



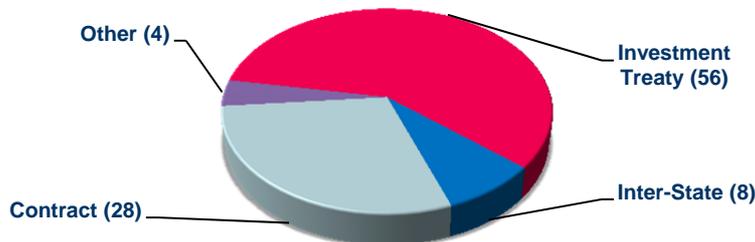
**INFORMATION ABOUT THE ACTIVITIES OF THE PERMANENT COURT OF ARBITRATION
IN ENVIRONMENTAL DISPUTES IN THE CONTEXT OF ENERGY PROJECTS**

**prepared by Judith Levine, PCA Senior Legal Counsel, for the 1-2 September 2014
Copenhagen Conference on Arbitration of Energy Disputes: New Challenges**

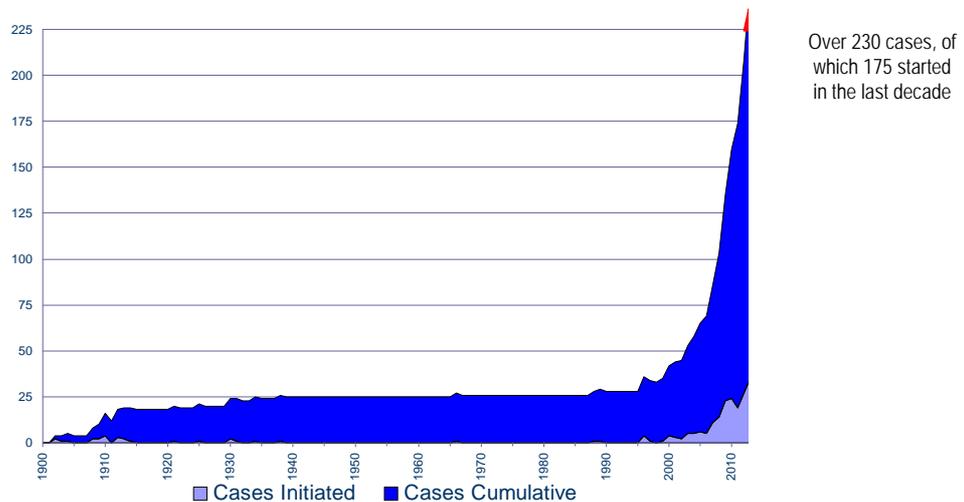
This note provides some background for Panel III on Dispute Settlement Options for Environmental Disputes in the Context of Energy Projects. Part I sets out background on the Permanent Court of Arbitration (“PCA”); Part II includes some examples of PCA energy cases with an environmental angle; Part III describes the PCA’s environmental rules and 2012 rules; Part IV recounts the PCA’s cooperation on other projects on environmental issues; and Part V contains some observations about procedural issues that may particularly arise in the environmental context.

I. Background on the Permanent Court of Arbitration (“PCA”)

Established by treaty in 1899, the PCA is an intergovernmental organization tasked with facilitating arbitration and other modes of dispute resolution between States, State entities, intergovernmental organizations, and private parties. With a membership of 116 States, the PCA has seen its caseload grow exponentially throughout recent years. The PCA administers the following types of cases: (i) inter-State arbitrations; (ii) investment disputes arising under bilateral or multilateral investment treaties; and (iii) disputes arising under contracts between private parties and States, other State-controlled entities or intergovernmental organizations. The chart below shows the breakdown of the PCA’s current docket of 96 cases.



The following chart shows growth in PCA case activity.



In addition to providing registry services, the PCA plays an important role under the UNCITRAL Arbitration Rules, pursuant to which the Secretary-General of the PCA is charged with designating appointing authorities or, if the parties so agree, acting directly as appointing authority to appoint arbitrators or resolve challenges. The PCA has dealt with over 500 appointing authority requests since the UNCITRAL Rules were promulgated in 1976.¹

II. The PCA and Energy Disputes – Sample Cases with an Environmental Angle

The PCA has substantial experience administering disputes relating to energy, including the oil, gas, electricity, hydroelectricity, alternative energy, renewable energy, and energy distribution sectors.

