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A. Introduction

1 In 2001, the member states of the → *Permanent Court of Arbitration (PCA)*, an intergovernmental organization headquartered at the Peace Palace in The Hague, adopted the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment ('Arbitration Rules'). The PCA provides services for the resolution of international disputes and in particular serves as a permanent framework within which ad hoc arbitral tribunals can operate. It also remains the only arbitral institution to have specialist optional rules for the resolution of disputes relating to natural resources and/or the environment. The Arbitration Rules were drafted by experts in environmental law and arbitration and were aimed at addressing procedural deficiencies identified in dispute resolution arrangements under existing environmental treaties. They are based on the widely accepted 1976 Arbitration Rules of the → *United Nations Commission on International Trade Law (UNCITRAL)* (→ *Arbitration Rules: United Nations Commission on International Trade Law (UNCITRAL)*) ('UNCITRAL Rules'), are optional and adaptable, and provide parties with the PCA's well-established institutional framework.

B. Background to the Adoption of the Arbitration Rules

2 During the two decades preceding the adoption of the Arbitration Rules, environmental disputes were increasingly recognized as a threat to international peace and security. This was the result of, *inter alia*, increasing competition over access to limited natural resources, the unsettled scope of states' environmental obligations, and the fact that states continued to become involved in disputes arising from the activities of their nationals (Romano, 2000, 3-4). Moreover, national jurisdictions proved deficient in resolving disputes related to harmful transboundary effects and international environmental law, while existing international dispute resolution institutions did not provide direct access to non-governmental organizations, interest groups, and individuals (Rest, 1999, 107, 108, 112). Therefore, United Nations General Assembly ('UNGA') Resolution 44/228 on the United Nations Conference on Environment and Development (1989) declared as one of its main objectives 'to assess the capacity of the United Nations system to assist in the prevention and settlement of disputes in the environmental sphere and to recommend measures in this field', and Agenda 21: Programme of Action for Sustainable Development (1992), paragraph 39.3(h) recognized the need '[t]o study and consider the broadening and strengthening of the capacity of mechanisms, *inter alia*, in the United Nations system, to facilitate ... the identification, avoidance and settlement of international disputes in the field of sustainable development'.

3 Deficiencies in this regard were evident in many international legal instruments addressing environmental issues, such as multilateral environmental treaties. While these instruments frequently contained dispute resolution clauses, such clauses rarely introduced processes specifically designed for the resolution of environmental disputes and instead referred to traditional bilateral dispute settlement mechanisms such as → *negotiation*, → *arbitration*, and → *adjudication*. Most of the instruments providing for arbitration, moreover, merely contained a general reference to the process and did not specify a particular institution or procedural rules. Despite the growing number of disputes concerning environmental issues, states also seemed reluctant to resort to these settlement mechanisms, particularly those of a compulsory nature (Romano, 2000, 41, 44).

4 During the 1990s, the PCA recognized that there was a need for dispute resolution procedures tailored specifically for environmental disputes and addressing existing procedural lacuna with respect to the appointment of experts, confidentiality, interim measures, speed of the arbitral proceedings, and the enforceability of the final decision (Kröner, 2010, 279-80). The idea of the PCA as an appropriate forum for the resolution of such disputes was born at the First Conference of the Members of the Court in 1993. In

