Remarks on Selected Topics

Hugo H. Siblesz
Secretary-General
Permanent Court of Arbitration

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St. Petersburg State University

First of all, many thanks to the St. Petersburg State University for inviting us. It is always extremely encouraging to meet young scholars from around the world and sense a real interest in international law.

I will take these few minutes to introduce you to the Permanent Court of Arbitration, which, while being the world’s oldest intergovernmental institution devoted to the peaceful settlement of disputes, is nevertheless less well known than some of the other courts in The Hague, and I will then comment on some of today’s discussion topics.

The primary function (and aspiration) of the Permanent Court of Arbitration—the PCA—is to facilitate the peaceful resolution of disputes that involve at least one State, State entity, or intergovernmental organization. Most of the time, the PCA accomplishes this by acting as registry and secretariat to international arbitral tribunals, or by assisting in the constitution of these same tribunals. Despite its name, the Permanent Court of Arbitration is not a court, as different arbitrators and procedural rules may be agreed to by the parties in every dispute.

The PCA was originally created to operate in the context of inter-State disputes, at the outcome of the First Hague Peace Conference of 1899, which was convened by Czar Nicholas II of Russia in the hope of halting the arms race between the great powers of the day and finding an alternative to war. At the Conference, arbitration was considered to be “the most effective and equitable means of settling disputes between States which diplomacy has failed to settle.”\(^1\) It was adopted as a voluntary mechanism, predicated on the consent of the parties.

With the expansion of world trade, it has become common for States to accept to arbitrate disputes with private parties, especially in the context of commercial contracts and agreements for the protection of investments. In the past, a foreign investor that considered its rights to have been violated by the host State could only submit its grievances to the courts of the host State, which might have been biased or corrupt, or would have had to hope that its State of nationality would espouse its cause under the guise of diplomatic protection. By allowing direct recourse of private parties against States before a neutral forum, international investment arbitration has “depoliticized” the underlying conflicts, in essence avoiding the escalation of some of these disagreements into inter-state conflicts. In keeping with the times, the PCA Administrative Council has interpreted the institution’s mandate to encompass the administration of arbitrations between public and private entities.2

From this description of the PCA’s mandate, it should be apparent that there is an overlap between the areas of competence of arbitral tribunals operating under PCA auspices and that of other judicial international institutions. In this respect, I would like to make the point that while there is overlap, there is no “collision” in the violent sense of that term. Rather, there are options between which the parties may choose the one best suited to their needs.

For example, in the case of inter-State disputes, it was thought that the advent of the Permanent Court of International Justice and then the International Court of Justice, would mark the end of inter-state arbitration. Over time, this prediction was proven wrong. In the past 12 years, the PCA has administered 17 inter-State cases, thus experiencing its highest level of activity in inter-State matters since 1899. As the former United Nations Secretary-General Kofi Annan stated in 2005: “the Permanent Court of Arbitration and the International Court of Justice are not merely neighbours in the Hague Peace Palace; they are complementary institutions offering the international community a comprehensive range of options for the peaceful resolution of disputes.”3 Thus, States can elect to bring their inter-State disputes either to international adjudication at the ICJ, before the standing panel of judges elected by the 193 UN members and backed by the power of the Security Council; or they can opt for international arbitration, which will allow them to choose their decision-makers, lay down the applicable law and rules of procedure, set the timetable, and perhaps agree to full or partial confidentiality of the proceedings. The importance of giving the parties the freedom to choose their preferred dispute resolution forum is recognized, for example, by the UN Convention on the Law of the Sea, which allows its Contracting Parties to elect, by

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3 Kofi A. Annan, Foreword, Permanent Court of Arbitration: Basic Documents vii (2005).
mutual agreement, to resolve their maritime disputes before the ICJ, the ITLOS—an international tribunal specialized in the law of the sea—or through arbitration.