Approximately half of the cases currently administered by the PCA involve the energy sector, including 20 investment treaty cases and 17 contract disputes. While the PCA's current inter-State arbitrations do not relate directly to the energy sector, some of them have potential implications for exploration of oil and gas reserves, as well as potential environmental impact. For example, in the arbitration brought by the Philippines against China under the United Nations Convention on the Law of the Sea ("UNCLOS"), the disputed area is suspected to hold substantial gas and oil deposits. The area is also rich in marine biodiversity.² Described below are examples of past and present PCA-administered cases involving the energy sector that also have a nexus with environmental issues.

A. Inter-State cases³

1. *MOX Plant Case*

www.pca-cpa.org/showpage.asp?pag_id=1148

Parties: Republic of Ireland v. United Kingdom of Great Britain and Northern Ireland

Date commenced: 25 October 2001

Energy sector: Nuclear

Arbitrators: H.E. Judge Thomas Mensah (presiding), Prof. James Crawford SC, Maître L. Yves Fortier CC QC, Prof. Gerhard Hafner, Rt Hon. Lord Mustill PC, Sir Arthur Watts KCMG QC

Legal instrument: UNCLOS, Annex VII

Nature of dispute and environmental aspect: The dispute pertained to the operation of a Mixed Oxide ("MOX") Plant, a recycling/reprocessing facility for radioactive material, at the Sellafield nuclear facility near the Irish Sea coast. At issue was whether the operation of the plant constituted a violation by the UK of its obligations to prevent pollution under UNCLOS.

¹ In some pending cases arising from production sharing contracts, in addition to adopting the UNCITRAL Rules, the Parties' wrote into their arbitration clauses the role of the PCA Secretary-General as appointing authority, and the PCA as administering institution. Often the PCA's services are agreed upon by the Parties in the early phases after a case commences, such as in the Terms of Appointment or at a first procedural meeting.

² See www.pca-cpa.org/showproj.asp?pag_id=1529.

³ Environmental issues have arisen in a number of past and present PCA-administered inter-State cases not relating to the energy sector, including: (i) *Netherlands v. France* (brought under the 1976 Convention on the Protection of the Rhine against Pollution by Chlorides); (ii) *Iron Rhine Arbitration (Belgium v. Netherlands)* (cost of environmental protection measures in reactivating Iron Rhine railway); (iii) *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)* (effects of land reclamation by Singapore on the marine environment); (iv) *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (issue regarding shoreline erosion); (v) *The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland* (regarding the UK's establishment of a Marine Protected Area around the Chagos Archipelago); (vi) *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)* (interpretation and application of Article 63(1) of UNCLOS regarding the shared stock of Atlanto-Scandian herring).

2. *OSPAR Arbitration*
www.pca-cpa.org/showpage.asp?pag_id=1158

Parties: Republic of Ireland v. United Kingdom of Great Britain and Northern Ireland
Date commenced: 18 June 2001
Energy sector: Nuclear
Arbitrators: Prof. W. Michael Reisman (presiding), Dr. Gavan Griffith QC, Rt Hon. Lord Mustill PC
Legal instrument: 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR”)

Nature of dispute and environmental aspect: The dispute pertained to whether the UK breached its obligations under the OSPAR Convention by declining to provide information requested by Ireland regarding the MOX Plant.

3. *Indus Waters Kishenganga Arbitration*
www.pca-cpa.org/showpage.asp?pag_id=1392

Parties: Islamic Republic of Pakistan v. Republic of India
Date commenced: 17 May 2010
Energy sector: Hydroelectric
Arbitrators: Judge Stephen M. Schwebel (presiding), Sir Franklin Berman KCMG QC, Professor Howard S. Wheeler FEng, Prof. Lucius Caflisch, Prof. Jan Paulsson, Judge Bruno Simma, and H.E. Judge Peter Tomka
Legal instrument: Indus Waters Treaty 1960

Nature of dispute and environmental aspect: The dispute arose from a treaty between Pakistan and India regulating their use of the waters in the Indus river system. At issue was whether it was permissible for India to operate the Kishenganga Hydro-Electric Project (“KHEP”), which was to generate power through the diversion of water from a dam site in the Kishenganga/Neelum River. The Final Award analyzes KHEP’s effects on the downstream environment and on Pakistan’s agricultural and hydro-electric use, which were considered in determining the minimum flow of water that would preserve India’s right to operate KHEP while mitigating the adverse downstream effects of the project.