1996, the PCA convened a special Working Group on Environmental and Natural Resources Law ('Working Group') in order to explore its potential role in the settlement of environmental disputes. The Working Group, composed of government representatives from Australia, Brazil, China, India, the Russian Federation, and Samoa, unanimously favoured using the PCA as the appropriate instrument to settle such disputes (Rest, 1999, 118), and at a follow-up meeting in 1998 it was decided to formulate new optional arbitration rules for this purpose. In 1999, a resolution was jointly adopted by the George Washington University Institute for the Environment, the Centre for International Environmental Law, and the American Bar Association's Section of Natural Resources, Energy and Environmental Law, stating that until an international environmental court is established with mandatory jurisdiction to resolve international disputes in environmental matters the PCA 'should be the competent institution for the settlement of disputes by using its flexible mechanisms of fact finding/inquiry commissions, mediation, conciliation, and arbitration according to its set rules of procedures' (Rest, 1999, 120). This resolution thus constituted recognition by private bodies, professional associations, and civil society of the urgent need to resolve international environmental disputes and evidenced their support of the PCA in this regard. At the Second Conference of the Members of the PCA, later in 1999, a resolution was adopted calling upon the Secretary-General and the International Bureau 'to vigorously pursue their recent initiatives to expand the Court's role as recommended by the Members of the Court at its First Conference including those in the area of environmental disputes, taking into account the entire range of international dispute resolution mechanisms administered by the Court' (PCA Annual Report 1999, para 76). Finally, in May 2000, a committee was formed to draft the Rules for the Resolution of Disputes Relating to the Environment and/or Natural Resources, with Professor Philippe Sands as its chairman. It took two years for the member states to agree on the final draft of the Rules, and at an Extraordinary Meeting held on 19 June 2001 the Administrative Council adopted by consensus the Arbitration Rules.

5 In 2002, a year after the adoption of the Arbitration Rules, the Administrative Council of the PCA adopted by consensus another set of rules for the resolution of environmental disputes, namely the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment ('Conciliation Rules'). These Conciliation Rules were said to be in line with the approach taken in the 1899 and 1907 → *Hague Conventions on the Pacific Settlement of International Disputes (1899 Hague Convention I)*, which provided for the constitution of international commissions of inquiry to facilitate the settlement of international disputes by elucidating the facts through impartial investigation (Kiss, 2003, 41, 45). The Conciliation Rules complement the Arbitration Rules and, taken together, they provide 'a wider variety of [alternative dispute resolution] procedures and services especially tailored to environmental and/or natural resources disputes than presently available anywhere' (Ratliff, 2004, 2). Similarly to the Arbitration Rules, the Conciliation Rules are available for use by private parties, other entities existing under national or international law, international organizations, and states if all parties agree to use them. The parties can choose conciliators from the PCA Panel of Arbitrators constituted under the Arbitration Rules, or Members of the PCA, and they can choose expert witnesses from the PCA Panel of Scientific and Technical Experts constituted under the Arbitration Rules (Conciliation Rules, Introduction). Finally, the Conciliation Rules contain recommendations to the conciliator(s) intended to facilitate resolution of environmental disputes, such as suggestions for the establishment of a committee to monitor the implementation of a settlement agreement (Art 12 Conciliation Rules). Thus far, the Conciliation Rules have been used only once, in a 2014 case concerning the → *Clean Development Mechanism* (Permanent Court of Arbitration, 'Intervention by H.E. Hugo H. Siblesz Secretary-General

of the Permanent Court of Arbitration, presented at the United Nations Framework Convention on Climate Change' [2015]).

C. Main Provisions of the Arbitration Rules

6 The Arbitration Rules are based on the UNCITRAL Rules but were modified to reflect the unique characteristics of disputes relating to natural resources, conservation, or environmental protection. First, they have a particularly broad and unusual scope of application. They are applicable to 'agreements, contracts, conventions, treaties, the constituent instrument of an international organization or agency or reference upon consent of the parties by a court' (Art 1 (1) Arbitration Rules), and can therefore be included by states in multilateral environmental agreements which foresee, but have not yet adopted, dispute settlement procedures as well as in contracts and in ad hoc arbitration agreements. This feature of the Arbitration Rules has been seen 'as an attempt to address the fragmentation of international environmental law into multifarious specialized instruments [by providing] a bridge between such agreements and a separate and distinct law based forum' (Ratliff, 2001, 887, 890).

