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## **Environmental disputes resolution by the conciliation of the Permanent Court of Arbitration (PCA)**

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**Abstract**

The article analyzes the conciliation procedure of resolving environmental disputes at the Permanent Court of Arbitration. Methodological basis for this study is a general scientific method of knowledge and specific methods which based on the legal analysis of the essence and the role of the international commercial arbitration.

The author researches sources of legal regulation of foundation and function, the order of conciliation procedure, the clauses of PCA. The Permanent Court of Arbitration gives parties the unique way in resolving environmental disputes in spite of the differences in legal systems of the countries.

The key objective of the study is to acquaint readers with the activities of the Permanent Court of Arbitration, to develop skills in practical application of norms of arbitration law which regulate the activities of International Commercial arbitration for resolving environmental disputes by conciliation. The theoretical and practical importance of this study may be useful for scientists, practitioners and students.

**Keywords**

Permanent Court of Arbitration (PCA), arbitration, mediation, arbitration clause, environmental dispute, settlement agreement, Environmental Rules, International Bureau, Conciliation Commission.

## Introduction

For the time being we may observe the global climate change in the world, and people have no small share in this irreversible process. Often the economic benefit is higher than even the environmental safety of certain states. Hazardous industry, poor security in enterprises and many other negative factors have led to the emergence of environmental disputes or disputes related to the environment.

The globalization of the world economy originates the desire of parties of environmental disputes from various countries to independence from the state sovereignty. To resolve international environmental disputes according to the principles of justice, the patterns of such a settlement shall include in the treaty (for example, in the article of the Treaty on the Settlement of Disputes) or in a separate agreement for arbitration.

The purpose of this article is to analyze the legal regulation of the consideration of environmental disputes by the Permanent Court of Arbitration.

Permanent Court of Arbitration (hereinafter – PCA) is the oldest arbitration, established in 1899, deals with all types of disputes, including those related to the environment, which is of consid-

erable interest because of the amount of accumulated practice on certain categories of cases.

## Permanent Court of Arbitration – a body to review and resolve environmental disputes

Permanent Court of Arbitration was established during the First Hague Conference of 1899, which was held on the initiative of the Russian Emperor Nicholas II<sup>1</sup>. The conference adopted the Convention for the Pacific Settlement of International Disputes. In fact it was the first real mechanism for resolving disputes between states. In 1907, a new Convention for the Pacific Settlement of International Disputes was adopted. In tribute to the centenary of the above mentioned Conventions on October 18, 2007 the anniversary meeting of the members of the Administrative Council of the Permanent Court of Arbitration has been held.

Permanent Court of Arbitration settles disputes through arbitration and

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1 "Official website of the Permanent Court of Arbitration (PCA). Netherlands" ["Dannye ofitsial'nogo saita Postoyannogo arbitrazhnogo suda (PCA). Niderlandy"], available at: [www.pca-cpa.org/showpage.asp?pag\\_id=1058](http://www.pca-cpa.org/showpage.asp?pag_id=1058)

conciliation procedures between the various parties of the dispute: a state, individuals and legal entities, public entities and intergovernmental organizations.

All questions of the PCA are regarded in English and French, and the process can be conducted in the language provided by the parties to the dispute.

Permanent Court of Arbitration is assisting to permanent and ad hoc arbitrations in the appointment of arbitrators. In accordance with the UNCITRAL rules of arbitration the Secretary General of the Permanent Court of Arbitration appoints the arbitrators and determines the composition of the court.

In addition, PCA is a research center – it awards scholarships for the publication of scientific papers on the problems of international law and dispute resolution.

In 2001 started an operation to develop special rules for PCA arbitration in the resolution of environmental disputes, disputes relating to the environment and (or) natural resources, the so-called "Environmental Rules". Rules have been worked out by the working group and experts in environmental law and arbitration.

Environmental policies are aimed at filling a gap in the settlement of environmental disputes. Environmental

Rules were adopted on April 16, 2002. These rights provide the most precise selection of procedures and affordable ways to resolve environmental disputes. This is also confirmed by many foreign scholars that arbitration is a unique way to resolve environmental disputes, which provide the parties with a "unique procedure going beyond the system-based differences in legal systems"<sup>2</sup>.

### **The order of environmental disputes consideration by the conciliation**

Permanent Court of Arbitration offers parties certain arbitration clauses to be signed by the parties or included in one of the paragraphs of international environmental agreements.

Environmental Arbitration Rules provide a specific list of arbitrators who are experts in this field, as well as a list of scientists and technicians, who can act as experts in the process to give an opinion. The parties are free to choose the arbitrators, advisors and experts from these lists. However, the process may involve other persons.