4. *Eritrea v. Yemen*
www.pca-cpa.org/showpage.asp?pag_id=1160

Parties: State of Eritrea and Republic of Yemen
Date commenced: 3 October 1996
Energy sector: Maritime boundary dispute, with implications for petroleum contracts and fishing rights
Arbitrators: Prof. Sir Robert Y. Jennings (presiding), Judge Stephen M. Schwebel, Dr. Ahmed Sadek El-Kosheri, Mr. Keith Highet, Judge Rosalyn Higgins
Legal instrument: Arbitration Agreement dated 3 October 1996

Nature of dispute and environmental aspect: The Tribunal’s decision held implications for the fishing rights of nationals from each country, the two countries’ cooperation with respect to marine pollution, as well as rights under petroleum contracts and concessions entered into by Yemen or Eritrea.

5. *The “Arctic Sunrise” Arbitration*
www.pca-cpa.org/showpage.asp?pag_id=1556

Parties: The Netherlands v. The Russian Federation
Date commenced: 4 October 2013 [still pending]
Energy sector: The case concerns the arrest of a Greenpeace boat that was protesting against drilling in the Arctic
Arbitrators: Judge Thomas A. Mensah (presiding), Mr. Henry Burmester, Dr. Alberto Székely Sánchez, Prof. Alfred Soons, Prof. Janusz Symonides
Legal instrument: UNCLOS, Annex VII

Nature of dispute and environmental aspect: These ongoing proceedings concern the alleged breach of UNCLOS by the Russian Federation by means of the boarding and detention of the vessel “Arctic Sunrise” in the exclusive economic zone of the Russian Federation and the detention of Greenpeace personnel on board the vessel by Russian authorities.

B. Investment Treaty Cases⁴

1. *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*
www.pca-cpa.org/showpage.asp?pag_id=1408

Date commenced: 23 September 2009 [still pending]
Energy sector: Oil
Arbitrators: Mr. V.V. Veeder QC (presiding), Dr. Horacio Grigera Naón, Prof. Vaughn Lowe, QC
Legal instrument: US-Ecuador BIT

Nature of dispute and environmental aspect: At issue is whether Ecuador violated the US-Ecuador BIT in connection with litigation by a group of indigenous plaintiffs against one of the claimants for environmental damage arising from operations in the Amazon region of Ecuador.

2. *Mesa Power Group, LLC v. Government of Canada*
www.pca-cpa.org/showpage.asp?pag_id=1579

Date commenced: 4 October 2011 (pending)
Energy sector: Renewable energy/wind power
Arbitrators: Prof. Gabrielle Kaufmann-Kohler (presiding), The Hon. Charles N. Brower, Mr. Toby Landau, QC
Legal Instrument: North American Free Trade Agreement (“NAFTA”)

Nature of dispute and environmental aspect: The claimant owned and controlled four wind farm investments in Ontario. The case concerns measures taken by the Government of Ontario relating to the Feed-in Tariff program enabled by the *Green Energy Act* to encourage the production of renewable energy in Ontario. The claimant alleges it suffered loss when the Government changed the regulatory framework without notice.

⁴ Environmental issues have arisen in a number of past and present PCA-administered investment treaty cases not relating to the energy sector, including: (i) *Vito Gallo v. Canada* (on revocation of licenses for an abandoned mine due to statute prohibiting the disposal of waste at the mine), (ii) *Bilcon of Delaware et al. v. Government of Canada* (denial by Canada of claimant’s application to operate a quarry based on an environmental assessment); (iii) *China Heilongjiang International Economic & Technical Cooperative Corp. et al. v. Mongolia* (dispute on mining license for iron ore); and (iv) *Allard v. Barbados* (involving a nature reserve).

3. ***Windstream Energy LLC v. Government of Canada***
www.pca-cpa.org/showproj.asp?pag_id=1550

Date commenced: 28 January 2013 (pending)
Arbitrators: Dr. Veijo Heiskanen (presiding), Mr. R. Doak Bishop,
Dr. Bernardo Cremades
Legal instrument: NAFTA

Nature of dispute and environmental aspect: The claimant invested in a wind energy project in the Wolfe Island Shoals off the shores of Ontario. Its complaint concerns measures taken by the Government of Ontario relating to the Feed-in Tariff program enabled by the *Green Energy Act*. The claimant alleges that it suffered loss as a result of the Government's change in regulatory framework and imposition of a moratorium.

4. ***Guaracachi America, Inc. (U.S.A.) and Rurelec plc (UK) v. Plurinational State of Bolivia***
www.pca-cpa.org/showpage.asp?pag_id=1436

Date commenced: 24 November 2010
Arbitrators: Dr. José Miguel Júdice (presiding), Mr. Manuel Conthe, Dr. Raúl Emilio Vinuesa
Legal instrument: US-Bolivia BIT and UK-Bolivia BIT

Nature of dispute and environmental aspect: The dispute involved the nationalization of the claimants' investments in the electricity sector in Bolivia and seizure of some assets. The claimants complained of changes to the regulatory framework governing electricity prices which Bolivia claimed to have implemented with a view to furthering efficiency in the sector and environmental policy goals. In addition, the claimants alleged that Bolivia had interfered with the ability of the claimants to finance a particular project through the sale of carbon credits. The tribunal decided against the claimants on both counts, but awarded damages for the fair market value of the claimants investment at the time of nationalization.

