

**ENVIRONMENTAL LAW****ENVIRONMENTAL DISPUTE RESOLUTION, ADR METHODS AND THE PCA  
ARBITRATION RULES***Sai Ramani Garimella\****Abstract**

Little success in the implementation of the international environmental law regime could, amongst others, be attributed to the absence of clarity in the dispute settlement mechanism and also a clearly identified institution for such dispute settlement. While the law has evolved in addressing the variety of concerns presented by often immediate and irreversible damage to the human environment, the working of the law has been plagued by an ineffective dispute settlement mechanism with precious little detailing on its administration. International environmental treaties are increasingly making space for alternative dispute resolution (ADR) methods towards dispute settlement. The Permanent Court of Arbitration Environment Arbitration Rules, 2001 are a set of rules with a few novel features addressing concerns that are exclusive for environmental disputes – the role of the non-state actors and multi-party disputes. The rules are fashioned in a manner that would make possible for any combination of parties to a dispute, state, NGOs, multinational corporations and even individuals. The rules are also designed to handle multi-party disputes. Another important feature of these rules is that it addresses the costs aspect in international dispute settlement process - member states have access to the environment assistance fund. Permanent Court of Arbitration (PCA) and the environment rules could thus fill the place of the forum for environmental disputes with expertise.

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\*Faculty of Legal Studies, South Asian University, Chanakyapuri, New Delhi. Email:[ramani@sau.ac.in](mailto:ramani@sau.ac.in)

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## I Introduction

ADDRESSING THE quest for a forum for deciding the increasing volume of disputes concerning environmental damage has occupied much of the discourse in international environmental law. Also finding space in this discourse is the debate on reconciling the conflicting claims/interests of states, non-state actors and victims of mass torts arising from environmental law violations. Such reconciliation could happen only through an appropriate forum for dispute resolution. Contemporary chroniclers of environmental concerns have articulated the disillusionment with the international legal system and its functionalities in addressing the growing concerns regarding the environmental degradation.<sup>1</sup>

One concern that has occupied much discussion space in all the fora at all levels of international participation has been the insufficient response of the international legal system to disputes and conflicts that arise in trade, commerce and investment, especially with the way the disputes have been managed and resolved.<sup>2</sup> Philippe Sands remarked that the international community could no longer allow the international legal order to continue to be self-contained and self-referential regime that would not reach out to meld the larger societal interests that are often not irreconcilable.<sup>3</sup> What Sands was referring to was the insulated international law regime that did not make space for reconciling the apparently conflicting interests, including the methodology to address the disputes. Such insufficiency in the legal system especially with regard to the dispute settlement mechanism largely made it non-participative for the groups that are otherwise stakeholders in the environmental concerns.

The paper makes no attempt to state that there is an absence of normative structure with regard to dispute resolution in trans-boundary environmental disputes. Rather it aims to show the normative insufficiency in the methodology adopted to address the content of the dispute resolution mechanisms and present ADR methods as an effective methodology for resolution of environmental disputes. It begins with a brief discussion on the characterisation

<sup>1</sup> See, for example, Tjaco T. van den Hout, "Resolving Environmental Disputes from Negotiation to Adjudication", *Bio-politics International Organisation*, available at: <http://biopolitics.gr/biowp/wp-content/uploads/2013/04/van-den-Hout-resolving.pdf> (last visited on Apr. 29, 2013).

<sup>2</sup> Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, Cambridge, 2009).

<sup>3</sup> Philippe Sands, "Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law" OECD Global Forum on International Investment (2008), available at: [www.oecd.org/investment/globalforum/40311090.pdf](http://www.oecd.org/investment/globalforum/40311090.pdf) (last visited on Apr. 14, 2016).

of an environmental dispute and the difficulties in the existing legal regime. This is followed by a brief overview of the dispute settlement structure in international law. It then discusses the mechanism of conciliation, mandatory and optional, exemplified through a few international environmental instruments. Further there is a discussion on the Permanent Court of Arbitration Optional Rules for Conciliation in Environmental Disputes, 2001 (hereinafter rules, 2001). The next part discusses the mechanism of arbitration, mandatory and optional, as exemplified through state practice in a few arbitrations like the *Mox Plant Arbitration*, and the International Tribunal for the Law of the Sea (ITLOS) arbitrations. Further there is a discussion on the rules, 2001 and how they could be of increased utility by customizing them for disputes like the trans-boundary freshwater disputes. The paper concludes with an appraisal of the rules.

## II Characterisation of an international environmental dispute

Characterisation of the dispute has been further affected by the normative insufficiency within the definition of ‘environmental dispute’. For example, Bilder’s definition of an international environmental dispute as any disagreement or conflict between states relating to the alteration, through human intervention, of natural environmental systems was highly restrictive in its implementation, limiting it to inter-governmental conflicts.<sup>4</sup> It was much in line with the *Trail Smelter Arbitration*,<sup>5</sup> which, though a dispute between individual victims and a non-governmental polluter, overlooked private international law remedies in the ordinary national courts and moved to arbitration. Sand opined that while international environmental law emerged as a distinct discipline of legal knowledge it continued to borrow its template on the lines of public international law, which largely presents itself as law of nations.<sup>6</sup> Referring to the existing literature on the subject he pointed out that German-language treatises on international environmental law continue to be titled ‘environmental law of nations’ (*Umweltvölkerrecht*).<sup>7</sup> Such insufficiency turned the legal regime non-participative for the groups that are otherwise the principal stakeholders in the environmental concerns.

<sup>4</sup> R.B. Bilder, “The Settlement of Disputes in the Field of International Law of the Environment” 144 *Recueil des cours*, 139-23 (1975-I).

<sup>5</sup> *Trail Smelter Arbitration* case (Canada/United States of America) III (1938 and 1941).

<sup>6</sup> Sand, Peter H., “The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective” 1(1) *Transnational Environmental Law* 183-198 (2012), available at: [https://www.researchgate.net/profile/Peter\\_Sand2/contributions](https://www.researchgate.net/profile/Peter_Sand2/contributions) (last visited on Jun. 5, 2015)

<sup>7</sup> *Ibid.*

The normative insufficiency as pointed out in the literature sample accessed for this research paper is three-fold

- i. difficulty with characterization of the dispute as 'environmental dispute'
- ii. largely non-participative process because of the definitional insufficiency in limiting environmental disputes to inter-governmental conflicts.
- iii. absence of an appropriate forum, the existing options being optional and the mechanism being activated only upon the common agreement between states.

### **The dispute settlement structure in international law**

Article 33 of the United Nations Charter, 1945 provides that the disputes ought to be settled through pacific means like negotiation, enquiry, mediation, conciliation, arbitration and adjudication by a judicial institution apart from resorting to regional agencies or arrangements. Many international environmental agreements give meaning to this article by including a dispute resolution clause in their treaty administration structures.

