94 Member States of the PCA, of which there are now 95 (as all of the distinguished delegates are naturally aware since they also represent Member States of the PCA) adopted the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment ("Environmental Rules" hereinafter), they were trying to envisage all imaginable types of scenarios in which disputes might arise, much the same as this Intergovernmental Working Group is doing now. Indeed, the PCA Working Group on the Environmental Rules studied the gamut of existing mechanisms on environmental dispute settlement, including various civil liability mechanisms such as those in the two UNECE Conventions at hand[2]. Just as the present Draft Protocol [3]states in the Preamble that Parties are "Convinced of the need to provide for third-party liability", the PCA Working Group had to consider the myriad of potential actors who might have a legal interest in damage to the environment and/or natural resources, whether before or after such damage occurred. In addressing access to justice, the Environmental Rules uniquely provide a forum to which States, intergovernmental organizations, non-governmental organizations, corporations, and private parties can

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[2] For a detailed overview of deficiencies of existing mechanisms *see* P. Sands and R. MacKenzie, *Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements*, *in* International Investments and Protection of the Environment, the Role of Dispute Resolution Mechanisms, Ed. by the International Bureau of the PCA, 305-345 (2001). The foregoing study was a basis for the work of the Working Group.

have recourse *in any combination*, an important point which I will return to later, when they agree to use them in seeking resolution of disputes involving environmental protection, and/or conservation of natural resources[4].

The PCA working group determined that the scope of the Environmental Rules needed to be broad enough to potentially allow for standing of non-state entities, as existing mechanisms did not, with one exception[5]. Member States and Working Group Members cited to Principle 10 of the Rio Declaration in making that decision, which states in relevant part 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."[6].

The Environmental Rules do just that where all parties agree to use them as the Introduction and Article 1(1) of the Rules provide. Mindful of the possibility of multiparty involvement in disputes having a conservation or environmental component, the Environmental Rules provide specifically for multiparty choice of arbitrators and sharing of costs. Arbitration has the added incentive of procedural economy for multiparty disputes. For the foregoing reasons, a 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 being seen as a last resort.

Looking at the Preamble, Articles 2(b), 2(c), 3-7 and the general language of the Draft Protocol, this body has apparently grappled with many of the same issues of standing and multiple parties of mixed origin potentially being involved in disputes as the PCA Working Group in its considerations. The delegation of Hungary to this Working Group noted in its first working paper, MP.WAT/AC.3/2001/WP.1-CP.TEIA/AC.1/2001/WP.1, that "The effective protection of the environment based on the instruments dealing with legal liability may require the simultaneous utilization of state responsibility and civil liability." At the risk of stating the obvious, a classic

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[3] UNECE Doc. MP.WAT/AC.3/2002/2 and CP.TEIA/AC.1/2002/2.
[4] *See* Introduction and Article 1(1) of the Environmental Rules.
[5] In that list, only the Law of the Sea Convention was observed to allow for a limited intervention by private parties. *See* UNCLOS Art. 20(2) of Annex VI.

scenario of this is where an operator is active in State A, it is possible that his hazardous activities cause harm not only to State B, but also to the citizens of State B. The PCA Environmental Rules include provisions in Article 1(1) on the Scope, Article 3(3)(c) on the Notice of Arbitration, and Article 33(1) on the Applicable Law among others which could deal with precisely the types of issues which might arise under the latter scenario. The distinguished delegation of Switzerland points out in its Working Paper, MP.WAT/AC.3/2002/WP.1-CP.TEIA/AC.1/2002/WP.1, on pg. 5 para.22, that victims inside and outside the accident state might get unequal treatment due to stricter and less strict regimes in the respective States on either side of the border. Arbitration of such disputes under the PCA Environmental Rules could level the playing field in such a scenario, as the Tribunal would have to determine and apply equal standards to both parties pursuant to Article 15(1) of the PCA Environmental Rules.

In light of the foregoing, *these Rules are perfectly suitable for arbitration of disputes arising under the provisions of this Draft Protocol*. Article 1(1) of the Environmental Rules enumerates the various types of legal instruments that might contain reference to the Rules, including this Draft Protocol. These are references in Article 3(3)(c) 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", ensuring harmony with the provisions of this Draft Protocol. 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[7]. Although an arbitral Tribunal may be able to address issues from a variety of instruments, the

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[6] E. Hey provides a good survey of the problems that private parties face when seeking access to justice in *Reflections on an International Environmental Court*, 287-295, esp. 294-295, *in* International Investments and Protection of the Environment *supra* note 1.

Environmental Rules cannot be used to create any permanent hierarchy among fora. They *can* however, be used to connect systems and actors that might previously have been viewed as separated. But generally speaking, an arbitral award, is strictly *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, and it also appears that thought has been given to this issue considering the Draft Protocol enforcement Article among others. It was considered by the PCA Working Group that parties referring disputes arising under a convention or agreement may wish to include specific language on the relationship between an arbitral award and that convention or agreement. Please let me reiterate here that the Secretary-General has indicated his *full willingness and preparedness* to place the resources of the PCA at the disposal of this body and is committed to cooperating with you on any aspect your work, including if so desired, drafting points of language within the PCA's institutional expertise.