7 The Arbitration Rules are also innovative in their definition of the disputes to which they apply. This is significant since it has been notoriously difficult to arrive at an objective definition of an 'environmental' dispute. Indeed, one of the reasons why states have largely refrained from submitting disputes to the Chamber for Environmental Matters of the → *International Court of Justice (ICJ)* (→ *Chamber for Environmental Matters: International Court of Justice (ICJ)*), for instance, is that they are unlikely to agree that their dispute is in fact environmental (Romano, 2000, 6, 125). Other international tribunals, such as the → *International Tribunal for the Law of the Sea* also require the parties to agree on such definitions in order to take jurisdiction over their dispute. The Arbitration Rules, on the other hand, apply to disputes related both to the environment and to natural resources, and provide that '[t]he 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' (Art 1 (1) Arbitration Rules).

8 In addition, the Arbitration Rules provide considerable flexibility and freedom to parties. They allow them to choose an arbitral tribunal of one, three, or five arbitrators (Art 5 Arbitration Rules) and to appoint arbitrators with experience and expertise in environmental or natural resources law from the PCA Panel of Arbitrators (Art 8 (3) Arbitration Rules). Such a panel of specialized arbitrators was used, for instance, in a confidential dispute regarding a Clean Development Mechanism project (Levine and Peart, 2015). Moreover, the parties can choose expert witnesses and the tribunals can appoint experts from the PCA Panel of Scientific and Technical Experts to assist them with scientific or technical matters (Art 27 (5) Arbitration Rules). Finally, the Arbitration Rules can be modified or adapted in order to suit the specific requirements of the parties and the issues involved in the dispute and particularly to specify jurisdiction *ratione personae* in order to allow for the participation of non-state actors (Arbitration Rules, Introduction).

9 The Arbitration Rules also create a procedural framework that can expedite the arbitral process and prevent deadlock where, for instance, the parties cannot decide on the arbitrators or the procedure for their appointment. In such instances, the Secretary-General of the PCA acts as appointing authority unless the parties have designated another appointing authority (Arts 6 (2) and 7 (2) Arbitration Rules). The time period for this safeguard procedure has been shortened to 30 days instead of 60 days as is the case in the PCA's other Optional Rules pre-dating the Arbitration Rules (→ *Optional Rules for Arbitrating Disputes between Two States: Permanent Court of Arbitration (PCA)*; → *Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State*:

Permanent Court of Arbitration (PCA); → *Optional Rules for Arbitrating Disputes Involving International Organizations and States: Permanent Court of Arbitration (PCA)*; → *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities: Permanent Court of Arbitration (PCA)*). These provisions are important since time is frequently of the essence in environmental disputes because of the possibility of irreversible damage to the ecosystem (Kröner, 2010, 280). Finally, as environmental disputes may involve multiple parties the Arbitration Rules include specific provisions for multiparty appointment of arbitrators.

10 Furthermore, the Arbitration Rules include stronger and more detailed confidentiality provisions than other PCA Optional Rules and the UNCITRAL Rules as they not only provide for proceedings to be held *in camera* (Art 25 (4) Arbitration Rules) but also for the award to be confidential (Art 32 (6) Arbitration Rules) unless the parties agree otherwise. They also allow parties to apply to the tribunal to have any information submitted in the proceedings classified as confidential (Art 15 (4) Arbitration Rules), and allow the tribunal to determine whether information should be so classified since it is of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party or parties invoking its confidentiality. Finally, the tribunal can instruct the Registry under what conditions and to whom such information may be disclosed in whole or in part (Art 15 (5) Arbitration Rules). The tribunal may also, at the request of a party or *proprio motu*, appoint a confidentiality advisor as an expert on such matters without disclosing them 'either to the party from whom the confidential information does not originate or to the arbitral tribunal' (Art 15 (6) Arbitration Rules). These confidentiality provisions were designed to protect information impacting national security, intellectual property, trade secrets, and other proprietary information, and to allow parties to comply with their national laws and manage any sensitive information or political constraints (Kröner, 2010, 280). Nonetheless, some have argued that this strict presumption in favour of confidentiality goes against the prevailing trend in environmental law to open decision-making processes to public scrutiny and participation. Such transparency is said to be 'essential for ensuring that arbitrators are accountable to the international community at large in achieving a settlement of the dispute in accordance with prevailing environmental standards and values' (Stephens, 2009, 33-34). Moreover, keeping awards confidential can leave third parties disenfranchised and lags behind the established practice of other international courts and tribunals dealing with interstate disputes to publish decisions, such as the International Tribunal for the Law of the Sea, the International Court of Justice, and the judicial bodies operating under the dispute settlement system of the → *World Trade Organization (WTO)* (→ *World Trade Organization, Dispute Settlement*) (Vespa, 2003, 310, 319).