The structures that have been put in place in most of the treaties can be broadly categorized under two heads:

- i. the use of diplomatic means where parties retain control over the dispute in so far as they may accept or reject a proposed settlement, like, fact-finding, mediation/conciliation, negotiation, consultation, inquiry; and,
- ii. the legal means that result in binding decisions on the dispute, like, arbitration and judicial settlement.

There is a third category that encapsulates the role of the regional arrangements and international organizations as mediators and conciliators the legal consequences of the efforts of this category depends upon the language and content of the treaty establishing that institution.

While negotiation and consultation have been known for their success as dispute avoidance and sometimes, settlement methods and also that most environmental agreements have them as preliminary tiers in the dispute resolution process, the evaluation of these methods is not often devolved as a template for future such efforts. Such situation could be attributed to the fact that the treaties/agreements that specify the process do not specify the institutional arrangements to be followed for negotiation or consultation; thus precious little is available as documented material for similar efforts in future, apart from nothing much known about the methodology of negotiation.

Commissions of inquiry provide a means for fact finding activity in relation to the dispute.

These dispute resolution techniques have been further grouped on the standard of their presence in any international instrument – either as a mandatory dispute settlement (either compulsory or at the request of one of the parties) or as an optional recourse to a dispute settlement procedure, allowing a party to accept submission of the dispute arising under that specific international instrument either to arbitration or the International Court of Justice (ICJ), or allowing the parties upon mutual agreement to submit their dispute to conciliation. It could also be said that the dispute resolution techniques could be classified on the basis of their detailing. Some conventions provide a detailed structure of rules and procedure to be adopted for such express choice of the technique (as in an arbitration annex or conciliation annex) including identifying the dispute settlement organization, others might leave the detailing to later agreement between the parties (make a choice to refer the matter either to an existing institution or prefer an *ad hoc* mechanism).

### **Conciliation**

Conciliation as a dispute resolution technique has been a common feature in many environmental treaties.<sup>8</sup> The technique involves a third party in a formal role often investigating the factual aspects underlying the dispute and thereby putting forth formal proposal for the resolution of that dispute. The result could be a set of non-binding recommendations to be accepted by the parties in good faith. The specific conventions could either make such conciliation effort either mandatory or optional.

### **Mandatory conciliation**

The 1992 Biodiversity Convention mandated conciliation when the parties were unable to resolve their dispute through any other method, or found such other method unacceptable to them. Further, and more importantly, the convention includes an annex with detailed rules on the establishment of a conciliation commission. While unfortunately such commission has not yet become a reality, it has been in the discussion amongst states often, mention being made of the discussion in the context of the French nuclear testing. Other examples of the mention/presence of conciliation as a dispute resolution technique in environmental disputes include The Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2002 and the Permanent Court of Arbitration Optional Rules on

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<sup>8</sup>Philippe Sands and Ruth MacKenzie, “Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements”, *The PCA/Peace Palace papers* 17(2000), available at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Guidelines-for-Negotiating-and-Drafting-Dispute-Settlement-Clauses-for-International-Environmental-Agreements.pdf>(last visited on Apr. 4, 2015).

Conciliation of Disputes relating to the Natural Resources and/or Environment, 2002. Article 25 of the convention allows parties to use a number of dispute resolution methods in the event of a dispute between them. These methods include seeking a solution through negotiation, jointly seeking the good offices of or mediation by a third party. Parties could request the creation of a conciliation commission that would provide then parties with a dispute resolution proposal they must examine in good faith.<sup>9</sup>

Some conventions provide that upon a failure to resolve the dispute by any other means or a failure on behalf of the parties to accept any other means of dispute settlement under the treaty, the dispute may be submitted to conciliation at the request of either of the party to the dispute – in such circumstances, the other party is bound to submit the dispute to the conciliation procedure. Examples of this approach could be found in the 1992 United Nations Climate Change Convention (UNCCC).<sup>10</sup> Article 14, clause 5 of the UNCCC refers to the process of conciliation upon request by the party. Further clause 6 gives detailed recommendations on the constitution of conciliation commission. Another example is the 1994 Second Sulphur Protocol. The protocol specifies a dispute resolution technique similar to the UNCCC in article 9. The provisions of article 9 state that except in the event where the parties have resorted to either the jurisdiction of ICJ or to arbitration, the parties shall, after the specified period within which the settlement of the dispute was not arrived at, submit the dispute to conciliation. The protocol also provided for details on the structure of the conciliation process.<sup>11</sup>

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<sup>9</sup> Ivan Bernier and Nathalie Latulippe, “Conciliation as a dispute resolution method in the cultural sector”, The International Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *available at*: [http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/document\\_reflexion\\_eng.pdf](http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/document_reflexion_eng.pdf) (last visited on Apr. 24, 2016).

<sup>10</sup> United Nations Climate Change Convention, 1992, subject to the operation of para 2 above, if after twelve months following notification by one party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in para 1 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.

A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith, *available at*: [http://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf) (last visited on Apr. 10, 2016).

<sup>11</sup> *Ibid.* Except in a case where the parties to a dispute have accepted the same means of dispute settlement under para 2, if after twelve months following notification by one party to another that a dispute exists between them, the parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, the dispute shall be submitted, at the request of any of the Parties to the dispute, to conciliation. For the purpose of para 5, a conciliation commission shall be created. The commission shall be composed of an equal number of members appointed by each party concerned or, where parties in conciliation share the same interest, by the group sharing that interest, and a chairman chosen jointly by the members so appointed. The commission shall render a recommendatory award, which the parties shall

### **Optional conciliation**

There are also treaties that make the recourse to conciliation for dispute settlement an optional process subject to the disputing parties' agreement. Article 33 of the United Nations International Watercourses Convention, 1997 states that the parties, upon a failure to reach a negotiated settlement of their dispute, may make a joint application for conciliation to a third party facilitator. The 1997 convention did not mandate conciliation and stated that it might be one of the available options (arbitration, submission to ICJ, or any other water-course commissions that might have been established by the parties) when a negotiated settlement could not be possible.<sup>12</sup>

### **Permanent Court of Arbitration Optional Rules for Conciliation of Disputes relating to Environment and/or Natural Resources, 2002**

Similar to its efforts at promoting arbitration as a dispute resolution mechanism in environmental disputes, PCA has furthered its presence in environmental dispute resolution (EDR) through a set of rules related to conciliation in environmental disputes. Known as the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, 2002 (hereinafter referred to as rules, 2002) they were adopted by consensus amongst the 96 PCA Member States on April 16, 2002. Modeled on the lines of the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules, 2002 the optional rules reflect the particular characteristics of disputes having a natural resources conservation or environmental protection component. Founded upon the idea of ensuring greatest flexibility and party autonomy the rules could be used for dispute resolution by states who are parties to a bilateral or a multilateral agreement relating to access and utilisation of natural resources, on differences pertaining to such agreement's interpretation and/or application. Importantly, the rules and the resources of the PCA could be accessed by private parties, international organisations and other entities under national and international law, thus providing an important space to the non-state entities in the dispute settlement process. Keeping the preventive and amicable settlement aim of conciliation in perspective, the rules suggest that conciliation should be used prior to arbitration and as far as possible, a replacement for arbitration.