<sup>2</sup> Carbonneau, T. (2009), "Arguments in Favor of the Triumph of Arbitration", *The Cardozo Journal of Conflict Resolution*, No. 10, pp. 395-423.

Environmental regulations were primarily formulated to be procedural rules for the resolution of disputes between states in multilateral environmental agreements. To make the Environmental Rules a major tool for dispute resolution, the Permanent Court of Arbitration regularly participates in the negotiations under the auspices of the UN, as well as conferences on global warming and other environmental issues.

Dispute settlement through arbitration by the Permanent Court of Arbitration is the recommended procedure in many multilateral agreements in order to facilitate the negotiation process in the agreements relating to the environmental sector.

Due to climate change the Permanent Court of Arbitration puts forward the "Environmental Rules" in the resolution of disputes arising out of treaties related to emissions trading. In addition, the International Emissions Trading Association ("IETA") recommends the use of PCA Environmental Arbitration Rules in the agreements on reducing emissions. As part of the Permanent Court of Arbitration there is a list of experts specializing in the field of emissions trading, which can act as arbitrators or advisers to the conciliation commissions. The Secretary General of the PCA also compiles its

own list of experts on emissions trading. PCA in the framework of the United Nations Environment Programme (UNEP hereinafter) together with the Governing Council of the UNEP released a report on the problems of the environment and ways to avoid disputes on November 3, 2006.

PCA offers parties to choose an arbitration clause:

- the arbitration clause, if the parties to the case are states;
- the arbitration clause, if one party to the case is a state;
- the arbitration clause, if the parties to the case are international organizations and states;
- the arbitration clause, if the parties to the case are international organizations and individuals;
- the arbitration clause for conciliation;
- the arbitration clause to deal with disputes relating to the environment and natural resources;
- the arbitration clause for disputes conciliation relating to the environment and natural resources;
- the arbitration clause to deal with disputes relating to space activities.

According to Article 1 of Environmental Rules the reconciliation of the parties means an appeal to a third party

or group for help in an amicable dispute settlement relating to the environment or natural resources. However, such a specific feature of the dispute as related to the environment or natural resources is not necessary for the application of these rules, it's enough to precise that the dispute is specific. The only prerequisite for the application of the Rules is a presence of a written agreement between the parties for the application of the Rules in the form of agreements, conventions, contracts (treaties), founding documents, which can be made by electronic methods accepted in international practice.

The party initiating the process has to send a notice to the other party, and a copy to the Permanent Court of Arbitration, which shall include: names, addresses, phone numbers and other information on both parties of the dispute, the invocation to the arbitration agreement (clause) and the invocation to the dispute nature.

The conciliation procedure starts from the moment when the other party has indicated its consent to it, or when the other party's consent is a prerequisite. If within 30 days the consent of the other party will not be received, this fact will be considered as a deviation from the party conciliation.

The International Bureau assumes the duties of the conciliation commission, if the agreement between the parties is not reached. It will act as means of communication between the parties and Conciliation Commission upon request, as well as provide administrative, secretarial and registration services.

As a general rule, one person acts as a conciliator if the parties fail to agree on three or even five conciliators, but they all work together. The parties who agree to consider a dispute by one conciliator shall select its nominee within 6 days from the start of the mediation process, otherwise the conciliator will be appointed by the Secretary General of the Permanent Court of Arbitration. If the dispute is to be considered with three conciliators, in this case, each of the parties within 60 days of the commencement of the mediation process chooses a conciliator on its part and has to notify the other party and the International Bureau, and selected conciliators choose a chief conciliator within 30 days. If the dispute should be considered with 5 conciliators, in this case, each of the parties within 60 days of the commencement of the mediation process chooses two conciliators each one and notify the other party, and selected conciliators choose a chief conciliator within 30

days. In case of no use of conciliators in collegial group, the Secretary General will appoint conciliators within 30 days.

It should be noted that the conciliator cannot be of the same nationality with the parties, and he has to sign a special declaration to the effect that he has no professional, business and other relationships with the parties.

Following its appointment, the conciliator invites the parties to write up the essence of the dispute and its requirements, and then send them to the other side and to the International Bureau. In addition, the conciliator may require the parties to make their written request of all the evidence, to which they refer, and send copies to the other party and to the International Bureau. At any time, the conciliator may ask the parties for additional information.

Parties may litigate by proxy or with the assistance of any person. In this case the party shall notify the other party, the conciliator and the International Bureau on this candidate, together with name and address.