Returning to the provisions of the PCA Rules which could contribute to the effectiveness and stability of the envisaged Protocol, they are designed for rapid response to environmental damage, not only in the constitution of the Tribunal with extensive UNCITRAL Rules based "fall-back" procedures in Articles 6-8, but also in Article 21(4) which allows the Tribunal to proceed with an arbitration despite preliminary objections to its jurisdiction and rule on a plea that it has no jurisdiction in its final award. This prevents dilatory tactics and allows the tribunal to proceed with a case, potentially calling for provisional measures to "preserve the rights of any party or to prevent serious harm to the environment falling within the subject matter of the dispute" under Article 26(1) where parties do not otherwise agree. (I need not expound on the importance of rapid reaction to prevent and mitigate environmental harm to a body that is inherently concerned with drafting a protocol with just that in mind.) Article 26(2) suggests that liability mechanisms were studied when drafting the Environmental Rules as it allows the Tribunal to request security for any interim measures taken, much the same as insurance being required for private operators.

[7] As the Law of the Sea Tribunal does. *See* Sands, *supra* note 6, 327. *See also* R.R. Churchill and A.V. Lowe, The Law of the Sea. Third Edition. 447-462. Esp. 454-459.

Whereas it is true that the Environmental Rules are ideal for State – Non-State arbitrations, the participation of a State is not necessary for their use, making them equally ideal for disputes, *inter alia* involving a private operator as respondent and private claimant. I note again that the rules may be used by *any combination and number of Parties*. Mass-claims could also be arbitrated under the Environmental Rules, and as an aside, the PCA is currently hosting a mass-claim arbitration involving an IGO and thousands of claimants consolidated into one action in parallel proceedings. Complex multi-party arbitration involving Non-State actors is something that, not only the Environmental Rules can accommodate, but that the PCA has experience in facilitating. Moreover, the PCA is hosting and assisting the work of a Steering Committee on Mass Claims processes chaired by Judge Howard Holtzmann, known to some of you through UNCITRAL, which is establishing a database for designers of mass-claims systems.

Article 7(*bis*) of the Draft Protocol provides that liable operators have a right of recourse against any other persons "also liable" under the Draft Protocol. This indeed appears to create precisely the type of situation that I have just described, namely that private parties may take action against other private parties under the Draft Protocol just as they could under the PCA Environmental Rules. Article 13 (*bis*) and Article 7 appear fully compatible in the view of the PCA. Given our experience with private parties, additional language specifying the relationship between Articles 7 and 13 may even be worth consideration.

If the Rules are used by two private parties in an arbitration pursuant to this Draft Protocol, the fact that the Secretary-General has PCA Member State nominated environmental law and science experts at his disposal under Articles 8(3) and 27(5) of the Environmental Rules, may come as great relief. Unsophisticated Parties will need the kind of guidance and experience that the Secretary-General alone can offer in choosing arbitrators, and or experts. The Secretary-General of the PCA has acted and continues to act as the institutional appointing authority under the UNCITRAL Rules since their adoption in 1976. Further, provisions allowing costs to be kept to a minimum are included in the PCA Environmental Rules, and arbitration is generally less expensive than litigation, as it usually proceeds much quicker. Further, 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 perhaps even more relevant for the possible Member States of this Draft Protocol, countries with economies in transition[8].

In concluding let me state that the Environmental Rules offer 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 various 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 such as the PCA Environmental 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, legally strong regimes can be created. Where a regime foresees, but lacks a dispute settlement mechanism, it might not function efficiently.

For example, the United Nations Framework Convention on Climate Change (UNFCCC) 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(COP), 6 part 2 in Bonn and COP 7 in Marrakesh to discuss the possibilities of the Environmental Rules serving as the Annex on Arbitration referred to in Article 14 of the UNFCCC, and the item is presently under consideration. However, even if the UNFCCC does not complete their dispute settlement regime using the PCA Environmental 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 can also promoted. The Environmental Rules are therefore not only a bridge between legal instruments, they are a bridge between all actors who can potentially be affected in environmental disputes of the type this body is considering.[9] As any good bridge, they do not discriminate between traffic, whether pedestrian or diesel-powered, they remain neutral, simply providing the space to move.

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[8] *See* "PCA Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines" in PCA Basic Documents, *supra* note 3 at 231.

On behalf of the Secretary-General of the PCA I would like to thank the distinguished delegates, the Executive-Secretaries of both Conventions, the Chair and Vice-Chairpersons for their kind invitation, and note our willingness to work with this Working Group on any aspect of the Drafting Process and beyond it, that it sees fit. With the permission of the Chairperson I would be glad to answer any questions, and if time does not permit now, I will remain to answer questions after the session.

[9] The International Bureau and the Drafting Committee are presently working on a set of conciliation rules for the resolution of disputes relating to natural resources and/or the environment.