11 The Arbitration Rules are also innovative in granting access (→ *Access to Justice in Environmental Matters*) to non-state entities as they can be used in disputes involving not only states but also inter-governmental organizations, → *non-governmental organizations*, corporations, and private parties (Art 1 (1) Arbitration Rules). The lack of access to most international forums suffered by such entities has been a significant weakness of the environmental dispute resolution system and the main argument in favour of establishing a permanent → *international environmental court* (Romano, 2000, 126). In the context of disputes related to climate change, for instance, the greater accessibility to the process provided in the Arbitration Rules may open a new avenue for non-state actors, some of whom have already been involved in disputes relating to the Kyoto Protocol to the United Nations Framework Convention on Climate Change ('Kyoto Protocol') (Mackenzie, 2012, 395).

12 The Arbitration Rules also provide that, unless the parties agree otherwise, the arbitral tribunal may, at the request of any party and after obtaining the views of all 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’ (Art 26 (1) Arbitration Rules). This provision reflects a necessary compromise between the need for → *interim (provisional) measures of protection* in the environmental context and the concerns of member states that arbitral tribunals, by being able to order measures to prevent environmental harm in general, could over-extend their jurisdiction so as to affect third parties not involved in the arbitration (Ratliff, 2001, 892–93). This Article therefore limits orders for interim measures to the ‘subject-matter of the dispute’ and allows them only in order to ‘preserve the rights of any party or to prevent serious harm to the environment’. This provision has been used, for instance, in a confidential dispute regarding a Clean Development Mechanism project (Levine and Peart, 2015).

13 Like the UNCITRAL Rules, the Arbitration Rules also provide that the arbitral tribunal may conduct an arbitration in such a manner as it considers appropriate so long as the parties are treated with equality and are given full opportunity to present their case (Art 15 (1) Arbitration Rules). The proceedings are to be conducted on the basis of documents but, if a party requests, hearings may be held for the presentation of witness evidence including expert evidence (Art 15 (2) Arbitration Rules). The Arbitration Rules also exclude additional fees for the correction of an award but not for additional awards or interpretation of awards (Art 40 (3) Arbitration Rules). This was intended to discourage parties from attempting to frustrate the implementation of the award (Ratliff, 2001, 894). Unlike the UNCITRAL Rules, however, the Arbitration Rules provide that, failing designation of the → *applicable law* by the parties, the tribunal shall apply ‘the national and/or international law and rules of law it determines to be appropriate’ (Art 33 Arbitration Rules). This broad scope given to the arbitral tribunal to decide the applicable law is important in the international environmental context given that issues often arise in a national context and become transnational at a later stage (Kröner, 2010, 280). The Arbitration Rules also allow for separate or dissenting opinion(s) (Art 32 (5) Arbitration Rules), which reflects the Drafting Committee’s position that such opinions may, together with the majority award, contribute to forming a body of environmental arbitral jurisprudence (Ratliff, 2001, 891). Finally, in order to facilitate the tribunal’s understanding of technical matters and to assist it in determining whether experts are needed, it may request the parties to agree upon and provide a non-technical document summarizing and providing background on scientific or technical issues necessary for understanding the matter in dispute (Art 24 (4) Arbitration Rules).