C. **Contract and Other Cases**

The PCA also administers cases arising from contract disputes between private parties and States, State-controlled entities or intergovernmental organizations. More than half of the contract cases in the PCA's current docket relate to the energy sector. Of those cases, the disputes pertain to a diverse set of issues and/or subsectors, including *inter alia*: (i) oil/gas exploration or extraction; (ii) natural gas supply; (iii) power purchase agreements; (iv) electric power infrastructure; (v) gas price disputes; (vi) wind power; and (vii) hydroelectric power.

Most of these cases are confidential but some case details are available at: www.pca-cpa.org/showpage.asp?pag_id=1029.

III. The PCA's Environmental Rules and 2012 Rules

Adopted in 2001, the PCA's Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ("PCA Environmental Arbitration Rules")⁵ are procedural rules based on the 1976 UNCITRAL Arbitration Rules but modified to reflect the unique characteristics of disputes relating to natural resources, conservation or environmental protection. The PCA Environmental Arbitration Rules also provide a list of specialized arbitrators and a list of scientific and technical experts on the environment. Parties to a dispute are free to choose arbitrators, conciliators and experts from these Panels, but are not limited to those panels and may choose from outside the lists.

Parties to a dispute may adopt these rules for their arbitration, or as in the case of the International Emissions Trading Association ("IETA"), the PCA Environmental Arbitration Rules may be recommended for incorporation into contracts such as Model Emissions Reduction Purchase Agreements. The PCA's Specialized Panels, established pursuant to the PCA Environmental Arbitration Rules, include emissions trading experts who are available for appointment to arbitral tribunals or conciliation commissions. The Secretary-General may maintain his own list of emissions trading experts.

The PCA Environmental Arbitration Rules also reference the following model clauses that parties may include in treaties or other agreements for future or existing disputes relating to the environment and/or natural resources:

Model Clause for Future Disputes:

1. Any dispute, controversy, or claim arising out of or relating to the interpretation, application or performance of this agreement, including its existence, validity, or termination, shall be settled by final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, as in effect on the date of this agreement. The International Bureau of the Permanent Court of Arbitration shall serve as Registry for the proceedings.⁶

Model Clause for Existing Disputes:

1. The Parties agree to submit the following dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, as in effect on the date of this agreement: [insert brief description of dispute].

There have been five cases under the PCA Environmental Arbitration Rules. One is currently pending. It is a commercial contract dispute involving Asian hydroelectric companies and a European company. Three cases have been concluded under the PCA Environmental Rules – two of them were between private parties; and the other involved a private party against a State entity in connection with a carbon emissions trading scheme. The details are confidential.

The PCA is also currently administering three cases in connection with Clean Development Mechanism ("CDM") emission reductions. Two are arbitrations under the UNCITRAL Rules and one started under the PCA Environmental Arbitration Rules but by consent has now been referred to conciliation under the PCA Optional Rules for Conciliation of Disputes relating to Natural Resources and/or the Environment, adopted in 2002.⁷ The details of those cases are also confidential.

⁵ See www.pca-cpa.org/showpage.asp?pag_id=1188.

⁶ After section 1, parties may also consider adding the following: 2. The number of arbitrators shall be [insert 'one', 'three', or 'five']; 3. The language(s) to be used in the arbitral proceedings shall be [insert choice of one or more languages]; 4. The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration; and 5. The place of arbitration shall be . . . [insert city and country].

⁷ See www.pca-cpa.org/showfile.asp?fil_id=589.

Parties may also choose to adopt the 2012 PCA Arbitration Rules (“PCA 2012 Rules”) for use in disputes relating to the environment and/or natural resources.⁸ The PCA 2012 Rules are based on the 2010 UNCITRAL Arbitration Rules but with changes made in order to (i) reflect the public international law elements that may arise in disputes involving a State, State-controlled entity, and/or intergovernmental organization; (ii) indicate the role of the Secretary-General and the International Bureau of the PCA; and (iii) emphasize flexibility and party autonomy (for example in relation to multiparty disputes and the number of arbitrators).