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consider in good faith, available at:  
<http://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1994.Sulphur.e.pdf>(last visited on May 5, 2016)  
<sup>12</sup> United Nations International Watercourses Convention 1997, art. 33(2) reads: If the parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice.

By agreement of all parties to the dispute, the conciliation process could dispense with the characterisation of the dispute as relating to environment and/or natural resources. Parties could further agree for conciliation by a panel of one, three or five conciliators chosen from the list of experts on the PCA arbitrators' panel/experts' panel, or nominate their choice of conciliator under the rules. Failing appointment by the parties within 60 days of beginning the process, the secretary-general of the PCA could make the appointment of such conciliator. The role of the conciliator consists of assisting the parties in an independent and impartial manner in their attempt to reach an amicable dispute resolution.<sup>13</sup> At any stage of the conciliation proceedings he/she can make proposals and may communicate with the parties together or with each of them separately.<sup>14</sup>

An interesting feature of the rules is the establishment of an implementation committee to monitor the implementation and thereby ensure enforcement of the settlement agreement.<sup>15</sup> The rules also ensure the confidentiality of the entire process and information about the conciliation is made public only if the parties had agreed for it or is otherwise required by a court or a tribunal of competent jurisdiction.<sup>16</sup>

Alfred Rest made an interesting statement about the rules, 2002 relating to environmental disputes. He called the rules as innovative because they allow non-state actors to initiate the process and be directly protected in their rights, in spite of being an amicable, preventive and non-confrontational procedure.<sup>17</sup>

### III Arbitration

Arbitration is a non-judicial private dispute settlement method<sup>18</sup> providing for a final and binding resolution of the dispute, founded upon an agreement of the parties. Unlike judicial officers the arbitrators, appointed as a result of an agreement between the parties, could dispense with legal formalities and apply the procedural rules and the substantive law that best fits the dispute before them within the framework of the arbitration agreement. The binding nature of the process has been reinforced through international conventions, national

<sup>13</sup> PCA Optional Rules for Conciliation of Disputes relating to Natural Resources and/or Environment, 2002, art. 7(1).

<sup>14</sup>*Id.*, art. 7(5) and art. 8(1)

<sup>15</sup>*Id.*, art.12(4) (c).

<sup>16</sup>*Id.*, art. 13.

<sup>17</sup>Alfred Rest, "Enhanced Implementation of International Environmental Treaties by Judiciary - Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration" 1(1) *Macquarie Journal of International and Comparative Environmental Law* 1(2004), available at: <http://www.austlii.edu.au/au/journals/MqJICEL/2004/1.html> (last visited on Apr. 15, 2015).

<sup>18</sup>Walter Mattli, "Private Justice in a Global Economy: from Litigation to Arbitration", 55(4) *International Organisation* 919-947(Autumn, 2001).

arbitration laws and the institutional arbitral rules which act as a fillip to the enforceability of the arbitration agreement and the arbitral award.

A survey of international instruments agreed upon in the later part of twentieth century showed a dominant preference for arbitration over judicial settlement in the environmental disputes. For example, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on Conservation of Migratory Species of Wild Animals, 1979 include an identical dispute settlement clause<sup>19</sup> (article XVIII and article XIII respectively) provide for submission of the dispute, by mutual consent, to arbitration, in the event of a failed negotiation effort. The UNCCC 1992<sup>20</sup> and the 1994 Desertification Convention<sup>21</sup> also provide for adoption of annexes on arbitration by the Conference of the Parties.

The Vienna Convention on the Protection of the Ozone Layer, 1985, under which the Montreal Protocol, 1992 was adopted, makes it imperative upon state parties to declare either at the time of signature to the convention, ratification, or a later date, that they would refer all unsettled disputes to arbitration or to the ICJ or both.<sup>22</sup> This however demonstrates that the convention viewed arbitration only as an option for dispute resolution, nevertheless is another affirmation of preference for this mechanism in environmental disputes resolution.

The Convention on Biodiversity, 2002 opened for signatures at the Rio Earth Summit, 1992, has been viewed as a framework convention for conservation and sustainable use of biodiversity with access and benefit sharing as its primary goals. A detailed annexure, called annex II, details the methodology of the dispute resolution through arbitration.<sup>23</sup> An important feature of the arbitration rules in this annex is that it allows any contracting party to intervene, with the permission of the tribunal, in the proceedings. However, it does not

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<sup>19</sup>Convention on the Conservation of Migratory Species of Wild Animals, 1979, art. XVIII reads: If the dispute can not be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the parties submitting the dispute shall be bound by the arbitral decision; art. XIII 2. If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision.

<http://www.cms.int/en/node/3916> (last visited on May 2, 2016).

<sup>20</sup> *Supra* note 10, art. 14(2)(b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration, *available at*: <http://unfccc.int/resource/docs/convkp/conveng.pdf>(last visited on Apr. 10, 2016)

<sup>21</sup> *Id.*, Art. 28 (2)(a) arbitration in accordance with procedures adopted by the Conference of the Parties in an annex as soon as practicable; <http://www.unccd.int/Lists/SiteDocumentLibrary/conventionText/conv-eng.pdf>

<sup>22</sup> Vienna Convention on the Protection of the Ozone Layer, art. 11, *available at*: <http://ozone.unep.org/en/handbook-vienna-convention-protection-ozone-layer/2217> accessed 28 May, 2016.

<sup>23</sup> The Convention on Biodiversity, 2002, art. 27 discusses arbitration as an optional mechanism for dispute resolution.

make space for non-state parties. Biodiversity as a domain has multiple stakeholders, and to restrict the access to arbitration only to the contracting parties, as in states, would mean little service to the cause of protection of biodiversity.

### **Mandatory arbitration**

Many international agreements in the environmental space provide that if a dispute could not be settled through arbitration or mediation, it shall be submitted to arbitration at the request of one party to the dispute. Such unilateral submission of the dispute is found in many treaties<sup>24</sup> like, for example, The Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 (OSPAR) which provides for submission of the dispute to arbitration at the request of any of the disputing parties, if it could not be settled through conciliation. The convention makes detailed provisions on the composition of the arbitral tribunal and the procedure to be adopted by it.

Such reference to mandatory arbitration could also be seen in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) where the party to the convention has an option to accept arbitration as compulsory. It further states that where a party to the UNCLOS has not made a declaration on acceptance of a particular method of dispute resolution, it would be deemed to have accepted arbitration.<sup>25</sup> A total of 167 States are currently parties to the UNCLOS 1982, but less than a third of them fulfilled article 287 declaration on the choice of dispute resolution procedure. A few of them favoured application of annex VII, making an express preference for arbitration (Canada and Belarus are amongst such States). Some of these 1/3 countries declared that they would express their choice of dispute resolution mechanism at an appropriate time, which would more often than not, be when there is a dispute between the parties (India and Cuba) are examples of this scenario.<sup>26</sup> Another significant feature of the article 287 declarations of the states has been

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<sup>24</sup>Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, art. 32, Settlement of Disputes reads: Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, for instance by means of inquiry or conciliation within the Commission, shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article.