Similarly, the PCA’s mandate in the administration of arbitrations between investors and States overlaps with that of other institutions. Here too, parties have a choice. For example, many of Russia’s bilateral investment treaties allow the investor to choose between different forums and sets of procedural rules.4

As a side note, the PCA’s mandate also captures cases for which no other appropriate forum is available, such as disputes between States and international organizations, and disputes within a State, for example between a national government and a political entity from the same State, as was the case in the recent PCA-administered Abyei arbitration between the Government of Sudan and the Sudan People’s Liberation Army or Movement.5

I will conclude with the example of the Eritrea-Ethiopia Claims Commission, a PCA administered-arbitration that raises good questions as to the best methods for achieving the compensation of victims of armed conflict—the third topic of today’s discussion. The Eritrea-Ethiopia Claims Commission was a five-member arbitral body,6 established by the Peace Agreement of December 12, 2000 (the “Peace Agreement”),7 which put an end to a two-year armed conflict between Eritrea and Ethiopia.8 The mandate of the Commission was to “decide through binding arbitration all claims for loss, damage, or injury by one Government against the other, and by nationals . . . of one party against the Government of the other party.”9 In accordance with the Peace Agreement, the PCA Optional Rules for Arbitrating Disputes Between Two States applied. The PCA acted as registry and secretariat. The Claims Commission was presented with diverse claims, including claims regarding the treatment of

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4 The choice is generally between the ICSID Additional Facility Rules, the Stockholm Chamber of Commerce, and the UNCITRAL Rules. Two cases initiated by Russian investors under the UNCITRAL Rules are presently administered by the PCA.
6 Professor Hans van Houtte served as President of the Commission. Ethiopia appointed Judge George Aldrich and Dean James Paul. Eritrea appointed Mr. John Crook and Ms. Lucy Reed.
8 The Peace Agreement also established the Eritrea-Ethiopia Boundary Commission, which in 2002 promptly proceeded to render a Decision on Delimitation of the disputed border. See Brooks W. Daly, “Chapter 2: The Permanent Court of Arbitration” in The Rules, Practice, and Jurisprudence of International Courts and Tribunals, ed. Chiara Giorgetti (Martinus Nijhoff, 2012).
9 Article 5 of the Peace Agreement.
civilians and prisoners of war, as well as the impact of the war on economic activities. A total of 17 awards were rendered.

The Commission’s decisions on liability are likely to offer practical guidance to future commissions in post-conflict situations. For instance, the Commission found that the Geneva Conventions of 1949, including part of Protocol 1, have become an expression of customary international humanitarian law. The Commission also continuously recognized the limited resources of the parties, for instance in its decision on the medical treatment to which prisoners of war were entitled. In its Final Awards on damages rendered in 2009, the Commission awarded USD 174 million to Ethiopia, USD 161 million to Eritrea, and USD 2 million to six individuals whose claims were filed by Eritrea. To explain these amounts, which paled in comparison with the actual costs of the war, the Commission stated that it had “been mindful of the harsh fact that these countries are among the poorest on earth.”

With regard to the efficiency of this mechanism for the compensation of victims, it must first be noted that there was no dedicated source of funding guaranteeing the payment of the award. Consequently, “satisfaction will depend on the willingness and ability of the governments to pay.” Moreover, while the Peace Agreement provided for a mass claims option, whereby each State could submit claims on behalf of individual nationals, in practice, Eritrea and Ethiopia brought predominantly State-to-State claims that were not directed at specific recipients. In awarding the damages to the States themselves, the Commission “encouraged the Parties to consider how, in the exercise of their discretion, compensation can best be used to accomplish the humanitarian objectives.” However, the parties technically have discretion as to what to use the funds, and may chose to distribute them or not among the affected

10 Other subject-matters included liability for breach of *jus ad bellum* by having started the war, breaches of international law in the front zones, and liability for the destruction of cultural property (the Stelle de Matala).
11 Eritrea Ethiopia Claims Commission, Final Award, Eritrea’s Damages Claims, 17 August 2009, available on the PCA website: [http://www.pca-cpa.org/showfile.asp?fil_id=1259](http://www.pca-cpa.org/showfile.asp?fil_id=1259), at para. 18. In particular, the Commission was concerned not to interfere with each State’s ability to provide for the basic needs of its population, and with the consequences of imposing impossible obligations, such as had been done with Germany after WW1.
population. In addition, because they are inter-State awards, the granted sums in great part cancel each other out, resulting in a judgment of only USD 10 million for Eritrea.