The conciliator independently and impartially assists the parties in reaching an amicable agreement with the principles of objectivity and fairness. In addition, the conciliator due to the nature of

the dispute may suggest the parties their suggestions and options for preventing and (or) a decrease the extent of damage caused to the environment.

Conciliator in the settlement of the dispute may choose any version of this procedure on his own, taking into account the relevant law and circumstances of the case, and at the request of the party can be held an oral hearing to the quickness of the process.

The conciliator may bring to the process one or more experts to study specific issues of the dispute, with the approval of the parties, and to have recourse to the Secretary General for a list of experts with scientific and technical knowledge. At any stage of the process he may offer to conclude an amicable agreement, such offers may be made orally and the parties do not need to confirm in writing their refusal.

The principle of confidentiality is manifested in two aspects: in the disclosure of information and respect for the principle itself. After receiving information from the one party, under conditions of confidentiality, the conciliator does not have the right to disclose it to the other party. However, as a general rule, having received an explanation from the one party, the information is sent to the other party to give explanations.

All persons involved in the case must comply with the principle of confidentiality, do not have the right to disclose any information obtained in the course of the dispute by the Permanent Court of Arbitration. Under the information understands opinions, expressions, suggestions, arguments and admissions made by the parties or the conciliator in the dispute. The terms of the agreement are also confidential, exceptions may relate only to its application and enforcement.

The conciliation may be carried out both orally and in writing by the parties, as well as with the two parties at the same time or separately. Unchanged is the meeting place of conciliator with parties, which can be chosen by the International Bureau.

In the course of the dispute either party may invite the other party to conclude the agreement. If the option of dispute settlement is found, the conciliator formulates the terms of the agreement and sends to the parties for an approval. After consent agreement by the parties, the conciliator prepares a written amicable agreement, and the parties will continue to sign it.

The conciliator may propose the parties to establish an executive committee to promote the conclusion of a settle-

ment agreement between the parties. In the case of a committee establishing, the parties may be required to provide: regular and summary reports of attempts to reach a settlement and to report on the results to the other parties of the dispute. Furthermore, the committee shall review the procedures used by the parties at the conclusion of a settlement agreement, as well as a list of measures to be applied to the party who has failed to fulfill its obligations under the terms of the settlement agreement.

The conciliation procedure is completed on the day of the settlement agreement signing by the parties, or a statement issued by the conciliator that the parties failed to reach an agreement and all efforts have been ineffective, and the written statements of the parties that the conciliation procedure is over. If one of the parties indicates that the conciliation procedure is not mandatory and the agreement provided by a different procedure, the conciliation procedure will also be discontinued.

## **Conclusion**

The general principle for determining the competence of international commercial arbitration by the agreement between the parties subject to constraints

posed by the public and legal nature of the dispute. Environmental disputes are to be settled by international commercial arbitration only if the treaty contains an arbitration clause. Longer time for consideration, more complicated litigation procedure in the state courts has resulted in an increased number of appeals to international commercial arbitration in recent years. The increased number of pending disputes leads to a more rapid procedures such as mediation<sup>3</sup>.

Different ways of resolving environmental disputes, active implementation of alternative dispute resolution (mediation) not only does not reduce the role of international commercial arbitration, but also can improve the substantive and procedural legal aspects of its efficiency due to more accurate resolution procedures selection.

The Permanent Court of Arbitration gained experience in reforming the

procedure for consideration of environmental disputes in international commercial arbitration should be considered useful for the Russian law-making with regard to the competence of the courts.

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3 Rusakova, E.P. (2009), "Variety of methods of dispute resolution as factors of effectiveness of international commercial arbitration in Russia and England" ["Mnogoobrazie sposobov rassmotreniya sporov kak faktorov effektivnosti deyatel'nosti mezhdunarodnogo kommercheskogo arbitrazha v Rossii i Anglii"], *Vestnik Rossiiskogo universiteta druzhby narodov. Seriya "Yuridicheskie nauki"*, No.1, pp. 68-75.

## **Разрешение экологических споров посредством применения процедуры посредничества Постоянным арбитражным судом. Нидерланды**

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### **Аннотация**

Анализируется процедура рассмотрения споров, связанных с окружающей средой и природными ресурсами посредством применения процедуры посредничества Постоянным арбитражным судом. Исследуются источники правового регулирования создания и деятельности Постоянного арбитражного суда.

### **Ключевые слова**

Постоянный арбитражный суд (РСА), арбитраж, посредничество, арбитражная оговорка, экологический спор, мировое соглашение, Экологические Правила, Международное бюро, Примирительная комиссия.

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