Unless the parties to the dispute decide otherwise, the procedure of the arbitration referred to in paragraph 1 of this Article shall be in accordance with paragraphs 3 to 10 of this article.  
[http://www.ospar.org/html\\_documents/ospar/html/ospar\\_convention\\_e\\_updated\\_text\\_2007.pdf](http://www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007.pdf)

<sup>25</sup>United Nations Convention on the Law of the Sea, 1982, art. 287 Choice of Procedure cl. 3 reads: A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII, [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/part15.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/part15.htm) (last visited on Apr. 15, 2016).

<sup>26</sup> [https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec) (last visited on Mar. 10, 2016).

that parties have made country-specific choice of dispute resolution mechanism. For example Bangladesh's made a country-specific declaration on the choice of dispute resolution mechanism for India and Myanmar separately. Its commitment to submit the dispute to the International Tribunal on the Law of the Sea (ITLOS) is a country-specific commitment.

### **Optional arbitration**

Some treaties provide for a choice to the ratification parties on whether to submit the dispute to compulsory arbitration. They may provide alternative options and allow the state parties to decide upon their choice of dispute resolution mechanism. In that situation, they just need to inform the administrative mechanism established under the convention of their choice. The 1992 Helsinki Convention on the Trans-boundary Effects of Industrial Accidents has a similar provision.<sup>27</sup> Different from the provision from the provisions of the UNCLOS that provided for compulsory procedures of dispute settlement,<sup>28</sup> the Helsinki Convention allows the parties to decide in favour of a dispute settlement process in the event of a negotiated settlement not being possible.

It is observed that a large majority of international environmental agreements rely on special *ad hoc* mechanisms for their administration.<sup>29</sup> A common under-current through these treaties is that while most of them have provided for a detailed rule structure with regard to the conduct of the arbitration, the arbitration is *ad hoc* and specific institutional support for the arbitral process has not been a feature of these conventions.<sup>30</sup> UNCLOS 1982 seems to be only example where comprehensive dispute settlement arrangements have been made to deal with particular categories of disputes under the convention, and specifically the establishment of specialist chambers within the ITLOS.<sup>31</sup> There are now five specialist

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<sup>27</sup>Convention on The Protection and Use of Trans-boundary Watercourses And International Lakes, 1992, art. 21(2) Settlement of Disputes reads: When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in Annex XIII hereto.

<sup>28</sup> *Id.*, part XV of the Convention dealing with Settlement of Disputes specifies in s. 2 Compulsory Procedures Entailing Binding Decisions a list of procedures over which Parties shall express their choice either at the time of ratification or make a commitment to declare at a later date. (emphasis supplied by the researcher) [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/part15.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/part15.htm)

<sup>29</sup> *Supra* note 8 at 17.

<sup>30</sup> *Id.* at 11

<sup>31</sup> In its Press Release on Mar. 3, 1997 the tribunal informed establishment of two standing special chambers – the Chamber on Fisheries Matters and the Chamber on the Marine Environment. In addition the Seabed Disputes Chamber is a distinct judicial body within the tribunal.

chambers, including one on maritime delimitation issues and a seabed disputes chambers along with its *ad hoc* chamber.<sup>32</sup>

Another feature of the current approach to the dispute settlement process in the international environmental treaties that Sands and MacKenzie highlighted<sup>33</sup> was the absence of a compulsory character to these dispute settlement processes, barring the UNCLOS. Submission of disputes to the dispute settlement procedures, even the non-binding ones like negotiation, is still by agreement, thus leading to a possible avoidance of the procedure. Further even the UNCLOS provides for exclusion of categories of disputes; though these exclusions may not have functional basis it may still affect matters either because of the political sensitivity of the issues involved or because of trade-offs involved in the negotiation of the treaty.<sup>34</sup> Such exclusions are thus likely to affect the characterization of the dispute. This scenario only goes to confirm the opinion expressed by Kiss, that there has been less preference within the multi-lateral environmental agreements for reference of the dispute to existing institutions, either arbitration or judicial settlement, and instead the provisions of these dispute resolution clauses preferred reference to *ad hoc* bodies or procedures.<sup>35</sup>

#### **State practice on arbitration**

Furthermore it was also observed that there was an increasing preference for *ad hoc* arbitration rather than referring the dispute to the registry of an institution like the Permanent Court of Arbitration (PCA). Stephens<sup>36</sup> observed that some of the reasons that explained the preference for arbitration over judicial settlement have been that states have a greater interest in an adjudicative process that they have agreed upon, and in an arbitral panel that they themselves have selected.

It is not out of place here to recall the importance of the *Trail Smelter Arbitration*<sup>37</sup> between United States (US) and Canada defining the concept of trans-boundary environmental damage and the consequent liability in International environmental law. Other important arbitral decisions that have had significant influence on the development of international environmental law have been the *Bering Sea Fur Seals* case<sup>38</sup> between Great Britain and US

<sup>32</sup> Available at : <https://www.itlos.org/en/the-tribunal/chambers/> (last visited on Apr. 10,2016)

<sup>33</sup> *Supra* note 8 at 18.

<sup>34</sup> *Ibid.*

<sup>35</sup> A. Kiss, "Le reglement des differends dans les conventions multilaterals relatives a la protection de l'environnement", R.J. Dupuy (ed.), *The Settlement of Disputes on the New Natural Resources* 119, 122-123 (1993).

<sup>36</sup> *Supra* note 2 at 29.

<sup>37</sup> *Id.* at 5

<sup>38</sup> *Bering Sea Fur Seals Case* Aug. 15, 1893, XXVIII Report of International Arbitral Awards at 263-276, available at: [http://legal.un.org/riaa/cases/vol\\_XXVIII/263-276.pdf](http://legal.un.org/riaa/cases/vol_XXVIII/263-276.pdf) (last visited on Mar. 10, 2016).

involving the enforcement of conservancy measures beyond national jurisdiction and the *Lake Lanoux* case<sup>39</sup> between France and Spain concerning a proposal to interfere with the course of the Carol river for the construction of a hydroelectricity project, amongst others. Contemporary examples on the utility and indispensability of arbitration as a dispute resolution mechanism in environmental disputes include the *Southern Bluefin Tuna* cases<sup>40</sup> and the *MOX Plant dispute*<sup>41</sup> brought through the provisions of annex VII of the UNCLOS 1982. The tribunal of the ITLOS in the *Southern Bluefin Tuna case* was asked to adjudicate upon the differences that arose between Australia and New Zealand on the one side and Japan on the other with regard to the Experimental Fishing Program initiated by Japan as a signatory to the Convention on Conservation of the Southern Bluefin Tuna (CCSBT), a program that could have a significant impact on the current and future stocks of the Southern Bluefin tuna that is fished extensively by Australia, New Zealand and Japan. The *MOX Plant dispute* regarding environmental concerns arising from the nuclear re-processing facility on the shores of the Irish Sea gave rise to proceedings before the ITLOS and the PCA. In both these instances the tribunals were called to adjudicate upon issues that were beyond the UNCLOS and required interaction with other related international instruments, apart from the jurisdiction issues.