D. The Use of the Arbitration Rules

14 While the Arbitration Rules were widely celebrated when first adopted in 2001, they have rarely been used to resolve environmental disputes in practice. Thus far, there have been only six cases commenced under the Arbitration Rules; four concerning Emissions Reduction Purchase Agreements and two concerning contractual agreements relating to emissions reduction projects. In three of these cases, both parties were private entities; in one case the respondent was a public limited company; in another case the respondent was a private entity wholly owned by a public limited company; and in the last case the respondent was a government agency (Levine and Peart, 2015). Nonetheless, after the adoption of the Arbitration Rules, the PCA observed a significant increase in requests for information concerning the Rules and assistance in drafting arbitration clauses providing for recourse to the PCA in conventions, international agreements, and contracts (PCA Annual Report, 2002, para 89), as well as a dramatic increase in reference to the Arbitration Rules in Kyoto Protocol → *emissions trading* contracts (Kröner, 2010, 281). Moreover, in 2003, the Arbitration Rules were included for the first time in a multilateral

environmental agreement, namely the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents (PCA Annual Report 2003, para 45). Also in 2003, the PCA was involved in discussions on the potential use of the Arbitration Rules with the → *United Nations Environment Programme (UNEP)*, the → *North Atlantic Treaty Organization*, the Ramsar Convention Secretariat, and the → *United Nations Development Programme (UNDP)*/American Bar Association International Legal Resource Centre. The Arbitration Rules were also referenced in the 2006 Model Emissions Reduction Purchase Agreements developed by the International Emissions Trading Association. They were again adopted in a modified form by the Gold Standard Foundation, a certification body intended to ensure that climate change and sustainable development funding is being properly used, as the rules for its appeals mechanism. An adapted version of the Arbitration Rules has further been used by The Compact, a private sector initiative that enables United Nations member states to bring claims against participating companies for damage to biological diversity caused by living modified organisms (Levine and Peart, 2015).

15 It is additionally worth noting that the PCA has dealt with a variety of environmental disputes despite the fact that the Arbitration Rules have not been frequently used in the resolution of such disputes. Of the 100 cases pending at the PCA as of December 2015, half were related to energy and many raised environmental issues, such as environmental preservation and sustainability, remedies for environmental damage, and rights relating to natural resources (Kröner, 2010, 277-78). These cases were brought under Annex VII of the United Nations Convention on the Law of the Sea (→ *Investments, Bilateral Treaties*); the → *North American Free Trade Agreement (1992)*; and the → *Energy Charter Treaty dispute settlement system*). In addition, between 2009 and 2015, the PCA has administered nine contract cases arising from the 1997 Kyoto Protocol, including the six cases under the Arbitration Rules discussed above, and three cases under the UNCITRAL Rules (Ross, 2015).

E. Evaluation of the Arbitration Rules

16 The Arbitration Rules have been said to ‘represent the practical experience of leading environmental jurists while reflecting the concerns of the 94 member states of the PCA’ and to include ‘innovative provisions while avoiding procedures which may cause environmental dispute settlement to fail’ (Ratliff, 2001, 894). They also provide a ‘unified forum’ for the speedy and effective resolution of complex and multilateral disputes involving environmental issues by both states and non-state actors and avoid the lengthy and costly negotiation of procedural rules for the resolution of environmental disputes (Ratliff, 2004, 1). Moreover, the Rules combine the benefits of the widely accepted UNCITRAL Rules and the other well-established PCA Optional Rules, making them suitable to the resolution of both environmental disputes with commercial dimensions and public international law disputes with an environmental element (Ratliff, 2001, 895). In this way the Arbitration Rules certainly seem to fill the lacuna in international environmental dispute resolution they were intended to. However, in light of their relatively limited use thus far it remains to be seen whether the Arbitration Rules are in fact able to overcome the shortcomings of classical international dispute resolution in dealing with ‘global, multilateral and symmetrical’ environmental issues such as climate change and ozone depletion (Romano, 2000, 332-33).

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