THE PERMANENT COURT OF ARBITRATION AND MIXED ARBITRATION

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on the occasion of a Celebration of the Centenary of the PCA
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Mr President, Secretary-General, distinguished Ambassadors, Ladies and Gentlemen,

Introduction

The Permanent Court of Arbitration began its life in 1899, and continued after 1907, as an interstate arbitral institution. Even if its function was to be a permanent arbitral registry rather than a court in the proper sense, its vocation was a high one, associated with the classical choices between war and peace. It was an instrument through which the Signatory Powers could “work for the maintenance of general peace”, extend “the empire of law” and strengthen “the appreciation of international justice”. Of course it was not the fault of the registry that the Signatory Powers so soon elected for war instead. But despite this, as President Guillaume has shown, the PCA continued before and after the Great War to provide “the advantages attending the general and regular organization of the procedure of arbitration” between States.

One innovation of the interwar period was the extension of the PCA’s organizational role to mixed arbitration, that is, to arbitration between States or State entities on the one hand and private parties or corporations on the other. This occurred for the first time in 1935 – and at a time when the prospects for international arbitration or indeed any form of peaceful settlement of interstate disputes were rapidly fading. Since that time about half of all the cases dealt with under the auspices of the PCA have been mixed arbitrations, and the proportion is increasing. Subsequently the Secretary-General became the default mechanism under the UNCITRAL Rules of 1976, a role which is vital to the functioning of arbitration under those Rules and the scope of which is currently under debate in the context of UNCITRAL’s revision of the Rules. I want to say something about these three points: the PCA’s mandate to act in the field of mixed arbitration, its record in doing so, and the proposed role for the Secretary-General as default appointing authority under the revised UNCITRAL Rules.
1. **The PCA’s Mandate in Mixed Arbitration**

The competence of the PCA in the field of mixed arbitration has been founded on Article 47 of the 1907 Hague Convention, which contains two sentences. The first sentence provides:

“The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.”

The second sentence provides:

“The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal.”

The repeated use of the term “Powers” would seem to have limited Article 47 to interstate arbitration. But when a request came from a tribunal established under a contract between the Radio Corporation of America and China to use the PCA’s facilities, the Bureau felt able to agree. The PCA’s Annual Report for 1934 explained the decision in the following terms:

“Although only one of the parties to the case is a State, the Bureau concluded that it could accept their request, considering that if it is true that, generally speaking, international arbitration should be understood as a jurisdiction between two or more States, the drafting of [Article 47] does not imply that special boards of arbitration, as to which a broader interpretation tends to appear, are so conditioned.”

“Bien qu’une des parties seulement dans ce litige soit un Etat, le Bureau a cru pouvoir accueillir leur demand, considérant que s’il est vrai que, d’une manière générale, l’arbitrage international doive s’entendre comme juridiction entre deux ou plusieurs Etats, le libellé de l’article précité n’implique pas que les juridiction spéciales d’arbitrage, où une interprétation plus extensive tend à se fair jour, soient ainsi conditionnées.”

The request was expressly made under the second sentence of Article 47 but (to judge from this tortuous passage, no less tortuous in the original French) it appears to have been accepted under the first sentence. At any rate, under one sentence or the other, the Tribunal went on to sit under the auspices of the PCA. The core issue in the Radio Corporation case was whether an obligation of exclusive dealing could be implied into a concession contract for commercial communications between China and the United States. The Tribunal held it could not, on the basis that in the absence of express provision “the government has only to be assumed to have entered into the rights and duties definitely established, and which it has judged advantageous to the general interests of which it is in charge”. In case anyone may think that old decisions are necessarily irrelevant to modern conditions, I should point out that in the Eurotunnel
decision of 30 January 2007, a PCA Tribunal reached essentially the same conclusion with respect to a claim that the French Government had impliedly undertaken not to subsidize cross-Channel ferry services in competition with Eurotunnel.

In 1962 the PCA’s Permanent Administrative Council adopted the first set of Rules of arbitration and conciliation for settlement of international disputes between two parties of which only one is a State. This authorized the Bureau to use its facilities and premises for mixed arbitration provided the State in question was a party either to the 1899 or the 1907 Convention. Surprisingly the 1962 Rules did not automatically nominate the Secretary-General as the appointing authority even in default: in this respect they were more like model rules to be adapted by the parties and depended either on a foolproof submission clause or the continuing cooperation of the disputants. But as model rules they also had some surprising rigidities. They adopted an irrebuttable presumption of unanimity: “The award shall not mention the dissenting opinion of the minority.” By contrast, the amount of arbitrators’ fees had to be mentioned. The Tribunal had no power to award costs of representation to the winning party.