### **Institutional arbitration**

Established through the 1899 International Convention for the Pacific Settlement of International Disputes (also known as the 1899 Hague Convention), PCA has been the first and by far the most important amongst the international adjudicative mechanisms.

The PCA provides a list of arbitrators to arbitrate a dispute upon a request from the parties to a dispute. PCA administers arbitration under its auspices as well as assist arbitrations outside the institutional structure, for example, to the Iran-US Claims Tribunal, which rendered 680 awards during the period 1981-2001.<sup>42</sup> The case docket for the year 2013 as reported in the annual report of the PCA records as total of 104 cases with 59% of that figure being

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<sup>39</sup> *Lake Lanoux* case (1957) 12 RIAA 285.

<sup>40</sup> Southern Bluefin Tuna Cases, Judgment, ITLOS 1999; Dean Bialek, *Australia & New Zealand v. Japan Southern Bluefin Tuna Case 1(I) Melbourne Journal of International Law* (2002), available at: <http://www.law.unimelb.edu.au/files/dmfile/downloadf2ea1.pdf> (last visited on Mar. 10, 2015).

<sup>41</sup> Related proceedings were initiated at the PCA under the 1992 OSPAR Convention. *MOX Plant dispute Ireland v. United Kingdom* June 24, 2003, available at: [http://www.pca-cpa.org/showfile.asp?fil\\_id=81](http://www.pca-cpa.org/showfile.asp?fil_id=81) (last visited on Apr. 20, 2016).

<sup>42</sup> *Supra* note 2 at 30.

accounted by investment treaty arbitration, bi-lateral, multilateral investment treaties and national investment laws.<sup>43</sup>

One of the important cases before the PCA concerning environmental issues has been the *North Atlantic Fisheries Coast* case<sup>44</sup> in 1910 between UK and the US relating to the rights of Britain to regulate fishing by US vessels in Canadian waters. A recent case related to issues arising from a treaty on environmental concerns is the dispute between Netherlands and France is *The Rhine Chlorides Arbitration Concerning Auditing of Accounts*.<sup>45</sup> The dispute was largely an accounting dispute relating to the value that France owed in the cost sharing agreement pursuant to which Alsace would help reduction of the level of chloride salts deposits in the river Rhine.<sup>46</sup>

### **PCA Optional Rules for the Arbitration of Environmental Disputes, 2001**

Adopted by consensus by the 94 member-states of the Permanent Court of Arbitration for the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment Rules, 2001 are designed specifically for the environmental disputes resolution. Two of the principal lacunae<sup>47</sup> in the environmental dispute resolution are:

- a) dispute resolution system in international law is State-centric, and therefore, has not been responsive to the specific needs of the environmental law. Non-state actors (NSAs) who are otherwise important stakeholders in the environmental dispute, do not gain a direct access to the tribunals and can be represented only through the state. Most of the international tribunals with universal jurisdiction, ICJ and WTO Dispute Settlement Process for example, allow only states to appear before them as disputing parties. Non-Governmental Organizations (NGOs), an important category under the NSAs and also an important pressure group in the discourse on international law today, do not have direct access to the dispute resolution tribunals.
- b) Two-party adversarial system that is of commonplace in international litigation is insufficient in addressing environmental law disputes, which often involve a diversity of players at different levels and have multiple stakeholders having interest in its resolution.

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<sup>43</sup> PCA annual report 2013 at 14. Available at: [http://www.wx4all.net/pca/maintop/PCA-121307-v1-PCA\\_Annual\\_Report\\_2013\\_FINAL.pdf](http://www.wx4all.net/pca/maintop/PCA-121307-v1-PCA_Annual_Report_2013_FINAL.pdf) (last visited on Feb.25, 2016).

<sup>44</sup>*North Atlantic Fisheries Coast* case, The Hague, Sep. 7, 1910.

<sup>45</sup>The Rhine Chlorides Arbitration Concerning Auditing of Accounts, Mar. 7, 2004

<sup>46</sup>Mathew Parish, *Mirages of International Justice: The Elusive Pursuit of a Transnational Legal Order* 65 (UK, Edward Elgar Publishing, 2011).

<sup>47</sup> Charles Q Wu, "A Unified Forum? The New Arbitration Rules for Environmental Disputes under the Permanent Court of Arbitration" 3(1) *Chicago Journal of International Law*, 264 (2002).

Another important problem peculiar to environmental disputes is the problem of characterization. Often it was found difficult to identify a ‘distinctive environmental dispute’<sup>48</sup> especially because most environmental concerns have multiple levels of interests, sometimes, conflicting.

The 2001 Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment have been designed as a significant address to the above mentioned lacunae and concerns affecting environmental dispute resolution. The utility of the rules could be perceived all through the text of the rules beginning with article 1(1) dealing with the scope of the application of the rules. It states that characterisation of an environmental dispute or as being related to natural resources is not necessary for jurisdiction, if all parties agreed to dispute settlement under the rules.<sup>49</sup> This provision could be of significant help in addressing the dispute on merits and not allow the process to get mired in protracted hearings on defining terms like environment and natural resources, the words by themselves being difficult to possess a generic definition. Further the clarification on the characterization of the dispute also makes clear the statement of jurisdiction of the tribunal. The *Kompetenz* principle on the jurisdiction of the tribunal has been based on the principle of *lex specialis derogate legi generalis*, the rules require that the tribunal should rule on any objections to its jurisdiction as a preliminary question, but could still exercise its discretion to consider the pleas against jurisdiction within the final award also.<sup>50</sup> This discretionary power to the tribunal could help in effective continuation and completion of the arbitral process.

The rules make a significant statement with their provisions addressing the above-mentioned lacunae affecting environmental dispute resolution. Rules, 2001 are the first of the dispute resolution rules to have made space for non-state parties in dispute resolution. The stated objective of the rules as revealed in the Introduction makes place for the diversity of stakeholders in environmental disputes faced with immediate, irreversible and irreparable trans-boundary harm. The rules are founded upon the principles of flexibility and party autonomy, and along with the services of the Secretary-General and the International Bureau

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<sup>48</sup> *Supra* note 2 at 32.