IV. The PCA’s Engagement in Other Projects on Environmental Issues

The PCA Environmental Arbitration Rules were drafted, in part, to serve as procedural rules in disputes between States parties to multilateral environmental agreements. To promote the incorporation of references to the PCA Environmental Arbitration Rules, the PCA has participated in negotiations facilitated by United Nations convention secretariats, such as the Conferences of the Parties to the UN Framework Convention on Climate Change (“UNFCCC”).

In the late 1990s, the PCA commissioned the Foundation for International Environmental Law and Development (“FIELD”) to prepare the Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements, which provide guidance on drafting environmentally related dispute settlement clauses.⁹

The PCA’s work on environmental issues was also considered together with other developments in dispute resolution and avoidance in environmental disputes during the meeting of an Advisory Group convened by the United Nations Environment Programme in November 2006.¹⁰

PCA staff have also been involved in work that may be relevant to dispute resolution relating to the environment and/or natural resources, including: (i) participation in the drafting of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration;¹¹ (ii) participation in conferences about the Energy Charter Treaty (the PCA has administered 13 ECT arbitrations);¹² (iii) cooperation with a new Task Force of the International Bar Association on climate change and human rights; and (iv) participation in the Compact, a set of principles reflecting the Rio Declaration on Environment and Development, which set forth a process for a United Nations Member State to file and process claims in the event of environmental damage to biological diversity.¹³

V. Some Procedural Issues that Arise in the Environmental Context

A. Multiple stakeholders in environmental disputes

Disputes pertaining to the environment and natural resources frequently involve not only States, State-owned entities, or intergovernmental organizations but also private corporations, nongovernmental organizations, and even private litigants.

⁸ See www.pca-cpa.org/showpage.asp?pag_id=1188. For more information on the Rules, see Brooks W. Daly, Evgeniya Goriatcheva and Hugh A. Meighen, *A Guide to the PCA Arbitration Rules* (OUP 2014)

⁹ See www.pca-cpa.org/showpage.asp?pag_id=1058.

¹⁰ See www.pca-cpa.org/showpage.asp?pag_id=1058 for the 2-3 November 2006 report by the Working Group.

¹¹ See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html

¹² These include three recently concluded arbitrations between the former majority shareholders of OAO Yukos Oil Company and the Russian Federation, see www.pca-cpa.org/showpage.asp?pag_id=1599.

¹³ PCA Deputy Secretary-General and Principal Legal Counsel Brooks Daly is a member of the Compact’s Advisory Committee. The current members of the Compact are BASF, Bayer CropScience, Dow Agrosciences, DuPont, Monsanto Company and Syngenta. Membership is open to any entity such as private companies, public research facilities, or government agencies.

It is increasingly common for the parties and tribunals in cases with public interest elements, including environmental impact, to consider such issues as standing, non-party submissions, transparency, and options for the possibility of hearing the views of those stakeholders.

B. Provisional or interim measures

The use of provisional or interim measures to preserve the status quo may be particularly relevant in environmental disputes. A party may ask a tribunal to order these measures to prevent further environmental degradation or damage (for example, the cessation of spillage of waste into a water system or the construction of a dam that disrupts water flow) or dissipation of natural resources (for example, the cessation of fishing in a marine sanctuary or extraction of minerals in a protected area).

C. Appointment and examination of experts

Generally, many types of cases engage experts to shed light on particular subjects relevant to the resolution of the dispute, but the use of experts perhaps is a more readily used practice in disputes involving the environment and/or natural resources. That is because these types of disputes typically require an understanding of different technical fields that may be beyond the purview of the lawyers' or arbitrators' legal expertise. It is therefore important from an advocate's perspective to make use of experts who can clarify key points in their client's case theory, or from the tribunal's perspective, to work with impartial experts who can provide the arbitrators a clear, technical understanding of facts and data that may be relevant to the award or decision. In several of the cases referenced above, experts were appointed by the parties and/or the tribunal. In connection with the PCA's Environmental Rules, a panel of experts is established, though parties are not bound to choose from that list.

D. Site Visits

The PCA has seen a rise in the use of site visits in both inter-State and private-public disputes. Such visits are provided for in the founding conventions of the PCA as well as most modern arbitral rules. Site visits may allow tribunals and/or experts to appreciate first hand environmental considerations. Two site visits were undertaken by the arbitrators in the Indus Waters arbitration to inspect the hydro-electric plant (pictured below).



Information accurate as at September 2014. Further information about the PCA and its activities may be found at www.pca-cpa.org and in the PCA's Annual Reports (www.pca-cpa.org/showpage.asp?pag_id=1069).