In relation to these and other issues, the UNCITRAL Rules of 1976 adopted a different approach – more flexible but more foolproof. Most notably the Secretary-General of the PCA became the default appointing authority, and this was reflected also in the 1993 Optional Rules for Arbitrating Disputes between two Parties of which only one is a State. Under the 1993 Rules, which are tailor-made for mixed arbitration, the PCA is available for use by all States, whether or not parties to the Hague Convention.

The PCA also has distinct sets of Optional Rules for arbitrating disputes involving international organizations and States, and between international organizations and private parties. Again these are modeled upon the UNCITRAL Rules with individual modifications to reflect the specific context.

Disputes concerning the responsibility of international organizations are of particular significance these days. It will be recalled that the Statute of the International Court of Justice – which appears to be beyond amendment – excludes international organizations as parties to contentious proceedings. The 1899 and 1907 Conventions are more flexible, and so too has been the PCA’s Administrative Council, since disputes between States and international organizations, or between international organizations and private parties, can be brought within the framework of the PCA. Here there is only time to make two points. First, the European Union is even now to be classified as an international organization – an entity with separate personality created by treaty between States which is not itself a State. Secondly, under the emerging law of the responsibility of international organizations, it appears that conduct which is carried out “within the

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scope of an international operation authorized by the UN” – even though States are necessarily involved as agents – is thereby exclusively attributable to the UN and not to the participating States. In *Behrami v. France*, the European Court of Human Rights held that demining and detention of persons by KFOR in Kosovo was attributable to the UN, not France, and fell outside the scope of the European Convention of Human Rights. In practice the responsibility of international organizations is increasing – but the avenues for implementing that responsibility hardly exist. As a minimum we need the flexibility in jurisdictional arrangements which the PCA has shown.

2. Some Examples of the PCA’s Case-law in Mixed Arbitration

I turn to my second point, the record of PCA tribunals in mixed arbitration. In this context it may be instructive to mention four of the principal mixed arbitral awards from recent years: I will refer to them as *Larsen* (2001), *Bank for International Settlements* (2003), *Saluka* (2006) and *Eurotunnel* (2007). I must preface these remarks by noting that I was presiding arbitrator in two of these cases and counsel for the claimant in a third. Moreover two of them (*Saluka* and *Eurotunnel*) are still unresolved at the level of quantum. Thus – like the PCA itself – I can express no views as to the merits of the decisions reached. But some comments can nonetheless be made.

The first comment is that, among cases under the rubric of mixed arbitration, these are mixed indeed! They differ in the basis of jurisdiction, the classification of the respondent and the character of the claim.

- As to the source of jurisdiction, two were based on treaties, one on an internationalized concession agreement underwritten by a treaty, one on an arbitration agreement in relation to an alleged issue of extra-contractual liability arising from an earlier treaty. Only one – *Saluka* – was a more-or-less standard BIT claim. *Bank for International Settlements* was a claim by shareholders based on a multilateral treaty, which shed light on the legal status of international financial institutions and their development in the 75 years since the Bank was founded. *Eurotunnel* shows the use of expressly internationalized contracts in developed economies as a means of securing long-term infrastructure investments. At the same time it lends no support to dubious claims of implied internationalization.

- As to the identity of the respondent(s), in one case it was an indigenous group claiming identity with a deceased kingdom; in another case it was an international organization. Both cases appear to be unique: in particular I know of no other case in which the international responsibility of an international organization was dealt with by a general arbitral instance. The other two cases were against States, directly or through their designates. *Eurotunnel* was brought against partner governments and raised difficult

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7 *Supra* note 1.
issues of solidary responsibility. In Saluka the Czech Republic, as it has done in numerous BIT cases, stood alone.

- As to the character of the claims, all were claims under either general international law or under the applicable treaties or agreements; none was a straightforward contract claim. But two of the tribunals – Bank for International Settlements and Saluka – faced the intriguing issue of the admissibility of contractual counterclaims in proceedings in which the claimant is relying on breaches of treaty. On this point, Article 19(3) of the 1993 PCA Rules, following Article 19(3) of the UNCITRAL Rules, is very narrowly drawn. Indeed it can be read as excluding counterclaims entirely where the claim itself is treaty-based. But neither tribunal took that view in principle: in Bank for International Settlements the counterclaim was allowed; in Saluka it was not allowed but on narrower grounds of lack of a sufficient connection between claim and counterclaim. These are valuable precedents.