<sup>49</sup> Permanent Court of Arbitration Optional Rules For Arbitration of Disputes Relating To Natural Resources and/or The Environment, 2001, Art. 1(1) ..... The characterization of the dispute as relating to natural resources and/or the environment is not necessary for jurisdiction where all the parties have agreed to settle a specific dispute under these Rules. Available at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-E> (last visited on Aug. 30, 2015).

<sup>50</sup> *Id.*, art. 21(4).

of the PCA, are available to states, international organizations, and private parties. Wu has commented that the rules allow ‘*any combination*’<sup>51</sup> of states, inter-governmental organizations, NGOs, multi-national corporations and individuals to use them.<sup>52</sup> It may be noted that the only other international treaty that provided a space for non-state entities is the UNCLOS but in a limited manner, only when all the parties to that case have accepted to the presence of the non-state entities.<sup>53</sup> Dane Ratliff referred to the opinion of the members of the drafting committee in the discussion on standing for non-state entities.<sup>54</sup> The drafting committee cited principle 10 of the Rio Declaration “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.”<sup>55</sup> Further states could waive the requirement of exhaustion of local remedies, which could facilitate resolution of the dispute especially because it would bring all parties accessing justice at one forum.<sup>56</sup>

Addressing the second lacunae mentioned above, the rules within the introductory note<sup>57</sup> state their commitment for multi-party arbitrations. The rules reinforce this commitment by stating that they could be utilized for dispute resolution process by two or more parties (in fact, Dane Ratliff uses the phrase ‘*any combination and number of parties*’<sup>58</sup> to emphasize upon the utility of the Rules for multiparty arbitrations) on shared costs and also by providing for a multiparty arbitration possibly involving private parties under the Environmental Rules as a way of providing a quick and efficient initial solution to such disputes instead of being seen as a last resort.<sup>59</sup> Multi-party disputes can also gain significantly because of the procedural flexibility feature of arbitration.

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<sup>51</sup>Dane Ratliff, PCA Draft Presentation at the UNECE Intergovernmental Working Group on Civil Liability, 2nd Meeting, 5 February 2002, Geneva at 2, 5. Available at: <http://www.unece.org/fileadmin/DAM/env/water/documents/legalaspects.pdf>

<sup>52</sup> *Supra* note 47 at 263-64.

<sup>53</sup>United Nations Convention on the Law of the Sea, 1982, annex VI, Art. 20, “The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.” Available at :[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (last visited on Apr. 20, 2016).

<sup>54</sup>Dane P. Ratliff, The PCA Optional Rules for Arbitration of Disputes to Natural Resources and/or the Environments, 14 *Leiden Journal of International Law* 887-896 (2001).

<sup>55</sup>Available at : <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

<sup>56</sup>*Supra* note 54 at 890.

<sup>57</sup>Mindful of the possibility of multiparty involvement in disputes having conservation, natural resources, or environmental protection component, these rules provide specifically for multiparty appointment of arbitrators. Available at: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1058](http://www.pca-cpa.org/showpage.asp?pag_id=1058) (last visited accessed 15 May, 2015)

<sup>58</sup> *Supra* note 51 at 5.

<sup>59</sup> *Supra* note 54 at 890.

Founded upon the principles of flexibility and party autonomy, the Rules have been designed to address the above-mentioned lacunae affecting environmental dispute resolution. Article 1(1) of the rules presents an inclusionary approach to the utilisation of the rules by stating that all parties to the dispute could agree that the rules could be included in to agreements, contracts, conventions, treaties, the constituent instrument of an international organization or an agency or a reference upon consent by the parties by a court. This inclusionary approach ensuring adaptability of the rules is further reiterated through article 3(3)(c) in the provisions relating to the notice of arbitration, where the party(s) making the claim is supposed to refer to any of the diverse elements mentioned in article 1(1) in relating to which, the dispute arose. Further in the absence of a prior arbitration clause, rules could still be invoked by making a submission agreement after the dispute has arisen.

An important procedural innovation of the rules is the provision of two panels of arbitrators and experts respectively, for parties to choose from for the tribunal composition. This feature could be of significant value in assuring of the best available expertise on the environmental disputes apart from creating value by saving on time and material resources. An innovative feature in the rules is that they provides for the constitution of two panels of arbitrators and experts for parties to choose from for the tribunal composition. Parties could appoint their own arbitrators, failing which, they could choose an appointing authority entrusted with forming the arbitrator panel. Interestingly, the Rules allow the arbitrators to appoint experts to form an expert panel reporting to the arbitrator panel.<sup>60</sup> Wu termed these Rules as PCA's response to the criticism that existing tribunals lack expertise to deal with the complexities involved in environmental disputes as was seen in the International Court of Justice's Chamber for Environment Matters 1997 decision in the *Gabcikovo-Nagymaros Project*, where Hungary was held bound by the 1977 treaty obligations with the Czechoslovak Republic despite the project presenting grave environmental concerns, a scenario that he attributed to the absence of an environmental specialist in the tribunal leading to the disregard to environmental concerns.<sup>61</sup>

Keeping note of the rapid response requirement the time periods for fallback appointment procedures<sup>62</sup> and submissions have been significantly shortened in the PCA Environmental Rules.<sup>63</sup>

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<sup>60</sup> *Supra* note 47 at 265.

<sup>61</sup> *Ibid.*

<sup>62</sup> See, for example, UNCITRAL Arbitration Rules, 2010, art. 6(2) if within 30 days of the receipt of notice for an appointment of sole arbitrator as agreed by the parties, the parties could not reach an agreement on the choice of the sole arbitrator, the parties shall entrust such appointment to the appointing authority as agreed

On technical issues disputing parties could submit a gist of the technical and scientific issues that they might wish to raise in their oral hearings and in their memorials.<sup>64</sup>

Confidentiality clauses incorporating protection of information have been incorporated into the rules through article 15(4)-(6). While such provisions are deemed as inherent, the Rules are unique in this regard, as they have specifically made place for the confidentiality measures, thereby ensuring ironing out of irritants that could possibly delay the work of the tribunal and also ensure accountability of the confidentiality.<sup>65</sup>

Another important feature of the rules, of special importance to environmental disputes, is the power of the arbitral tribunal to issue interim orders. Article 26 reflects the spirit of principle 15 of the Rio Declaration, which says that precautionary approach shall be widely applied by states according to their capabilities. The rules, for example article 26(1),<sup>66</sup> are sensitive to the responsibility of ordering immediate measures to correct or arrest any immediate/irreversible damage to environment.

Despite the interesting structure of the rules and the possibility of the PCA Environmental Rules presenting an option for a more diverse representation at the dispute process, and also the institutional advantages that PCA offers, few irritants remain.