Some other observations are in order. First, all four tribunals operated within the framework of general international law and gave strong protection to the rights in issue – including, in Larsen, the rights of non-parties. Second, all tribunals focused on the texts before them, refusing to import or imply terms based on some generic conception of legitimate expectations. Thirdly, they seem – as far as the record shows – to have dealt efficiently with the incidental procedural issues which have been proliferating in mixed arbitration. In this regard tribute should be paid to the professionalism and responsiveness of the PCA’s legal and administrative staff.

The need for such registry services is increasing. The ICSID Secretariat – excellent as it is – is over-stretched and will not service BIT claims not covered by either the ICSID Arbitration Rules or the Additional Facility Rules. But something of the order of 40% of BIT claims are not brought under one of these two ICSID umbrellas, and the PCA is an obvious alternative venue, both in terms of expertise and available facilities.

3. The Secretary-General as Default Mechanism under the UNCITRAL Rules

I turn to my third point, the role of the Secretary-General as default mechanism in designating an Appointing Authority for arbitrations under the UNCITRAL Arbitration Rules.

The serious consequences that can befall when there is no adequate default appointment mechanism in respect of treaty claims were made clear in the Interpretation of Peace Treaties advisory opinion in 1950. Despite that lesson, they still occasionally recur, as they have done recently under Chapter 20 of the NAFTA. Thus it was a very significant step when, in 1976, the UNCITRAL Rules entrusted to the Secretary-General of the PCA the task of designating an appointing authority in arbitrations under those Rules. The Secretary-General will do so if no appointing authority has been agreed upon by the parties or if the appointing authority refuses or fails to act. There are also default roles in relation to challenges to arbitrators (Article 12) and the fixing of fees (Article 39). These are important provisions which have been frequently relied on in practice (more than 270 times).
Although the Secretary-General has performed this role in a way which has been generally approved, the fact that the default mechanism has two stages can cause difficulties. At present when the Secretary-General acts in the default role he appoints some other body – e.g. the ICC in Paris – to perform that function. There is inevitably some delay with a two stage process, during which no tribunal exists which can exercise interlocutory powers. Moreover there is a widespread misunderstanding that in default the Secretary-General is the appointing authority. For the Secretary-General to nominate some other body (by definition not chosen by the parties) does not necessarily fulfil their expectations.

The UNCITRAL Rules are currently undergoing revision. A Note by the UNCITRAL Secretariat proposes to retain and even enhance the role of the PCA in this regard. It seeks to “clarify for the parties the importance of the role of an appointing authority, particularly in the context of ad hoc arbitrations”. It has also been suggested that the Secretary-General not merely be the default body to designate an appointing authority but should be, as such, the default appointing authority. This proposal, made by Bahrain and amended by Mexico, would preserve the freedom of the parties to select another appointing authority but would give them a predictable rule in the event they do not agree. At the most recent session of the Working Group, this further proposal was not agreed: indeed it was said to constitute “a major and unnecessary departure from the existing UNCITRAL Arbitration Rules”. But it remains on the table.

It is not easy to discern the grounds for opposition to the proposal. One suggestion is that the PCA is seen as a “western” institution; but that seems to me to elevate form over substance. The PCA may be located in western Europe but it is responsible to a group of over 100 States, many of them developing States, and in terms of the two Hague Conventions it has a universal mission. Moreover the PCA’s performance of its role both as appointing authority and as registrar has been scrupulously fair – as I have observed as counsel in PCA proceedings for States drawn from Asia, Africa and the Caribbean as well as Europe. It also seems to be thought that the existing rule promotes regionalisation. But if the parties had wanted regionalisation they could always have appointed a regional agency – as under the Bahrain/Mexico proposal they can agree to do at any time.

It may be hoped that the UNCITRAL revision process will incorporate this further and progressive step. I take this opportunity to encourage the representatives of member governments of the PCA to urge upon their colleagues who are working on the revision of the UNCITRAL Rules this simple and sensible reform. The PCA has come a very long way over the last 20 years. It deserves this further indication of the trust of member governments and of the system of international arbitration.