- i. The Rules share a common weakness with the other institutional systems for settlement of international disputes – absence of compulsory jurisdiction. All the advantages of the Rules, together with the institutional resources of the PCA (PCA is an affordable arbitration option, as the operating costs of the PCA's International Bureau are covered under the budget of the United Nations)<sup>67</sup> cannot offset the absence of compulsory jurisdiction that is an anathema for international dispute settlement, and of escalated concern to environmental disputes. PCA's jurisdiction could, as of now, only be triggered by the submission of the dispute. Since the forum needs support from other enforceable instruments, States could agree upon inserting a clause in to treaties requiring submission of disputes to arbitration at

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upon by the parties. Further within sixty days if such appointing authority could not make such appointment, the appointing authority shall be the Secretary General of the PCA at the Hague.

<sup>63</sup> Time periods for submissions, for example, under the PCA Optional Rules for Arbitration between International Organizations and private parties is a maximum of 90 days as compared to 60 days under the PCA Environmental Rules. ; See also, *supra* note 40 at 892.

<sup>64</sup>Art. 24(4)

<sup>65</sup> *Supra* note 17.

<sup>66</sup> *Supra* note 62, art. 26 (1) Unless the parties otherwise agree the arbitral tribunal may, at the request of any party and having obtained the views of all the parties, take any interim measures including provisional orders with respect to the subject-matter of the dispute 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.

<sup>67</sup>Sean D.Murphy, Does the World need a New International Court, 32 *George Washington Journal of Law & Economics* 333, 348 (2000).

PCA. Sands and MacKenzie in their study reported that as of 1995, 23 multi-lateral environmental treaties provided for unilateral submission of disputes to arbitration, and 21 treaties allowed submission only upon parties agreement.<sup>68</sup> With the availability of the rules and the institutional resources of the PCA, environmental disputes could be resolved effectively and expeditiously if states included a PCA arbitration submission clause into the multilateral treaties.

- ii. Non-State Actors would still have to rely on some form of State sponsorship to participate in the dispute resolution process, especially categories with NGOs and Civil Society Pressure Groups. While the Rules itself demonstrate flexibility and autonomy, one major difficulty with the working of the Rules could be, especially with regard to the NSAs, defraying the costs of arbitration. The Rules state that each party shall bear its own costs of arbitration. Such symmetric Rules structure, affecting all the parties identically may be in principle a reflection of the principles of arbitration and make it easier for parties to agree to arbitration. Nevertheless it is difficult for parties, especially developing countries, NGOs and individuals to pay for the arbitration. While the PCA provides a financial assistance fund, it is available only to countries that are members of the PCA and also listed as aid recipients by the Organization for Economic Cooperation and Development (OECD) qualify. Cost allocation mechanism thus could be a hindrance to the PCA's avowed purpose of becoming a unified forum for environmental disputes resolution.
- iii. While the rules on interim measures is a significant step towards addressing the possible irreversible harm to environment pending dispute resolution, difficulties could crop up because of the enforcement concerns regarding interim orders. While environment arbitration tribunals could more frequently issue interim measures/orders, there could be difficulties in enforcing them, especially because the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 does not specifically apply to interim orders/awards. Therefore local courts in different jurisdictions might apply varying considerations with regard to enforcement/non-enforcement of interim orders.

A significant feature of the PCA Environmental Rules is the discretion available with the arbitral tribunal to apportion each of the costs amongst the parties, if it determines that

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<sup>68</sup> Philippe Sand, Ruth MacKenzie, *supra* note 4, available at: <http://www.pca-cpa.org/EDR/envannex1.htm>(last visited on Apr. 15, 2016).

such apportionment is reasonable, in the circumstances of the case.<sup>69</sup> The manner of exercise of this discretion could be a fillip to increased use of arbitration as a dispute settlement mechanism in transnational environmental disputes.

The Rules can be of significant utility in addressing trans-boundary water disputes<sup>70</sup>. Trans-boundary fresh-water disputes are defined as a dispute that 1) occurs between two or more states concerning an international drainage basin; 2) concerns fresh surface water (e.g., rivers, lakes) and groundwater resources (e.g., aquifers) with respect to four main water utilization issues: (a) allocation (e.g., ownership and sovereignty rights); (b) quantity (e.g., dams and diversions); (c) quality (e.g., pollution); and (d) rights of use (e.g., infrastructure, irrigation, and hydropower); and 3) exhibits a sufficiently high level of conflictual interaction between the disputing states.

However, it is pertinent to note that there is an increasing incidence of trans-boundary freshwater disputes. Peter H. Gleick chronicling the water conflicts stated that over 150 water-related conflicts have been recorded between 1900-2010.<sup>71</sup> 60% of the world's international river basins currently lack any type of cooperative management framework that might assist in preventing or resolving future conflicts.<sup>72</sup>

While the core principles of international water law are commonly viewed as having customary status, their interpretations reflected divergent views, often contradictory.<sup>73</sup> Further a multi-lateral water treaty failed to take off despite being in existence for nearly two decades.<sup>74</sup>

Trans-boundary freshwater disputes (TFDs) have not had much judicial delineation, therefore States are reluctant to submit TFDs to 'legal' resolution by an international

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<sup>69</sup> *Supra* note 62, art. 40(1)

<sup>70</sup> Tamar Meshel, "The Permanent Court of Arbitration and the Peaceful Resolution of Transboundary Freshwater Disputes" 5 (1) *ESIL Reflections* (Jan. 2016).

<sup>71</sup> Peter H. Gleick, 'Water Conflict Chronology', 7 *The World's Water: The Biennial Report on Freshwater Resources* (Island Press, 2011).

<sup>72</sup> Tamar Meshel, Interstate Arbitration and the Peaceful Resolution of Transboundary Fresh Water Disputes, 5 (6) *ESIL Conference Paper Series*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2709623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709623) (last visited on May 10, 2016).

<sup>73</sup> *Id.* at 3.

<sup>74</sup> The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 21 May 1997, which currently has 36 parties, available at : [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-12&chapter=27&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&lang=en) (last visited on Mar. 20, 2016).

court<sup>75</sup> and most often attempt to resolve such disputes by way of bilateral negotiation or non-binding third-party mechanisms such as mediation, conciliation, and good offices.<sup>76</sup> However, bilateral non-binding mechanisms may also prove ineffective in resolving disputes since they cannot assure the settlement of a dispute; a negotiated settlement may reflect the parties' relative negotiating power; it is inherently political and therefore subject to external pressures; and the parties may not have access to technical expertise required for the resolution of a dispute. Third-party non-binding mechanisms suffer from a common disadvantage that may hinder the effective resolution of TFDs - a result that fails to 'give expression to an affirmative endeavour to effect accord between the states at variance' and 'those states remain free to draw their own conclusions as to the course thereafter to be followed.'<sup>77</sup>

### **Inter-state arbitration of TFDs through the PCA rules**

The advantage of interstate arbitration as a distinct dispute resolution mechanism for TFDs lies in the fact that it fulfills parties' desire for designed for quick, practical and efficient resolution. Further, arbitration appears to be a more practical method of dispute resolution as most TFDs are 'multi-scalar and comprehensive problems' in which 'justice is in many ways contingent' on factors other than law.<sup>78</sup>

The PCA rules are a unique set of rules that could be used without a reference to an applicable treaty or convention. This feature is of particular appeal because most TFDs arise in situations where there has been no allocation of water set out in an agreement. The rules combine the advantages of a permanent and much-favoured mechanism of the PCA with the *ad-hoc* process of arbitration. Further, since there is little favour amongst States for creation of a new forum in environmental context,<sup>79</sup> the PCA and the rules are an apt alternative for the resolution of the TFDs.

The rules, however, need to be adapted to the resolution of the TFDs given the unique nature of these disputes, as not arising out of or connected with any international agreement or convention. A few features of the rules that need to be customised for TFDs resolution are:

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<sup>75</sup> Lucius Caflisch, 'Judicial Means for Settling Water Disputes' in International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of international water disputes: papers emanating from the Sixth PCA International Law Seminar 236* (Kluwer Law International 2003).

<sup>76</sup> *Supra* note 72 at 4.

<sup>77</sup> *Id.* at 12

<sup>78</sup> *Id.* at 18.

<sup>79</sup> *Tim Stephens, supra* note 2 at 61.

- i. While the importance of confidentiality as an arbitral feature in the context of the sensitive information within the TFDs cannot be gainsaid, a strict presumption in favour of confidentiality in environmental disputes goes against the prevailing trend of transparent decisional process open to public scrutiny and participation in environmental disputes, especially related to TFDs. Keeping in line with the practice of ITLOS, and the WTO dispute settlement mechanisms, the awards of the arbitral tribunals established under the PCA could also be made public.
- ii. With regard to the composition of the tribunal, PCA already has a list of arbitrators specialized in environmental disputes. While the Rules provide for accessing expertise, from the list of experts specified under the Rules as well as elsewhere, it would be advisable to include a technical expert on the tribunal. For example, the Indus Waters Treaty between India and Pakistan provides that one member of the arbitral tribunal shall be a ‘highly qualified engineer’<sup>80</sup>
- iii. The provision of *amicus curiae* within the rules could be of significant value to resolution of TFDs. Participation of non-state actors through amicus briefs is of immense help in assessing the full range of issues, needs and interests of all stakeholders, such briefs help in incorporating the interests of those most affected by the outcome. The rules could therefore be customized to ensure third party participation within the resolution of the TFDs. Such participation could be limited to specific issues and particular facts.
- iv. In the context of TFDs effective participation of a diverse set of stakeholders would ensure that local customs and practices of water use and sharing are factored into the dispute resolution process. Only making available arbitral documents to accredited third parties could ensure such effective participation.

#### IV Conclusion

The rules barring the irritants are an important methodology for resolution of environmental disputes. PCA could truly be a unified forum for arbitration of

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<sup>80</sup> Indus Water Treaty (Pakistan and India), 1960 Annexure G - Unless otherwise agreed, between the Parties, a Court of Arbitration shall consist of seven arbitrators appointed as follows

(a) Two arbitrators to be appointed by each Party in accordance with Paragraph 6; and

(b) Three arbitrators (hereinafter sometimes called the umpires) to be appointed in accordance with Paragraph 7, one from each of the following categories:

(i) Persons qualified by status and reputation to be Chairman of the Court of Arbitration who may, but need not, be engineers or lawyers.

(ii) Highly qualified engineers.

(iii) Persons well versed in international law. Available at: <http://mea.gov.in/bilateral-documents.htm?dtl/6439/Indus> (last visited on Mar. 20, 2016).

environmental disputes if the criticism mentioned above could be addressed and such address read into the rules. There is no division on the opinion that arbitration has been a significant contributor the resolution of many environmental disputes, the arbitral regimes have worked towards ensuring protection and conservation of environment and natural resources.

The PCA Environmental Rules is also a pioneer in international law development in the sense that it is one set of optional rules that have created a standing and space for a variety of NSAs in dispute resolution. More importantly in a world that is increasingly becoming prone to irreversible damage to its environment, the PCA Environmental Rules offer a rapid response through its expedited and effective dispute resolution process.

Further the rules are also a significant development in the area of international environmental law because they offer a procedure for conducting the arbitration hearings within a time frame for each section of the process, unlike other important conventions which have a dispute settlement clause referring parties to arbitration in annex, but have not yet adopted arbitration procedures. PCA's institutional resources and the rules could be of help for states who are parties to such conventions if they could agree to refer their disputes to the Rules, thereby making the conventions complete in all respects and also contributing to the environmental dispute resolution. The Kyoto Protocol (1997) to the United Nations Framework Convention on Climate Change (1992), for example, provided for binding arbitration as an optional means for dispute settlement, nevertheless did not set out any arbitration procedures. PCA actively promoted the rules to serve as an annex on arbitration referred to in article 14 of the UNFCCC. The rules have been referred to in emissions trading agreements under the Kyoto Protocol.<sup>81</sup> The rules also found favour with the International Emissions Trading Agency, which has recommended PCA Environmental Arbitration Rules in its Model Emissions Reduction Purchase Agreements.<sup>82</sup> Recourse to PCA arbitration is also gaining favour among the dispute settlement options recommended in the draft International Covenant on Environment and Development, a model agreement developed by NGOs with the purpose of facilitating treaty negotiations in the environmental sector.<sup>83</sup>

Considered from the standpoint of the discourse on a forum for resolution of environmental disputes, the PCA Rules on Arbitration of Environmental Disputes could be

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<sup>81</sup> Barbara T. Hoffman – *Art, Culture and Heritage – Law, Policy and Practice* 472,473(Cambridge: Cambridge University Press, 2009).

<sup>82</sup> Available at : [http://www.pca-cpa.org/showpage.asp?pag\\_id=1058](http://www.pca-cpa.org/showpage.asp?pag_id=1058) (last visited on Apr. 10, 2016).

<sup>83</sup> *Ibid.*

seen as a possible approximation of the goals sought to be achieved through the establishment of the international environmental court, especially given the fact that there still is no multilateral agreement accepting broad arbitral jurisdiction for environmental disputes. The foregoing discussion also points to the fact that the rules have to a large extent addressed the difficulties arising from the normative insufficiency in the characterization of an international environmental dispute. Reviewing the response to the rules as well as the institutional advantages, there is a significant gain in greater engagement with PCA.<sup>84</sup> PCA and its environmental rules could be seen as a possible approximation of the goals sought to be achieved through the establishment of the international environmental court. More importantly, as Sand opined,<sup>85</sup> it is pertinent and essential that people interact with governments and people beyond geographic boundaries in all areas of governance for a better understanding and implementation of the complex transnational environmental necessities. The PCA Optional Rules for Arbitration of Disputes relating to Environment/Natural Resources provide an immediate and extended address to the needs environmental dispute resolution in a participatory process.

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<sup>84</sup>*Supra* note 51.

<sup>85</sup> Sand, *supra* note 6 at 13.